

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2009-CP-00524-COA

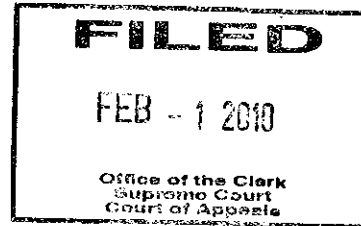


LARRY EVANS

APPELLANT

V.

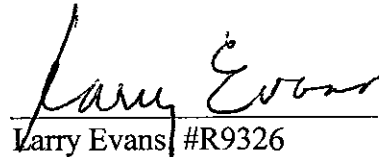
STATE OF MISSISSIPPI



APPELLEE

BRIEF FOR APPELLANT

BY:


Larry Evans #R9326

CMCF

P. O. Box 88550

Pearl, MS 39208

ORAL ARGUMENT NOT REQUESTED

PRO SE PRISONER BRIEF

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2009-CP-00524-COA

LARRY EVANS

APPELLANT

V

STATE OF MISSISSIPPI

APPELLEE

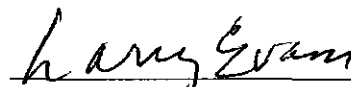
CERTIFICATE OF INTERESTED PERSONS

The undersigned Appellant, Larry Evans, certifies that the following listed persons have an interest in the outcome of this case. The representations are made in order that the Justices of this Court may evaluate possible disqualification or recusal.

1. Larry Evans, Appellant pro se.
2. Honorable Jim Hood, and staff, Attorney General.
3. Honorable W. Swan Yerger, Circuit Court Judge.
4. Honorable Rebecca Chastain, Assistant District Attorney.

Respectfully Submitted,

BY:



Larry Evans, #R9326

CMCF

P. O. Box 88550

Pearl, MS 39208

Appellant

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2009-CP-00524-COA

LARRY EVANS

APPELLANT

V

STATE OF MISSISSIPPI

APPELLEE

STATEMENT OF ISSUES

ISSUE ONE

APPELLANT SUFFERED A VIOLATION OF DUE PROCESS OF, IN VIOLATION OF THE 5TH AND 14TH AMENDMENT, WHEN THE PROSECUTION WITHHELD INFORMATION FROM APPELLANT THAT THE CO-DEFENDANTS INTENDED TO TESTIFY FOR THE PROSECUTION, UNTIL THE DAY OF THE TRIAL.

ISSUE TWO

APPELLANT WAS PROVIDED WITH INEFFECTIVE ASSISTANCE OF COUNSEL, IN VIOLATION OF THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

ISSUE THREE

THE PROSECUTION DEPRIVED AND INTERFERED WITH APPELLANT'S RIGHT TO KNOWLEDGE OF THE EVIDENCE AGAINST HIM IN ORDER TO COERCE AND ENTICE A PLEA OF GUILTY, IN VIOLATION OF THE 5TH AND 14TH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

ISSUE FOUR

APPELLANT SUFFERED A VIOLATION OF HIS CONSTITUTIONAL RIGHTS UNDER THE 5TH AND FOURTEENTH AMENDMENTS WHERE RECORDS WERE WITHHELD UPON NUMEROUS REQUESTS IN REGARDS TO PREPARATION OF HIS POST CONVICTION COLLATERAL RELIEF MOTION.

ISSUE FIVE

THAT THE TRIAL COURT ERRED IN FAILING TO ADDRESS THE ISSUES OF THE POST CONVICTION RELIEF MOTION OR TO CONDUCT AN EVIDENTIARY HEARING AND FAILED TO COMPLY WITH THE POST CONVICTION RELIEF STATUTE WHERE COURT DENIED SUMMARILY DENIED THE MOTION WITHOUT REVIEWING THE TRANSCRIPT OF THE PLEA SINCE THE PLEA TRANSCRIPT WAS NOT MADE AVAILABLE UNTIL IT WAS TRANSCRIBED BY THE COURT REPORTER ON DECEMBER 17, 2009 AND FILED WITH THE CIRCUIT COURT CLERK ON THE SAME DAY.

