IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

SARAH ATTABERRY — APPELLANT

V. — 2008-CP-00878-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF OF APPELLANT

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SARAH ATTABERRY	APPELLANT
V.	2008-CP-00878-COA
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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of this Court may evaluate possible disqualifications or recusal.

1. State of Mississippi, specifically Circuit Court Judge Billy Joe Landrum
2. Dennis Lee Biznette, Assistant District Attorney

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STATEMENT OF THE CASE

This appeal proceeds from the Circuit Court of the Second Judicial District of Jones County, Mississippi, and a judgment of conviction for the crimes of Burglary and Grand Larceny against Sarah Attaberry; the resulting sentencing of 15 years with 5 years suspended and 10 years to serve in the Mississippi Department of Corrections was imposed following a plea bargain accepted on April 4, 2007 by the Honorable Billy Joe Landrum, presiding. Sarah Attaberry is presently incarcerated with the Mississippi Department of Corrections.

FACTS

On or about January 13, 2006 Sarah Attaberry sat down in good faith with Alan Morgan in his office at Morgan Bros. in Laurel, Mississippi and admitted to Diane Havens that she had entered her house without permission. Ms. Havens had reported a break-in the day before and reported nothing missing. Ms. Havens had assumed that "Mexican gangs" were targeting her or "the niggers" were out to get her. To reassure Ms. Havens, Attaberry signed a notarized

agreement with Audubon Drive Bible Church to attend services, receive only biblical counseling, and test negative from all mood altering substances at work. Attaberry and Ms. Havens were both employees of Alan Morgan. Attaberry signed a notarized agreement which stated that she *broke and entered* into Ms. Havens' home and she was compelled to do so by the leadership of Audubon Drive Bible Church. The church elders, specifically Alan Morgan, made it clear that they would urge Ms. Havens to seek prosecution in the matter if Ms. Attaberry did not sign this agreement and there was an implied threat that if she did not adhere to this enter into this agreement that she would be fired by Mr. Morgan.

The cause of Ms. Attaberry's outlandish behavior was a long standing addiction to prescription narcotics. She asked Alan Morgan and the church she was attending for assistance in a detoxification program months before these incidents occurred and no treatment was endorsed or recommended by her church. Attaberry violated her agreement with Diane Havens by testing positive for narcotics in March, 2006.

Ms. Havens and Mr. Morgan both wrote statements against Ms. Attaberry in March, 2006. Attaberry met with a detective at the Laurel Police Department whereby she stated the facts, the same facts she had given to Alan Morgan in his office in front of Ms. Havens. The detective who took her statement indicated that considering all of the facts it was most likely that Ms. Attaberry would be given a misdemeanor charge of criminal mischief. It is of note that the person who drove Attaberry to the police station was Alan Morgan's wife. A confession was essentially extracted from the defendant and her signature was obtained by direct promises and by the exertion improper influence. Attaberry was awaiting indictment from the office of the District Attorney of Jones County for breaking and entering. She was later mistakenly indicted for Burglary.

By June, 2006 Sarah Attaberry received a call at 4 am from Kelly Lambert indicating that Ms. Attaberry had "items that belonged to her" which Ms. Attaberry returned the following morning at 9am. It was never addressed that Ms. Attaberry and Ms. Lambert had taken prescription drugs together which precipitated this event. On the day she was arrested, Detective Byron Craft entered her apartment and began to go through her closet and chest of drawers. He was not invited into her apartment and was repeatedly asked to step outside. Ms. Attaberry was charged with Grand Larceny and remained in custody in the Jones County Jail until August, 2006.

The day after she was arrested the police thoroughly searched Ms. Attaberry's residence at 2606 Old Bay Springs Rd after her landlord Libby Mulloy searched her apartment under the auspices of a "maintenance check" and discovered that Ms. Attaberry had used items stored in the front storage unit of Ms. Mulloys' property without permission. Detective Byron Craft had alerted Mrs. Mulloy after he illegally searched her apartment. A maintenance check had not been previously conducted in Ms. Attaberry's residence nor were there any known appliance problems. Mrs. Mulloy found items in Ms. Attaberry's possession which were borrowed from the front of the storage unit in the same building as Ms. Attaberry's residence. It is not known whether or not Ms. Attaberry was indicted for Burglary in this matter.

