

**IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI**

**CHARLES FRANK HOLLOWAY, JR.**

**APPELLANT**

**VS.**

**NO. 2009-CP-1069**

**STATE OF MISSISSIPPI**

**APPELLEE**

**BRIEF FOR THE APPELLEE**

**APPELLEE DOES NOT REQUEST ORAL ARGUMENT**

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**TABLE OF CONTENTS**

TABLE OF AUTHORITIES .....	ii
STATEMENT OF THE FACTS .....	3
SUMMARY OF THE ARGUMENT .....	4
ARGUMENT .....	6
PROPOSITION I	
THE RECORD REFLECTS HOLLOWAY'S PLEA WAS	
VOLUNTARILY AND INTELLIGENTLY ENTERED. ....	6
PROPOSITION II	
THE RECORD REFLECTS HOLLOWAY RECEIVED EFFECTIVE	
ASSISTANCE OF COUNSEL. ....	9
PROPOSITION III	
FACTUAL ISSUES WERE WAIVED WHEN HOLLOWAY PLED	
GUILTY KNOWINGLY AND VOLUNTARILY. ....	11
CONCLUSION .....	13
CERTIFICATE OF SERVICE .....	14

# TABLE OF AUTHORITIES

## FEDERAL CASES

Boykin v Alabama, 395 U. S. 238, 242 (1969) . . . . . 7, 8

## STATE CASES

Alexander v. State, 605 So. 2d 1170, 1172 (Miss. 1992) . . . . . 4, 7  
 Bailey v. State, 760 So. 2d 781, 783 (Miss. App. 2000) . . . . . 4, 9  
 Brooks v. State, 573 So. 2d 1350, 1352 (Miss. 1990) . . . . . 5, 10, 11  
 Campbell v. State, 611 So. 2d 209, 210 (Miss. 1992) . . . . . 11  
 Lindsay v. State, 720 So. 2d 182, 184 (Miss. 1998) . . . . . 4, 10  
 Roland v. State, 666 So. 2d 747, 750 (Miss 1995) . . . . . 9  
 Smith v. State, 490 So. 2d 860 (Miss. 1986) . . . . . 10  
 Smith v. State, 636 So. 2d 1220, 1227 (Miss. 1994) . . . . . 5, 10  
 Stringer v. State, 454 So. 2d 468, 477 (Miss 1987) . . . . . 9  
 Vilee v. State, 653 So. 2d 920, 922 (Miss 1995) . . . . . 10  
 Walker v. State, 703 So. 2d 266, 268 (Miss. 1997) . . . . . 9

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**PROCEDURAL HISTORY:**

On March 4, 2008, Charles Frank Holloway, Jr. "Holloway" pled guilty to sale of cocaine within 1500 feet of a school before the Circuit Court of Copiah County, the Honorable Lamar Pickard presiding. R. 1-13. The trial court advised and questioned Holloway and his counsel about Holloway's understanding of the nature of the proceedings and the consequences of his guilty plea, if voluntarily entered. After questioning him, the trial court found that Holloway's plea was voluntarily and intelligently entered. R. 12. Holloway was sentenced to serve a recommended eight year sentence with alcohol and drug treatment in the custody of the Mississippi Department of Corrections. R. 13. On June 4, 2009, Holloway filed a pro se motion for post conviction relief. C.P. 6-20. The trial court denied relief. C.P. 22-23. Holloway filed notice of appeal. C.P. 25.

ISSUES OF APPEAL

I.

WAS HOLLOWAY'S PLEA VOLUNTARILY AND INTELLIGENTLY ENTERED?

II.

DID HOLLOWAY RECEIVE EFFECTIVE ASSISTANCE OF  
COUNSEL?

III.

WERE FACTUAL ISSUES WAIVED WHEN HOLLOWAY PLED  
GUILTY?