STATEMENT OF INCARCERATION

The Appellant is presently incarcerated and is being housed in the custody of the Mississippi Department of Corrections where he is being housed at the Central Mississippi Correctional Facility, Pearl, Mississippi, in service of the prison term imposed as a result of the conviction which is the subject of this action. Appellant has been continuously confined in regards to such sentence since date of conviction and imposition by the trial court.

STATEMENT OF CASE

Larry Evans was indicted on November 3, 2005, in the Circuit Court of the First Judicial District of Hinds County Mississippi in a four (4) count indictment. Appellant Evans subsequently entered a plea of guilty to the armed robbery and manslaughter and was sentenced to a total sentence of 35 years, as a habitual offender, in the custody of the Mississippi Department of Corrections. (R. 10-11)

Appellant subsequently provided his post conviction motion (PCR) to the Circuit Clerk which was filed by the Clerk on December 10, 2008. (R. 27-70) The trial court without a hearing or reviewing the plea colloquy transcript, entered an order summarily denying the post conviction motion on December 04, 2008, which was filed December 10, 2008. (R. 27)

STANDARD OF REVIEW

In reviewing a trial court's decision to deny a motion for post-conviction relief the standard of review for this court is clear. The trial court's denial will not be reversed absent a finding that the trial court's decision was clearly erroneous. Kirksey v State, 728 So.2d 565, 567 (Miss. 1999).

In the instant case, well-settled law dictates that the trial court's decision was clearly erroneous since the trial court failed follow the requirements of the post conviction collateral relief act which requires that the court review the complete record, together with all the transcripts of the prior proceedings, before summarily denying the post conviction motion and the court failed to fully address all substantial and meritorious claims made by Evans in the motion, i.e., the record clearly demonstrates that Appellant Evans suffered constitutional violations where the trial court accepted the plea of guilty and sentenced Evans as a habitual offender without the indictment complying with the habitual offender requirements and Rule 11.03(1) of the Miss. Rules of Cir. and Cty Court Practice. Rule 11.03(1). The sentence imposed upon Evans, without compliance with the law, constitutes an illegal sentence where the court was deprived of it's jurisdiction by absence of compliance with Rule 11.03(1) of the Miss. Rules of Cir. and Cty Court Practice. While the state will argue that such claim was not presented to the trial court, Appellant would assert that an illegal sentence issue may be presented at any posture of the case and at any time. Even those claims presented to the trial court were never heard which demonstrates that presentation of this claim would not have mattered. Additionally, the record reflects and confirms that Evans never fully admitted the elements required for an armed robbery and manslaughter conviction under the standards and elements required by statute. The trial

court should have allowed Evans an evidentiary hearing on the claims before summarily dismissing the motion.

SUMMARY OF ARGUMENT

Larry Evans was effectively charged with two crimes in the indictment. The first crime being armed robbery. Evans should have been prosecuted under the initial charge where the allegations of the indictment constitute two offenses. The lesser included should have been applied.

ARGUMENT

ISSUE ONE

APPELLANT SUFFERED A VIOLATION OF DUE PROCESS OF, IN VIOLATION OF THE 5TH AND 14TH AMENDMENT, WHEN THE PROSECUTION WITH-HELD INFORMATION FROM APPELLANT THAT THE CO-DEFENDANTS INTENDED TO TESTIFY FOR THE PROSECUTION, UNTIL THE DAY OF THE TRIAL.

Appellant would assert to this Court that his rights to due process under the 14th Amendment of the United States Constitution, and Article 3, §14 of the Mississippi Constitution were violated by the Assistant District Attorney, Rebecca Mansell's failure to notify the Appellant, until right before trial, to wit, 10 days before trial, that the co-defendant's, Rufus Smith and William Thomas, were scheduled to testify against Appellant, thus putting the blame strictly on the Appellant. However, it was prosecutorial error, because the information was not included in the Appellant's discovery- exculpatory evidence. The prosecution intentionally with-held this information from Appellant to manipulate a plea of guilty "Suppression by the prosecution of evidence favorable to an accused who has requested it violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith of the prosecution." Brandy v. Maryland, 373 U.S. 83; 8 S. Ct. 1194; 10 L.Ed.2d 215, 1963 U.S. Lesis