As defendant was out on bond and gainfully employed, she met with her court appointed attorney on March 22nd 2007, whereby she was informed of the District Attorney's plea offer of 15 years with 10 years to serve. Defendant was not informed that ADA Dennis Biznett had agreed that morning to recommend to the Circuit Court a sentence of 10 yrs with 9 years suspended and one year of house arrest. Not aware of this offer, Defendant Attaberry ingested 24 1mg Xanax tablets issued by legal prescription and defendant maintains a limited recollection

of the events followed on March 23rd 2007. Defendant Attaberry was arrested for illegally obtaining a prescription by fraud. Attaberry was then taken to jail and later that evening she was transported to the South Central Regional Medical Center for a staff infection where she was treated with narcotics. Attaberry, upon return to the jail, was separated from the general population in an isolation cell as per Captain Judy Webb and not allowed access to a telephone. Captain Webb has presently been relieved of her duties in Jones County jail. Defendant Attaberry was met by court appointed counsel on March 28, 2007 At this time Mitchell informed her that she had "thirty minutes" to sign said plea or ADA Biznett would "indict her as a habitual felon" and she would "go to prison for life" and informed her when she hesitated that "the clock is ticking on this."

When Attaberry asked to consult her husband about this plea or her employer counsel informed her just to "sign it." When she mentioned a desire to seek chemical dependency evaluation her counsel's reply was "you'll be in Jones County Jail for years waiting for an evaluation." Thus, under coercion from her own attorney and the district attorney's office, and told that her charges for prescription forgery would be dismissed, defendant signed a plea agreement which was not notarized nor witnessed in front of her.

Mitchell stated he had "a stamp in the car."

Defendant filed in forma pauperis a Motion for Post-Conviction Collateral Relief on the 14th day of February, 2008 seeking relief from her conviction in this matter and a review of her attorney's misrepresentation and subsequent violation of due process by involuntarily signing a plea bargain. On April 16, 2008 an Order Denying Motion for Post-Conviction Collateral Relief alleging her argument was without merit to "establish an ineffective assistance of counsel claim" and dismissed her claim of involuntarily signing a plea bargain but did not address her claim that

by involuntarily signing a plea bargain she agreed to sign based on the presumption that she would be eligible for parole at some point in time that this violated her due process of law.

SUMMARY OF THE ARGUMENT

The defendant was denied due process of law by involuntarily signing a document which admitted her guilt to the Court. The Court accepted her plea, allegedly given knowingly and intelligently, but did *not inform her that as a consequence of her guilty plea that she would be ineligible for parole*. The Court, in denying defendant's Motion for Post-Conviction Collateral Relief, did not impute acquiescence or understanding by the defendant of the consequences of her plea and this consequence should have been established by her counsel of record in the matter or by the Court itself. The Court record did not establish a factual basis for believing that defendant understood that an acceptance of a guilty plea would make her ineligible for parole. Had the defendant been informed of this fact, she would never have agreed to enter a guilty plea.

ARGUMENT

ISSUE NO. I: WHETHER THE COURT APPOINTED ATTORNEY'S REPRESENTATION FELL BELOW A REASONABLE STANDARD?

Mitchell's representation fell well below an objective standard of reasonableness. He mentioned that her prior criminal history would be an "issue at trial" and failed to inform her that this history was not a factor in a plea proceeding. He continued to intimidate her by reminding her that the circuit Judge Billy Joe Landrum had been "burglarized twice before" but did absolutely nothing to motion Judge Landrum to recuse himself based on bias and an established social history with the victims Gene and Libby Mulloy nor did Mitchell motion for a change of venue. Mitchell did absolutely nothing but prove his loyalty did not lay with the defense of his client. Blanco v. Singletary, 943 F. 2d 1477 (11th Cir. 1991)

There is a reasonable probability that, but for counsel's indolent if not indifferent representation, the result of the proceeding would have been different. The same week of Attaberry's sentencing a defendant, who had paid Mitchell, signed a plea bargain for Burglary and Landrum sentenced him to the RID program in lieu of prison. This defendant faced the same charges as Ms. Attaberry and had a long criminal history in the State of Mississippi. This defendant also had the sheriff of Jones Country, Larry Dykes, in court speaking on his behalf, presumably because he had been a trustee working in the Jones County jail. Counsel abandoned any plausible defense strategy in Attaberry's cases because this obviously represented a conflict of interest for another client Mitchell represented, a client who paid him. Caik v. U.S., 59 F. 3d 296 (2nd Cir. 1995) "Counsel presented no adversarial challenge because counsel was not financially motivated to do so nor was he willing to investigate the motivations for the witnesses signed statements against the defendant." Davis v. Alaska, 415 U.S. 308, 39 L Ed. 2d 347, 94 S. Ct. 1105 (1974) Mitchell did not examine discovery in Ms. Attaberry's defense and had a vague recollection of the witnesses against her. Michael Mitchell did not as court appointed counsel for defendant Sarah Attaberry exhibited a representation so deficient that it fell below even the minimal standard for professionally competent assistance established by Strickland v. Washington, 466 U.S. 668, 104 S.Ct 2052, 80 L. Ed. 2d 647 (1984) which is the proving ground for all such said claims. Tejeda v. Dubois, 142 F. 3d 18 (1st Cir. 1998) The relationship of the accused to counsel provides "a critical factual context" here. "The one person in the world upon whose judgment and advice, skill and experience, loyalty and integrity that defendant must be able to rely upon, is his lawyer." Myers v. State, 583 So.2nd 174, 178 (Miss, 1991)