## STATEMENT OF THE FACTS

On March 4, 2008, Holloway pled guilty to sale of cocaine near a school before the Circuit Court of Copiah County, the Honorable Lamar Pickard presiding. R. 1-13. Holloway was represented by Mr. M. A. Bass. R. 1. Bass assisted Holloway in explaining the contents of a "Guilty Plea Petition," which Holloway acknowledged, signed and filed. R. 3.

The trial court advised and questioned Holloway and his counsel about Holloway's understanding of the nature of the proceedings and the consequences of his guilty plea, if it was voluntarily entered. Holloway admitted that he understood the information contained in the guilty plea petition which his guilty plea counsel had explained to him. He admitted knowing the sale of cocaine charge and the maximum thirty year sentence for a conviction. R. 1-13.

Holloway admitted under oath that he understood that he was waiving his right to a trial with cross examination, and a right against self incrimination. R. 5-8. He admitted that he had not been coerced or promised anything in exchange for his guilty plea. R. 10. He admitted knowing the "thirty year" maximum sentence as well as the recommended "eight year" sentence. Holloway admitted that he was guilty of having sold cocaine to an undercover agent in Copiah County. R. 11-12.

After evaluating Holloway and his counsel's answers to his questions, the trial court found that Holloway's plea was voluntarily and intelligently entered. R. 12.

Holloway was sentenced to serve an eight year sentence in the custody of the Mississippi Department of Corrections with alcohol and drug treatment and counseling provided. R. 13. This was the recommendation of the prosecution. R. 13.

On June 4, 2009, Holloway filed a pro se motion. It was entitled, "Petition For Writ Of Habeas Corpus." C.P. 6-20. The petition was considered a motion for post conviction relief. The trial court denied relief. C.P. 22-23. Holloway filed notice of appeal. C.P. 25.

## SUMMARY OF THE ARGUMENT

1. The record reflects that the trial court correctly denied Holloway's unsupported pro se motion for post conviction relief. C.P. 22-23. The guilty plea hearing transcript indicated that Holloway's guilty plea was intelligently and voluntarily entered. R. 1-13.

The record reflects that there was no affidavit from Holloway's guilty plea counsel, who was accused of misleading Holloway as to his possible sentence. C.P. 1-21.

The record indicates that Holloway admitted that he had not been promised anything or coerced and that he was "satisfied" with the advice and services provided by his counsel. R. 1-13. He admitted knowing that he was waiving his Constitutional rights by pleading guilty. R. 8. He also admitted that he sold cocaine in Copiah County "on September 10, 2007." R. 11-12. Holloway knew the maximum "thirty" and the recommended "eight year" sentence. R. 11-12.

There was sufficient evidence for the trial court to find that Holloway understood "the nature of the charges and consequences of his plea." C.P. 22. **Alexander v. State**, 605 So. 2d 1170, 1172 (Miss. 1992) and **Bailey v. State**, 760 So. 2d 781, 783 (Miss. App. 2000).

2. The record reflects effective assistance of counsel. There were no affidavits in support of Holloway's claims for relief. C.P. 1-21. There was no affidavit from his guilty plea counsel who was accused of misleading Holloway as to his possible sentence. **Lindsay v. State**, 720 So. 2d 182, 184 (¶6) (Miss. 1998).

Instead of serving a sentence of up to sixty years as "an habitual offender," Holloway is serving only an eight year sentence. R. 11-13. Holloway admitted that he was "satisfied" with the advice and representation of his guilty plea counsel. R. 9. He admitted that no one had promised him anything in exchange for his guilty plea. R. 10. He also admitted that he was guilty of having sold cocaine to an undercover agent in Copiah County. R. 11-12.

There is a lack of evidence that anyone provided Holloway with any "firm representation" of a more

lenient sentence. **Smith v. State**, 636 So. 2d 1220, 1227 (Miss. 1994). The appellee would submit that, based upon the record, there was neither evidence of deficient performance on the part of guilty plea counsel or of prejudice to Holloway's defense as a result of such alleged deficiencies. R. 1-13.