1615. The Supreme Court of Mississippi applies the four- part Brandy violation test adopted in King v. State, 656 So.2d 1168, 1174 (Miss. 1995) under which the defendant must prove; (A) That the State possessed evidence favorable to the defendant, (including impeachment evidence). (B). That the defendant does not possess the evidence, nor could he have obtained it himself with any reasonable diligence; (C) That the Prosecution suppressed the evidence, favorable to the Defendant; (D) That had the evidence been disclosed to the defense, a reasonable probability exist that the outcome of the proceeding would have been different. The Appellant claims he is entitled to a review of his sentence, and of the matter which is now in question. In the Post-Conviction Collateral Relief Act, Section 99-39-5, (21) II. Under Former §99-35-145: In general, it states “This section (Code 1942, §1992.5) provides a comprehensive procedure for the rehearing of criminal cases wherein errors of a constitutional nature have occurred.” King v. Cook, 287 F.Supp. 269 (N.D. Miss 1968). Suppressing evidence that could have made a difference in my sentence, is definitely of constitutional nature, it violates due process. Furthermore, the United States Constitution, Amendment 14,§1 defines the definition of due process in legal terms as “An established course for judicial proceedings and case law providing standards for fair treatment of citizens by Federal, State, and Local Government. The standards are known as Due Process. When a person is treated unfairly by the Government, including the Court’s he is said to have been deprived of or denied due process.”

ISSUE TWO

APELLANT WAS PROVIDED WITH INEFFECTIVE ASSISTANCE OF COUNSEL, IN VIOLATION OF THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION WHERE DEFENSE COUNSEL, INTER ALIA, FAILED TO INVESTIGATE OBJECT TO THE HABITUAL STATUS OF THE INDICTMENT AND WHERE SUCH LANGUAGE OF THE INDICTMENT AND PROOF OF PRIOR CONVICTIONS DID NOT SUBSTANTIATE HABITUAL STATUS.

That the Petitioner's right to effective assistance of counsel under the 6th Amendment and the 14th Amendment of the United States Constitution, as well as Article 3, §26 guarantees persons accused of a crime, the right to counsel is the right to effective assistance of counsel. McMann v. Richardson, 397 U.S. 759, 771, n. 14 (1970), also see, Strickland v. Washington, 466 U.S. 668; 104 S. Ct. 2052; 80 L.Ed2d 674; 1984 U.S. Lexis 79. Failure to have effective assistance of counsel, and then rendering a conviction, violates due process. Cuyler v. Sullivan, 446 U.S. 335 (1980), at 344. In Strickland, the court stated then "when a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt." The Appellant here claims that if his court appointed counsel would have done his job, and would have been properly prepared, there is a reasonable probability that he would have been given a different and lesser sentence. If the Appellant can establish a significant chance that the outcome would have been different, then surely he should be entitled to a redetermination of his fate. The Court's have defined "reasonable probability" as a "probability sufficient to undermine confidence in the outcome." In view of the nature of the (sanction at issue), and the difficulty of determining how a sentence would have responded if presented with a different set of facts, it could be argued that a lower estimate of the likelihood that the outcome of the sentencing proceeding was influenced by Attorney error, which is sufficient to "undermine the confidence of the outcome." The core

example of Court Appointed Attorney's, such as, William Labarre who was appointed to represent the Appellant, is their failure to investigate available "Mitigating Evidence," so as to humanize the client, as did Mr. Labarre in this case. In Strickland v. Washington, 693 F.2d 1243, Id. at 1256-1257, n. 23, the court stated that "Among the factors relevant to deciding whether particular strategic choices are reasonable are "(the experience of he Attorney, the inconsistency of unpursued and pursued lines of defense, and the potential for prejudice from taking an unpursued line of defense." The fact of the matter is, the Petitioner's Court Appointed Attorney, William Labarre is just a Lawyer for Formality purposes, and not a Legal Advocate on the Petitioner's behalf. If Mr. Labarre had investigated the available Mitigating Evidence, then he would have, or should have presented the material at the plea hearing to Mitigate the sentence, instead of doing nothing, therefore the Appellant was subjected to unreasonable representation, a violation of his Constitutional Right to Effective Assistance of Counsel.