Michael Mitchell did nothing to manage defendant's cases outside of pushing them through the circuit court, coercing his client to sign a guilty plea, and intimidating her by his

reassure Ms. Havens that she had not been the target of minority groups such as the "Mexican gangs" or the "niggers." Ms. Havens stated these minority groups had most likely broken and entered her home. There were no witnesses placing Ms. Attaberry at the scene or leaving the scene. Medina v. Barnes, 71 F. 3d 363 (10th Cir 1995)

Ms. Havens also allowed the police investigating the crime to believe that Ms. Attaberry had strewn clothing and assorted items all over her home when, in fact, Ms. Havens normally keeps her household in this condition. Essentially, Ms. Havens was not forthcoming with investigators. These facts were never challenged.

In the charge of Grand Larceny counsel utterly refused to investigate the nature of the relationship between the victim and the defendant or to offer any investigation into the nature of the assertion that Kelly Lambert had made, on several occasions, sexual advances toward the defendant and was rebuffed. Thus, it would have been prudent after Ms. Attaberry had returned the items in question, to investigate this relationship further.

Defendant was acting in good faith in both of these cases, admitting as well as contrite, even in the face of no legal evidence of wrongdoing. When there is truthful admission, a voluntary return of all property, and a prompt and voluntary surrender coupled with the timeliness of the acceptance of responsibility, a decrease in sentencing should be considered.

No *independent investigation of the circumstances of these cases* was carried out by trial counsel. It is also apparent that trial counsel relied solely on whatever witnesses and evidence the State was bringing to trial. "Our supreme court has established that such a failure to conduct a proper investigation results in ineffective assistance of counsel." Triplet v. State, 666 So. 2d. 1356, 1361-62 (Miss. 1995); Moody v. State, 644 So. 2d 451 (Miss. 1994); Barnes v. State, 577

So. 2d 840, 843-44 (Miss. 1991); State v. Tokman, 564 So. 2d 1339, 1342-43 (Miss. 1990); Yarbourgh v. State, 529 So. 2d 659, 662 (Miss. 1988); Ferguson, 507 So. 2d at 95-97.

Defendant Sarah Attaberry checked in with Mitchell's office weekly while out bond between August, 2006 and March, 2007. In their one formal office meeting he stated that he had not "reviewed the discovery materials in this case."

Defendant was undoubtedly under the influence of mind and mood altering substances during the commission of her crimes, at the time of her arrest, and in circuit court. While this is not an excuse by law it is certainly a mitigating factor and Mitchell refused to investigate, develop, or even explore long term treatment, outpatient treatment, the RID program, or a psychiatric evaluation by the court. The failure to admit psychiatric history or to propose the need of prolonged or properly managed drug treatment constituted a deficient performance on counsel's behalf and falls outside the range of professional standards maintain by the bar. The Court had no information pertaining to defendant's history in this respect and the voluntary nature of the plea is questionable. Tiller v. Esposito, 911 F.2nd 575 (11th Cir. 1990)

It is "not enough to assume that counsel thought there was no defense, and exercised his best judgment..." Powell v. Anderson, 287 U.S. 45, 58, 53 S. Ct. 55, 60, 77 L. Ed. 159 (1932) "It must be a rare circumstance indeed where a decision not to investigate would be 'reasonable' after counsel has notice of the client's history of mental (drug/alcohol) problems."

ISSUE NO. III: WHETHER THE COURT SHOULD HAVE RECUSED HIMSELF OR ATTORNEY OF RECORD MOTIONED FOR CHANGE OF VENUE?

As the defendant entered the court room, Libby and Gene Mulloy motioned to Court and acknowledged Judge Landrum. The judge and the victims in this case had a long standing social and political relationship with the Court. The court appointed counsel did not Motion the Court for a change of venue nor did the attorney of record ask the Court to recuse himself in the matter.