3. Factual issues necessary for proving Holloway guilty before a jury were waived when he plead guilty knowingly and intelligently. **Brooks v. State**, 573 So. 2d 1350, 1352 (Miss. 1990).



## ARGUMENT

### PROPOSITION I

#### **THE RECORD REFLECTS HOLLOWAY'S PLEA WAS VOLUNTARILY AND INTELLIGENTLY ENTERED.**

In Holloway's pro se motion he complained of an alleged factually flawed indictment, a violation of his due process rights, as well as surprise at receiving an eight year sentence rather than a much shorter sentence as allegedly related to him by his guilty plea counsel. C.P. 1-19.

The record reflects that Holloway with the assistance of counsel completed a "petition to enter a guilty plea" as well as answered questions under oath at a guilty plea hearing. R. 5. The record of that guilty plea hearing indicated, as found by the trial court, that Holloway entered his guilty plea voluntarily and intelligently. The trial court also found a factual basis for the plea. R. 12-13.

The record indicated that the Holloway understood the sale of cocaine charge, as well as the possible consequences of his guilty plea before the circuit court of Copiah county. He knew the thirty year maximum sentence for sale of cocaine, as well as the eight year recommended sentence which was the sentence which he actually received. R. 13.

He also acknowledged that he knew his Constitutional rights which he was waiving by pleading guilty. He admitted that he had not been promised anything, such as a lenient sentence, and that he had not been coerced into pleading guilty. R. 10. And he admitted that he was guilty of having sold cocaine to an undercover agent in Copiah County. R. 11-12.

As stated in the guilty plea hearing transcript:

Q... Has your lawyer explained to you and do you understand the nature of the offense that you're pleading guilty to, all the law related to that offense, the maximum and minimum penalties for the offense and all the elements of the offense you're pleading guilty to?

Defendant: Yes. R. 8.

Court: Do you all understand that you're waiving or giving these rights up by pleading guilty? Do you understand?

Defendant: Yes, sir. R. 8.

Court: ...Are you satisfied with the advise and help and assistance that your attorney has provided for you?

Defendant: Yes, sir. R. 9.

The Court: I want to make sure that this is your decision to plead guilty. Is there anyone who's been influenced by anyone or pressured by anyone or has there been any promises made to you that might force you to plead guilty? Anyone?

Defendant: No, sir. R. 10.

... Court: Is everyone pleading guilty because they are, in fact, guilty and no other reason?

Defendant: Yes, sir. R. 10.

Holloway admitted knowing the thirty year maximum sentence for sale of cocaine. R. 8; 11-12. He also knew the recommended eight year sentence which was the sentence he received from the trial court.

R. 13.

The trial court's Order denying relief stated that there was no merit to Holloway's claims for relief.

As stated:

The court now finds that it plainly appears from the face of the motion and the prior proceedings in said cause, that the movant is not entitled to any collateral relief, and as such there is no need for an evidentiary hearing, and Charles Frank Holloway's petition for writ of habeas corpus, taken by the Court as a motion for post conviction relief, lacks merit, and should be denied. C.P. 22-23.

In **Alexander v. State**, 605 So. 2d 1170, 1172 (Miss. 1992), this Court found, in accord with

**Boykin v Alabama**, 395 U. S. 238, 242 (1969), that a defendant must be advised and understand "the

nature of the charge against him and the consequences of the plea." This is necessary if the plea is to be

accepted on the record as voluntarily and intelligently entered.