Defense counsel never investigated the habitual portion of the indictment in regards to **THE HABITUAL PORTION OF THE INDICTMENT, CHARGING APPELLANT AS A HABITUAL OFFENDER UNDER MISS. CODE ANN. §99-19-81, WAS DEFECTIVE AND FUNDAMENTALLY CONSTITUTIONALLY VOID WHERE THE INDICTMENT FAIL TO CHARGE, AND THE STATE FAILED TO INTRODUCE PROOF OF, THE ELEMENT OF THE DATES OF THE JUDGMENTS AND SENTENCING IN THE PRIOR CONVICTIONS. THE HABITUAL ENHANCEMENT OF THE SENTENCE, THEREFORE, WAS ILLEGAL AS HAVING BEEN COMPLETED BY A COURT WITOUT JURISDICTION.**

The habitual portion of the indictment filed against Evans alleged the following as the basis for such habitual charge.

and said **Larry Evans**, upon conviction hereof, should be sentenced as a habitual offender as provided in Sections 99-19-81 or 99-19-83, Mississippi Code Annotated, 1972, as amended, in that he, the said Larry Evans, has been twice previously convicted of felonies, to-wit: the crime of armed robbery in the Circuit Court of the First Judicial District of Hinds County, Mississippi, on July 8, 1999, in Cause number 98-4-621 in said Court, and the crime of motor vehicle theft in the Circuit Court of the First Judicial District of Hinds County, Mississippi, on July 8, 1999, in Cause number 98-2-408 in said Court, each of said felony convictions being upon charges separately brought and arising out of separate incidents at different times, and upon each of said convictions, the said **Larry Evans**, was sentenced to separate terms of one year or more in a penal institution of the above-named state and did serve at least one year of said sentences, said offenses hereinabove charged are based on the same act or transaction or are based on two (2) or more acts or transactions connected together or constituting parts of a common scheme or plan within the meaning of Section 99-7-2, Mississippi Code Annotated, 1972, as amended, contrary to the form of the statute in such cases made and provided and against the peace and dignity of the State of Mississippi.

The habitual portion of the indictment failed to allege the specific date in which the previous sentences, which the state sought to use against Evans to forfeit many years of his life, were imposed. The record, as it is quoted above, word for word, confirms this. This cannot be disputed and defense counsel never raised this issue in the trial court below. Such failure was deficient and prejudicial to Appellant since if this claim had been raised before the trial court by counsel it would have deprived the trial court of jurisdiction to hear the habitual portion of the indictment or to impose a habitual sentence.

The State did not properly charge Larry Evans in the charging instrument. Had the defense counsel raised this issue trial court would not have been able to allow the state multiple chances to correct the error which it failed to correct before filing the indictment. Where the indictment was faulty in its attempt to charge the habitual offender status with specific dates of judgment and sentence, not necessarily the date of conviction, then that portion of the sentence should be voided. The state could not have been given a second chance to correct the allegations during the burficated hearing proceedings, without first having sought to have the indictment

amended and never corrected the failure to cite the date of judgment and conviction. This court should vacate the habitual portion of the sentence.

The State never made any attempt to correct the botched indictment which failed to meet the required elements of habitual offender status as set forth under Miss. Code Ann. Sec. 99-19-81 and Rule 11.03(1) of the Miss. Rules of Cir. and Cty Court Practice. Rule 11.03(1) provides that:

The indictment must include both the principal charge and a charge of previous convictions. The indictment must allege with particularity the nature or description of the offense constituting the previous convictions, the state or federal jurisdiction of any previous conviction, and the date of judgment.

In the instant case the indictment makes no such allegation and the argument of the state should not be accepted as a substitute to the indictment's failure to give written notice of this crucial information. The state never amended the indictment to cure such ailment.

