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IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2008-CP-1546-COA

TIMOTHY DIGGS

FILED

APPELLANT

VS.

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COURT OF APPEALS

STATE OF MISSISSIPPI

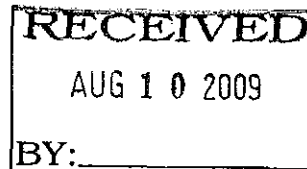
APPELLEE

REPLY BRIEF FOR APPELLANT

BY:

Timothy Diggs

Timothy Diggs, [REDACTED]
503 South Main Street
Columbia, MS 39429



IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

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VS.

STATE OF MISSISSIPPI

APPELLEE

APPELLANT'S REPLY BRIEF

The State of Mississippi has filed its brief in this case and has failed to refute Appellant's claims that:

I.

Appellant, Timothy Diggs has suffered a violation of his 5th and 14th Amendment rights under the United States Constitution as well as the Constitution of the State of Mississippi where he have been sentenced to a mandatory sentence without the benefit of earned time, without having been indicted for such offense which, upon indictment and conviction, required a mandatory sentence by law. There was no firearm or deadly weapon introduced in court to substantiate armed robbery under Miss. Code Ann. §97-3-79 and Miss. Code Ann. §47-5-139(1)(e).

II.

Appellant was subjected to a denial of due process of law where the trial court failed to advise Diggs of the correct law in regards to appeal of a sentence rendered upon an open plea of guilty to obtain direct review of such sentence by the Court of Appeals and the Mississippi Supreme Court.

III.

Appellant Diggs was denied due process of law and subjected to ineffective assistance of counsel where defense counsel advised Diggs that if he failed to waive indictment and enter plea to information his defense counsel would make sure the trial be conducted before Judge Prichard who would impose a life sentence.

IV.

Appellant Diggs was denied due process of law where he was convicted of the offense of armed robbery without having admitted a sufficient factual basis to demonstrate guilt of such armed robbery offense and where the appellant, in fact, advised the court that he never went into the store and he would take a polygraph to prove this.

I. PETITIONER'S PLEA TO INFORMATION WAS NOT SUBJECTED TO THE SAME RESTRICTIONS AS A PLEA OF GUILTY FOLLOWING AN INDICTMENT

The law is clear that before accepting a guilty plea, the trial court must inquire as to the voluntariness of the plea. URCCC 8.04(A). The accused must be advised concerning the nature of the charge and the consequences of the plea. Alexander v. State, 879 So.2d 452, 455 (Miss. 1992). The trial court may assure itself that the accused understands the elements of the crime charged by explaining the elements to the accused or by counsel's representation to the court that the elements of the crime have been explained to the accused. Bradshaw v. Stumpf, 545 U. S. 175, 183 (2005). The court must inform the accused of the maximum and minimum sentences that may be imposed for the charged crime. URCCC 8.04(A)(4)(b). The court must also ascertain that the accused is competent to understand the nature of the charge. URCCC 8.04(A)(4)(a). Moreover, the accused must be informed that a guilty plea waives certain constitutional rights such as the right to a trial by jury, the right to confront adverse witnesses, and the right to

protection against self-incrimination. Alexander, supra. It is clear here that there was not an adequate factual basis for his guilty plea to the charge of armed robbery. In order for a court to accept a guilty plea, the record must contain "enough that the court may say with confidence the prosecution could prove the accused guilty of the crime charged." Gaskin v. State, 618 So.2d 103, 106 (Miss. 1993) (quoting Corley v. State, 585 So.2d 765, 767 (Miss. 1991)). In order to form an adequate factual basis, it is not necessary to flesh out details that would be shown during trial. *Id.* The factual basis must be formed by any evidence before the court, or otherwise in the record before the court. In the instant case the State has not adequately refuted the claims which Appellant presented in his initial brief.

In the Brief filed by the State of Mississippi, the state never refuted the issue of the sentence not being subjected to a mandatory term where there is no indictment filed. The state attempts to evade to an argument which supports that a guilty plea waives all non-jurisdictional defects. This is the law under Swift v. State, 3 So.2d 1108 (Miss. Ct. App. 2008). However, this law applies to waiver of defects in an indictment. This law is not triggered where there is no indictment filed to commence the prosecution. It was the state's decision to not pursue an indictment. Selecting this option should come with consequences such as waiving any mandatory sentence where the defendant waives his right to require the state to seek and secure an indictment. Otherwise, any waiver of indictment by the defendant would be fruitless. The state ought to not be allowed to have it's cake and eat it too. It should not be permitted to enjoy the best of both worlds without some consequence. Defense counsel's performance at the plea proceedings were inadequate. Defense counsel never even informed Appellant of the terms of the plea. How else would Appellant be expected to know the terms of his plea before appearing before the Court to actually enter the plea of guilty.

This Court should reject the state's presentation and should direct that this conviction and sentence be reversed to the trial court.

III. THE PETITIONER IS ENTITLED TO AN EVIDENTIARY HEARING ON THESE MATTERS.

Appellant would continue to assert to this Court that the Mississippi Supreme Court has held "a post-conviction collateral relief petition which meets basic requirements sufficient to mandate and evidentiary hearing unless it appears beyond a doubt that the petitioner can prove no set of facts in support of his claim which would entitle him to relief." Marshall v. State, 680 So.2d 794, 794 (Miss. 1996). The state has failed again in refuting this point of law. The state's argument on Burch v. State, 929 So.2d 394, 398 (Miss. App. 2006) is not on point. It has no application to a claim of denial of an evidentiary hearing. Other authorities cited by the state also have no application to this claim.

In the instant case, the Appellant asserted that he was deprived of the effective assistance of counsel, a claim which can best be supported by the introduction of evidence not currently in the record. If the facts as claimed by the Petitioner are taken as true, there can be little doubt that he is entitled to relief in this matter. Therefore, Appellant requested an evidentiary hearing to review the issues. The state has failed to adequately respond to and refute the claims presented by Appellant.

CONCLUSION

For the reasons and authority cited herein, Appellant Diggs submits that his conviction and sentence should be reversed rendered. In the alternative, Appellant Diggs Conviction and

sentence should be remanded to the trial court for an evidentiary hearing.

Respectfully submitted,

By: Timothy Diggs
Timothy Diggs, [REDACTED]
503 South Main Street
Columbia, MS 39429

CERTIFICATE OF SERVICE

This is to certify that I, Timothy Diggs, have this date served a true and correct copy of the above and foregoing Reply Brief for Appellant, by United States Postal Service, first class postage prepaid, to: Honorable Jim Hood, Attorney General, P. O. Box 220, Jackson, Ms 39205;

This, the 6th day August, 2009.

By: Timothy Diggs
Timothy Diggs, [REDACTED]
503 South Main Street
Columbia, MS 39429