A plea of guilty is not binding upon a criminal defendant unless it is entered voluntarily and intelligently. *Myers v. State*, 583 So. 2d 174, 177(Miss. 1991). A plea is deemed "voluntary and intelligent" only where the defendant is advised concerning the nature of the charge against him and the consequences of the plea. See *Wilson v. State*, 577 So. 2d 394, 396-97(Miss. 1991). Specifically, the defendant must be told that a guilty plea involves a waiver of the right to a trial by jury, the right to confront adverse witnesses, and the right to protection against self incrimination. *Boykin v. Alabama*, 395 U.S. 238, 23 L. Ed. 2d 274, 89 S. Ct. 1709 (1969), Rule 3.03 of the Uniform Criminal Rules of Circuit Court Practice additionally requires, inter alia, that the trial judge "inquire and determine" that the accused understands the maximum and minimum penalties to which he may be sentenced.

The appellee believes there was sufficient record evidence, as cited above, in support of the trial court's finding that Holloway's guilty plea was validly entered. This was after a guilty plea hearing with the benefit of counsel and the submission of a guilty plea petition.

Holloway acknowledged knowing that he was waiving his right to challenge his indictment as well as the state's requirement to prove him guilty beyond a reasonable doubt. R. 1-13. Therefore, the trial court correctly found that Holloway was not entitled to a hearing on his unsupported pro se claims for sentencing relief. C.P. 22-23.

This issue is lacking in merit.

## PROPOSITION II

### **THE RECORD REFLECTS HOLLOWAY RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL.**

In Holloway's pro se motion he complains about his guilty plea counsel's allegedly misleading advice and counsel. Holloway asserts without any record support that his guilty plea counsel led him to believe that he would only be required to serve two years or less of his eight year sentence. C.P. 9.

The *Strickland v. Washington*, standard for "ineffective assistance of counsel," 466 U. S. at 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) requires both a showing of deficient performance as well as the prejudicial impact of this on a petitioner's defense. It is applicable to the entry of a guilty plea. *Roland*

*v. State*, 666 So. 2d 747, 750 (Miss 1995); *Bailey v. State*, 760 So. 2d 781, 783 (Miss. App. 2000).

This is an exacting standard and therefore demands a showing that counsel's errors were so serious as to deprive the defendant of a fair trial. Unless a defendant can offer evidence supporting both prongs of analysis, it cannot be said that the outcome resulted from a breakdown in the adversary process that renders the result unreliable. *Stringer v. State*, 454 So. 2d 468, 477 (Miss 1987)(citing *Strickland*, 466 U S at 687, 104 S Ct 2052). The burden of proof in the *Strickland* test rests with the defendant who faces a rebuttable presumption that counsel's performance falls within the broad spectrum of reasonable professional assistance. *Walker v. State*, 703 So. 2d 266, 268 (Miss. 1997).

As shown with cites to the record Holloway admitted that he had not been promised a more lenient sentence. He had not been "influenced" or "promised" anything to plead guilty. R. 10. He admitted that he was "satisfied with the advice and help and the assistance" provided by his guilty plea counsel, Mr. Bass. R. 9. He also admitted that he was guilty of having sold cocaine to an undercover agent on September 10, 2007. R. 12. Holloway acknowledged knowing the thirty year maximum sentence as well as the recommended eight year sentence which, in fact, was the sentence he received. R. 8-13. The trial court found there was "a factual basis to support the charge" and that Holloway's plea was voluntarily and intelligently entered. C.P. 22-23.

In **Lindsay v. State**, 720 So. 2d 182, 184 (¶6) (Miss. 1998), the Court stated that an ineffective assistance claim is deficient when supported only by a defendant's affidavit. In the instant cause, there are no affidavits of proposed witnesses in support of any of Holloway's claims for relief. C.P. 1-19.

In examining applicable case law, it is further shown that Lindsay's claims are without merit. The only affidavits in the record that suggest appellant's counsel was deficient are those filed by Lindsay. This is not enough to prove ineffective assistance. In a case involving Post Conviction Relief, this Court has held, "that where a party offers only his affidavit, then his ineffective assistance for counsel claim is without merit." **Viele v. State**, 653 So. 2d 920, 922 (Miss. 1995) See also **Brooks v. State**, 573 So. 2d 1350 (Miss. 1990); **Smith v. State**, 490 So. 2d 860 (Miss. 1986).. Since that is all that the appellant offers, his claim of ineffective assistance must fail.