The plea and sentencing colloquy reveals that the prosecution, nor trial court, never mentioned any information of habitual offender status when the sentence was recommended and the recommendation was imposed in open court. The trial court never sentenced Evans as a habitual offender. This information merely showed up on the sentencing order. Where the habitual offender sentence was not imposed in open court then it was an illegal sentence. Trial counsel should have raised this issue and his failure to do so meets the requirements of Strickland since such failures were deficient and prejudicial to the Appellant.

The guarantee of Counsel cannot be satisfied by mere formal or the formality appointment of counsel, just having a person who happens to be a lawyer present in court, and standing along side the accused, is not enough to satisfy the Constitutional Command. The State would not provide funding for Investigators, or Expert Witnesses to analyze the evidence, which

the Attorney should have argued this issue, but did not. Mississippi Court Rules, Rules of Professional Conduct- Preamble; A Lawyer's Responsibilities states" A lawyer should demonstrate respect for the legal system and for those who serve it, including Judges, other lawyers and Public Officials. While it is a lawyer's duty, when necessary, (to challenge the rectitude of official action), it is also a lawyer's duty to uphold legal process." Therefore, Mrdefense counsel's failure to challenge that State's actions, as well as those of the court, concerning the jurisdiction of the court to impose a habitual sentence and the fact that the trial court never imposed such a sentence in open court, violated the rules of the Court, causing a Due Process violation. In the Supreme Court's own words quoted in Strickland v. Washington, "the court recognized that the Sixth Amendment Right to Counsel exists, and is needed in order to protect the fundamental right to a fair trial. However, even though the Right to Counsel exists, it does not always mean that the client's fundamental rights are protected. See Powell v. Alabama, 287 U.S. 45 (1932), Johnson v. Zerbst, 304 U.S. 458 (1938), Gideon v. Wainwright, 372 U. S. 335 (1963). Furthermore, in Winters v. State, 797 So.2d 307 (Miss. 2001), who cited ; Gray v. State, 549 So.2d 1316 (Miss. 1989) quoting, "it has been established that where fundamental rights are violated, procedural rules give way to present a miscarriage of justice." Therefore, in the light of all the circumstances, the ultimate focus of inquiry must be on the fundamental fairness of the said proceedings in this case, as those possibilities, conjoined with the unreasonableness of counsel's failure to investigate, are more than sufficient to establish a violation of the Sixth Amendment, and the appellant is entitled to a new sentencing proceeding.

ISSUE THREE

THE PROSECUTION DEPRIVED AND INTERFERED WITH APPELLANT'S RIGHT TO KNOWLEDGE OF THE EVIDENCE AGAINST HIM IN ORDER TO COERCE AND ENTICE A PLEA OF GUILTY, IN VIOLATION OF THE 5TH AND 14TH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

(3) That the Petitioner's right to be confronted with the witness against him under the 6th Amendment of the United States, and Mississippi Constitution, Article 3, §26, were violated by the State's failure to allow him a copy of the deposition of the accusations, and a chance to possibly impeach the credibility of the witness against him, to wit, Rufus Smith and William Thomas, (co-defendant), Rule 609 (a), Mississippi Rules of Evidence-" General Rule. For the purpose of attacking the credibility of a witness." The defendant was entitled to notice of the accusation's that were against him, with a (reasonable opportunity to be heard) in his own defense, and also to be allowed to cross examine a witness, or witnesses as to their bias accusations may infringe on the defendant's right to confront the witness or witnesses, Johnson v. State, 756 So.2d 4 (Miss. 1999). A 10 (10) day notice to the defendant, and his appointed attorney, Mr. Labarre, that both co-defendant's were going to testify against him at trial, was not enough notice to allow a proper defense, and Mr. Labarre should have requested a continuance, but he did not request one nor did he argue the fact. In a prior case that is similar to this case, Malone v. State 486 So.2d 367 (Miss. 1986) which states in part, "Upon a prima facie showing of the existence of an advanced plea agreement between the State and a co-defendant who was the State's principal witness, whereby in exchange for testifying for the state, the co-defendant would receive a lenient sentence for Armed Robbery, a defendant, who had been convicted for the (same robbery) as accessory before the fact, may be entitled to Post Conviction Relief where the agreement had not been disclosed prior to his trial. "Generally out of Court statement's by a