Mitchell repeatedly told Ms. Attaberry that she should "say nothing" that the Judge was "unpredictable" and even "crazy." When she mentioned that she would not be adverse to entering the RID program or even taking an open plea so that the Court could be informed of her mitigating circumstances Mitchell rebuffed her and told her this would "not do much good, the Judge has been burglarized twice; he will hang you out to dry." The result of the proceeding may have been different had the court been made aware of the defendant's state of mind and the integrity of that proceeding could be looked upon as having been shaken by counsel's complete lack of loyalty, advice, judgment, and skill. Leatherwood v. State 539 So.2nd 1378, 1385 (Miss. 1989)

Nor was it an unreasonable idea for counsel to request a change of venue, or simply to Motion the Court to recuse in this matter as he had a history of particularly lengthy sentencing when the crime of Burglary was prosecuted.

Out of improper advice by counsel defendant was told to "go in there and say yes to everything the judge asks; do not address him at all," to "keep your mouth shut or it will be worse for you" thus discrediting any attempt at defense and was 'content, perhaps even eager, to leave the sentence in the hands of the DA' and to consequently follow any plea recommendations the District Attorney's office offered. Lane v. Richards, 957 F.2nd 363 (7th Cir. 1992)

The defendants accepting plea bargains were lined up in a row of eleven defendants, each asked the same series of questions to ascertain whether or not each was making their plea intelligently and knowledgably. Libby Mulloy made a statement during Ms. Attaberry's sentencing which indicated that she wished the defendant had "less time to serve" but this was

actually not present in the record and there is no indication that this statement was stricken from the record by an objection from the State. It simply was not there.

Although the court transcript indicated that the defendant answered specific questions in the affirmative there was no clear indication that defendant deemed her plea "fair and appropriate" nor was there any concern for the fact that her victims in the Burglary II charge addressed the court on her behalf expressing forgiveness and a wish that her "sentence be lighter." U.S. v. Cross, 57 F. 3d 588 (7th Cir. 1995)

This statement was stricken from the court record but affidavits can be obtained which indicate that this statement was made.

ISSUE NO. IV: WHETHER COURT ERRED IN ACCEPTING THE VERDICT OF GUILTY AND THUS VIOLATED THE APPELANT'S DUE PROCESS OF LAW WHEN THE APPELLANT DISCOVERED UPON ENTERING THE CORRECTIONAL SYSTEM THAT A CONSEQUENCE OF HER GUILTY PLEA WAS INELIGIBLITY FOR PAROLE?

Prior to trial or before accepting a plea an "accused is entitled to rely upon her counsel to make an independent examination of the facts, circumstances, pleadings, and laws involved" and then to rely upon her counsel's informed opinion as to what plea, if any, should be entered. Von Molke v. Gillies, 332 U.S. 708, 68 S. Ct. 316, 92 L. Ed. 309 (1947) Defendant Attaberry was defrauded of adequate representation or a thorough examination of the facts in the case. The Due Process clause of the 14th Amendment requires that a plea of guilty be made knowingly and willingly by the defendant after having been properly informed of all ramifications upon the signature of said plea bargain. In the charge of Burglary I and II, defendant Attaberry was never informed by court appointed counsel of the complete ineligibility for parole. Defendant would simply not have signed the plea offered if she had been aware that no parole would be afforded. Hill v. Lockhart, 894 F.2d 1009 (8th Cir. 1990) Defendant was neither advised by court or

counsel of her ineligibility for parole and her motion raising this issue in district court was summarily dismissed. In Otero-Rivera v. US, 494 F.2d900; (1st Cir. 1974) the appeal court granted appellant an evidentiary hearing on the matter.

Court did ask defendant if she had made her plea freely and voluntarily but the Court did not inquire as to whether or not the defendant completely understood the consequences of her plea. Defendant was, in fact, 'lured into pleading guilty with erroneous information.' Salas v. U.S., 996 F. Supp 826 (E.D. 111 1998) Ineligibility for parole is a material consequence of a guilty plea. Durant v. United States, 410 F.2d 689 (1st Cir. 1969) The circuit court failed to conduct a *specific* Rule 11 (d) inquiry of the defendant. Defendant was put in a line of eleven other defendants and was told repeatedly by counsel "do not say one word to Judge Landrum—he's crazy." In dismissing the motion, the court erred in construing pre-1966 Rule 11 as not requiring a court to have reason to believe that a defendant had knowledge of such a consequence. See: e.g., Munich v. United States, 337 F.2d 356 (9th Cir. 1964); Berry v. United States, 412 F.2d 189 (3rd Cir. 1969); Jenkins v. United States, 420 F. 2d 433 (10th Cir. 1970).