In **Smith v. State**, 636 So. 2d 1220, 1227 (Miss. 1994), this Court relied upon **Myers v. State**, 583 So. 2d 174, 177 (Miss. 1991) (quoting from **Sanders v. State**, 440 So. 2d 278 at 287) (Miss. 1983) in its decision.

In **Myers**, the "mere expectation" of a lesser sentence is contrasted with a "reliance" upon a "firm representation" of a lesser sentence. The Court found that Smith's plea was valid even though he had not been informed of the minimum sentence he could receive. In that case, as in the instant cause, the petitioner was pleading guilty based upon a plea agreement with the state. He knew the recommended sentence for his felony conviction.

As shown under proposition I, there was no basis in the record of the guilty plea hearing, or the record as a whole indicating that any representation was ever made to Holloway about a more lenient sentence. R. 1-13; C.P. 1-34. In other words, there was no evidence indicating that anyone lead Holloway to believe he would receive a lenient two year sentence.

The record cited above was sufficient for the trial court to find that Holloway's guilty plea was validly entered, and that Holloway received effective assistance of counsel.

This issue is also lacking in merit.

### PROPOSITION III

#### **FACTUAL ISSUES WERE WAIVED WHEN HOLLOWAY PLED GUILTY KNOWINGLY AND VOLUNTARILY.**

In Holloway's petition he complains about a lack of factual specifics needed for proving him guilty of selling cocaine within 1500 feet of a school. Petition, C.P. 1-20.

In **Brooks v. State**, 573 So. 2d 1350, 1352 (Miss. 1990), the Court stated that a guilty plea admits "all elements of a guilty charge" and operates as waiver of all non-jurisdictional defects contained in an indictment.

Brooks, in the wake of his guilty pleas, assails allegedly defective indictments. A valid guilty plea, however, admits all elements of a formal criminal charge and operates as a waiver of all non-jurisdictional defects contained in an indictment against a defendant.

The record reflects that Holloway acknowledged knowing that he was waiving his Constitutional rights by pleading guilty. R. 8. He admitted that he was guilty of having sold cocaine to an undercover agent in Copiah County "on September 10, 2007." R. 11-12. He also knew the maximum "thirty" and the "eight" year recommended non-habitual sentence which he actually received.

The trial court found, after questioning Holloway and his counsel, that there was a factual basis for his guilty plea. R. 12-13. The record indicates neither Holloway nor his counsel objected to the prosecution's statement of what they were prepared to present in evidence in the event of a trial. R. 11-12. Therefore, factual issues the prosecution would have been required to prove before a jury were waived. After a valid guilty plea with a factual basis for the plea in the record, it is not necessary to offer proof of the distance between the place where the sale occurred and the school.

In **Campbell v. State**, 611 So. 2d 209, 210 (Miss. 1992), the Court found that Campbell's "mere allegation" about factual issues was not sufficient for the trial court to grant an evidentiary hearing on this unsupported claim for relief.

These claims were based primarily on Campbell's allegations that a witness was not available to testify that the crime which Campbell was charged had been committed by another person. Campbell's petition asked that the alleged witness was not available to make an affidavit because he (Campbell) was incarcerated. Such mere allegation is insufficient to require the trial court to grant an evidentiary hearing.

These related factual issues were waived, and are therefore also lacking in merit.

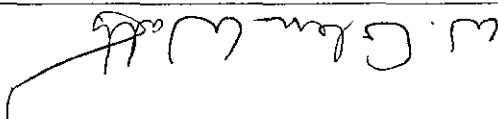
CONCLUSION

The trial court's order denying relief should be affirmed for the reasons cited in this brief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, W. Glenn Watts, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing BRIEF

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This the 19th day of October, 2009.



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