co-defendant which incriminate the defendant should not be allowed at late date as evidence, particularly to plea bargaining process, since it can not be known whether the co-defendant will testify and be subject to cross examination to avoid violating the defendant's right to confront witnesses against him. Smith v. State, 754 So.2d 1159, 1162 (Miss. 2000). The principle was established by the United States Supreme Court in Bruton v. United States, 391 U. S. 123, 88 S. Ct. 1620, 20 L.Ed 476 (1968). In Bruton the court held "that the confrontation clause of the 6th Amendment is violated when a co-defendant's incriminating statement is introduced at a Joint Trial." Here, the defendant would put this to test, same goes for plea hearings in weighing evidence of 2 co-defendants and their testimony, or statements and/or violating the defendant's right to confront them. Mississippi Rules of Evidence, Rule 609 (a) would have allowed the defendant here to use (key witnesses) prior Armed Robbery, of the same store in question, to wit, Rufus Smith, who was on probation for this crime, for purposes of impeaching his credibility as a witness, but in exchange for his statement, he was sentence to 5 years in the Mississippi Department of Corrections for pointing the finger at the defendant as being the ring leader of the robbery, when in all reality, robbery was the sole idea and action of Rufus Smith, as payback to them for him getting caught the first time for robbing this store, and he was in fact, on probation at the time of this robbery, thus, he had a lot to loose if he was convicted of robbing the same store again. Thereafter, the Appellant claimed that he was entitled to a review, and/or an Evidentiary Hearing regarding the facts, and as to the Constitutional violations concerning the matter in question regarding his Due Process Rights.

ISSUE FOUR

APPELLANT SUFFERED A VIOLATION OF HIS CONSTITUTIONAL RIGHTS UNDER THE 5TH AND FOURTEENTH AMENDMENTS WHERE RECORDS WERE WITHHELD UPON NUMEROUS REQUESTS IN REGARDS TO PREPARATION OF HIS POST CONVICTION COLLATERAL RELIEF MOTION.

That the Appellant's Rights to Due Process, and the Equal Protection under the 14th Amendment to the United States Constitution, and Article 3, §14 of the Mississippi Constitution were violated by his (numerous) requests for the Court's Records and Transcripts which are a direct result of his Conviction, the same conviction in which he is now forced to file this petition without any records and transcripts to properly address this complaint of his rights being violated, this is very prejudicial to the defendant. Had Evans been provided with such transcript he would have been able to demonstrate in the trial court that the Court never sentenced him as a habitual offender and that his trial counsel was ineffective. In Fisher v. State, 532 So.2d 992 (Miss. 1988), the Mississippi Supreme Court discussed a claim that, Britt v. North Carolina, 404 U.S. 226, 227, 92 S. Ct. 431, 433, 30 L. Ed 400 (1971), required a transcript of prior proceedings to be provided. While holding that there is no need to provide a prior transcript from an (unrelated) case, the court held that there can be no doubt... that the state (must) provide an indigent with a transcript of prior proceedings when that transcript is needed... Fisher, 532 So.3d at 999, (quoting Britt, 404 U. S. at 227). Thus, the Appellant, who was in need of his records and transcript in this case, respectfully moved the trial court for an order, compelling Barbara Dunn, the clerk of the court, to provide the Appellant with a copy of the records and transcript in Cause No. 06-329-02, a new Motion For Records and Transcripts was filed with the trial court which the trial court refused to grant.

ISSUE FIVE

THAT THE TRIAL COURT ERRED IN FAILING TO ADDRESS THE ISSUES OF THE POST CONVICTION RELIEF MOTION OR TO CONDUCT AN EVIDENTIARY HEARING AND FAILED TO COMPLY WITH THE POST CONVICTION RELIEF STATUTE WHERE COURT DENIED SUMMARILY DENIED THE MOTION WITHOUT REVIEWING THE TRANSCRIPT OF THE PLEA SINCE THE PLEA TRANSCRIPT WAS NOT MADE AVAILABLE UNTIL IT WAS TRANSCRIBED BY THE COURT REPORTER ON DECEMBER 17, 2009 AND FILED WITH THE CIRCUIT COURT CLERK ON THE SAME DAY.