"A plea of guilty is more than a confession which admits that the accused did various acts; it is itself a conviction; nothing remains but to give judgment and determine punishment." Boykin v. Alabama, 395 U.S. 238. 242. 89 S. Ct. 1709, 1711-12, 23 L. Ed 2d 274 (1969) "Ignorance, incomprehension, coercion, terror or other inducements, both subtle and blatant, threaten the constitutionality of a guilty plea." Boykin 395 U.S. at 242-43. The trial court's duty and responsibility was set forth in clear, forceful and unmistakable language by the Supreme Court of the United States in Boykin v. Alabama. Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences of entering a plea of guilty and circumvent trial by jury.

Under new Mississippi Rule 3.03 *supra*, there would appear to be no question that the defendant must be informed of her complete ineligibility for parole before the court can accept a guilty plea.

Defendant Attaberry was unaware of her complete ineligibility of parole and if she had been properly advised by the court or counsel she would not have pleaded guilty. The only time defendant was made aware of this fact was two months after her sentence began in the Mississippi Department of Corrections during the classification process. Ineligibility for parole is a consequence about which a defendant must be informed for her to voluntarily and knowingly plead guilty. Otero-Rivera v. United States, 494 F. 2d 900 (1st Cir. 1974); Bye v. United States, 435 F. 2d 177 (2nd Cir. 1970); Berry v. United States, 412 F. 2d 189 (3rd Cir. 1969); Harris v. United States, 426 F. 2d 99 (6th Cir. 1970); Gates v. United States, 426 F. 2d 73 (7th Cir. 1975); Moody v. United States, 469 F. 2d 705 (8th Cir. 1972); Munich v. United States, 337 F. 2d 356 (9th Cir. 1964); Jenkins v. United States, 420 F. 2d 433 (10th Cir). The requirement of informing a defendant of the consequences of her plea is "not concerned with the legislative genesis of the ineligibility for parole, but with the extent to which ineligibility for parole could influence an accused's decision whether to plead guilty." Bye, *supra*, at 180.

A 15 year prison sentence for felony charges in which defendant has made every effort to be truthful and forthcoming with all of the facts and has made every effort to make restitution directly after the incident occurred, demands by its very nature the utmost solicitude and many district courts have upheld that a trial court should not accept a guilt plea or a plea bargain without first addressing the defendant personally and determining that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea. Alexander v. State, 226 So. 2d 905 (Miss. 1969) The deprivation of parole is one of those

consequences necessary to be known and understood by a pleading defendant. Defendant expected that she would be entitled to be paroled after serving one third of her sentence, 18 U.S.C.S. § 4202. Parole is the norm and ineligibility for parole the exception, an exception of which defendant Attaberry should have been informed: "The nature of parole is well understood, and its availability may be regarded as assumed by the average defendant." Durant v. United States, 410 F. 2d 689, 692 (1st Cir. 1969)

The unavailability of parole directly affects the length of time an accused will have to serve in prison. If parole is unavailable, the mandatory period of incarceration under a given sentence is three times as long (not taking into account allowances for good time). The purpose of Rule 11 was to insure that an accused is apprised of the significant effects of her plea so that her decision to plead guilty and waive her right to trial is an informed one. Brady v. United States, 397 U.S. 742, 90 S. Ct. 1463, 1469 n. 6, 25 L. Ed. 2d (1970)

If the accused's ineligibility for parole is known to her prior to entering a guilty plea, she may decide not to plead guilty at all in view of the greater perceived risks of lengthy imprisonment. Bye v. United States, 435 F.2d 177 (2nd Cir 1970).

Sarah Attaberry would not have pleaded guilty if she had known that she was ineligible for parole.

CONCLUSION

Ms. Attaberry is entitled to have her conviction reversed and remanded for an evidentiary hearing on the issues raised in her appeal by a Circuit Court Judge appointed by the Court of Appeals. Petitioner would respectfully request a change of venue in this matter.

Ms. Attaberry would pled the Court to consider resentencing defendant to reflect a release date commensurate with a parole date or to suspend the remainder of her sentence and place her on immediate shock probation.

Respectfully Submitted,

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CERTIFICATE

I, Sarah Attaberry, the above Pro Se Petitioner in the foregoing Petition, do hereby affirm and state the following, to wit:

I.

I am the Petitioner in the foregoing original motion styled as Motion for Post-Conviction Collateral Relief.

II.

I have written as well as read the foregoing motion and all statements and other readings herein attached are true and correct to the best of my knowledge, information, and belief.

III.

I believe that I am entitled to the relief as requested in said motion.

Dated:

Sarah Attaberry, Petitioner