Mississippi Code Ann. § 99-39-11 (1) provides that when the post conviction collateral relief motion is filed:

(1) The original motion, together with all the files, records, transcripts and correspondence relating to the judgment under attack, shall be examined promptly by the judge to whom it is assigned.

In the instant case the trial court never complied with the statute before summarily denying the post conviction relief motion in a half page order. (C.P. 85).

The facts and information presented in this brief demonstrates that the trial court was manifestly wrong in summarily denying the motion. The sentence, as a matter of law, was not imposed under the habitual statute and the sentencing order, in it's present state, is illegal. This fact along, without any of the other claims, demonstrates that Appellant is entitled to relief and the post conviction relief motion should not have been summarily dismissed. Hunt v. State, 874 So.2d 448 (Miss. 2004).

The plea transcript was not transcribed and filed until long after the court had denied the post conviction relief motion. As a matter of fact, the plea transcript was not made a part of the record until this court ordered it to be filed. This plea transcript was not initially filed even after it had been designated in the Designation of Record on Appeal. The trial court could not have

possibly reviewed the transcript before mailing this summary dismissal because the transcript had not been written at that time.

The post conviction relief filed in this case was clearly sufficient to warrant an evidentiary hearing.

The Trial Court's finding that the motion should be summarily dismissed constitutes an abuse of discretion and should be reversed by this Honorable Court for an evidentiary hearing on the merits. Under the law where there is a question of fact presented by the post conviction motion the trial court should conduct an evidentiary hearing. This Court should therefore FIND THAT THE TRIAL COURT'S RULING TO BE VOID and remand this case to the trial court for evidentiary hearing on the merits. The trial court should have actually conducted an evidentiary hearing without any entry of a ruling regarding the motion. The claims contained in the motion are well pleaded and concise. Appellant was DEFINITELY entitled to develop additional facts, during a hearing, to support his motion. This Court is, once again, confronted with factual problems in this case which could have been fully and finally resolved in the trial court by an evidentiary hearing or, possibly, by development of facts and expansion of the record in conformance with Miss. Code Ann. §99-39-17 (Supp. 1992).

In the present case the Appellant supported his complaint with specific factual allegations and the record. The trial court did not bother to examine the record. Appellant also asserted that his plea of guilty was involuntary. These factual presentations constitute factual disputes which should have been resolved by a hearing. *"While a transcript of the proceeding is essential, which again the trial court never bothered to examine, other offers of clear and convincing evidence which prove that the defendant entered a guilty plea involuntarily are sufficient. For example, where an evidentiary hearing has established that a defendant's guilty plea was entered*

involuntarily, the fact that a record was not made at the time the plea was entered will not be fatal." Wilson v. State, 577 So.2d 394 (Miss. 1991).

In this case, the trial court never conducted an evidentiary hearing or examined the attachments to the Motion to verify that the claim of involuntary plea and ineffective assistance of counsel was supported by factual information. The trial court failed to the mandatory requirements of the post conviction procedure Act when it failed to conduct a hearing or to require an answer from the State or examine the evidence. This act sets out the following requirements

§ 99-39-11. Judicial examination of original motion; dismissal; filing answer.

(1) The original motion, together with all the files, records, transcripts and correspondence relating to the judgment under attack, shall be examined promptly by the judge to whom it is assigned.

(2) If it plainly appears from the face of the motion, any annexed exhibits and the prior proceedings in the case that the movant is not entitled to any relief, the judge may make an order for its dismissal and cause the prisoner to be notified.

(3) If the motion is not dismissed under subsection (2) of this section, the judge shall order the state to file an answer or other pleading within the period of time fixed by the court or to take such other action as the judge deems appropriate.

(4) This section shall not be applicable where an application for leave to proceed is granted by the Supreme Court under Section 99-39-27.

(5) Proceedings under this section shall be subject to the provisions of Section 99-19-42.

In the instant case now before the bar of this Court, the trial court never indicated that it had examined the record of the pleas. The law therefore requires that an evidentiary hearing be conducted in such an instance where the trial court is unable to make this finding. During the plea hearing, and according to law, Evans should have been advised that he had the right to have his witnesses testify. Moreover, the Court should have advised Evans that he could appeal the sentence to the Supreme Court directly since the sentence was not imposed pursuant to a plea

bargain. Evans was entitled to an evidentiary hearing because if these things were not told to him and because he had witnesses who could have been called at trial, and ready to testify, the plea would not have been made. The Supreme of Mississippi has previously held that it is committed to the principle that a post-conviction collateral relief petition, which meets basic requirements, is sufficient to mandate an evidentiary hearing unless it appears beyond doubt that the Appellant can prove no set of facts in support of his claim which would entitle him to relief Alexander v. State, 605 So.2d 1170, 1173 (Miss. 1992); Horton v. State, 584 So.2d 764, 768 (Miss. 1991); Wilson v. State, 577 So.2d 394, 397 (Miss. 1991); Myers v. State, 583 So.2d 174, 178 (Miss. 1991); Miller v. State, 578 So.2d 617 (Miss. 1991); Wright v. State, 577 So.2d 387 (Miss. 1991); Billiot v. State, 515 So.2d 1284 (Miss. 1987) .

In tandem, with the allegations in the post-conviction relief motion being supported by the record, Appellant was entitled to an "in court opportunity to prove his claims." Neal v. State, 525 So.2d 1279, 1281 (Miss. 1987). The trial court's decision not to grant an evidentiary hearing here forced another needless appeal upon an already overloaded and overtaxed appellate court. The trial court should have, at a minimum, granted an evidentiary hearing on the claims contained in the post-conviction relief motion. Relief beyond that point would have depended upon the developments at the evidentiary hearing. Neal v. State, 525 So.2d 1279, 1280-81 (Miss. 1987); Sanders v. State, 440 So.2d 278, 286 (Miss. 1983); Baker v. State, 358 So.2d 401 (Miss. 1978). This point is especially clear where there was no record transcript of the plea made or consulted in considering the post conviction motion. Appellant made a substantial showing of the denial of his constitutional rights under states law., as demonstrated by the record, that the trial court accepted pleas and sentenced him without the least concern as to whether any of his witnesses desired to testify in mitigation of the sentence to be imposed. Appellant Evans would

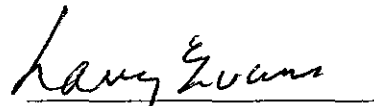
ask this Court to vacate the ruling of the trial court and remand this case to the trial court for an evidentiary hearing.

CONCLUSION

Appellant Evans respectfully submits that based on the authorities cited herein and in support of his brief, that this Court should vacate the guilty plea, conviction and sentence imposed as well as the action taken by the trial court in regards to the post conviction relief motion. In the alternative, this Court should vacate the sentence based upon the claims presented here regarding the failure to impose a habitual sentence and the legality of the indictment. This case should be remanded to the trial court for an evidentiary hearing or a hearing to impose a non-habitual sentence.

Respectfully submitted:

By:



Larry Evans, #R9326

CMCF

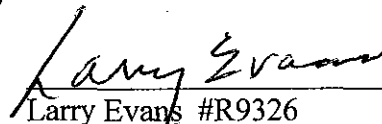
P. O Box 88550

Pearl, MS 39208

CERTIFICATE OF SERVICE

This is to certify that I, Larry Evans, have this date served a true and correct copy of the above and foregoing 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; Honorable W. Swan Yerger, Circuit Court Judge, P. O. Drawer 327, Jackson, MS 39205 Honorable Robert Smith, District Attorney, P O Box 22747, Jackson, MS 39205,

This, the 1, day of February, 2010



Larry Evans #R9326
CMCF
P. O. Box 88550
Pearl, MS 39208