IN THE COURT OF APPEALS FOR THE STATE OF MISSISSIPPI

CAUSE NO. 2010-CA-01951-COA

CEDRIC SMITH
Appellant

vs.

STATE OF MISSISSIPPI
Appellee

APPEAL
From the Circuit Court of Pearl River County, Mississippi

BRIEF OF THE APPELLANT

OF COUNSEL FOR APPELLANT:

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FOR THE STATE OF MISSISSIPPI

CEDRIC SMITH **APPELLANT**

VS. **CAUSE NO. 2010-CA-01951-COA**

STATE OF MISSISSIPPI **APPELLEE**

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 the Supreme Court and\or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Hon. Circuit Court Judge Prentiss Harrell
   Circuit Court of Pearl River County, Mississippi
   P.O. Box 488
   Purvis, Mississippi 39475

2. Hal Kittrell, Esq.
   Pearl River County District Attorney
   P.O. Box 584
   Poplarville, Mississippi 39470

3. Hon. Jim Hood
   Mississippi Attorney General
   P.O. Box 220
   Jackson, Mississippi 39205-0220

4. Cedric Smith.
   MDOC # 136092
   Marion County Correctional Facility
   Unit-MWCF ZoneD
   503 S. Main St.
   Columbia, MS 39429

SO CERTIFIED, this the 6th day of May, 2011.

JEANINE M. CARAFELLO (MSB [redacted])

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STATEMENT OF THE ISSUES

1. Cedric Smith did not knowingly and voluntarily waive his right to indictment.

2. The Circuit Court of Pearl River County, Mississippi did not have jurisdiction of the subject matter in this case.

3. The guilty plea and sentence imposed were unlawful and violated Mr. Smith's constitutional rights.

4. Mr. Smith's counsel was so deficient and ineffective that Mr. Smith's constitutional rights were violated.

STATEMENT OF THE CASE

On or about December 15, 2006, Cedric Smith (hereinafter sometimes referred to as "Mr. Smith") was arrested by the Poplarville Police Department for the alleged crime of Statutory Rape in violation of Section 97-3-65(1)(a) of Mississippi Code of 1972, as amended. It was alleged that ". . . on or about the 5th day of December, 2006, in said county and state, the defendant, Cedric E. Smith, being then and there a male person above the age of eighteen (18) years, to wit: thirty-five (35) years of age, did willfully, unlawfully and feloniously have sexual intercourse with A.H., a female who is at least fourteen (14) years of age, but under the age of sixteen (16) years, to wit: fourteen years of age, contrary to and in violation of Section 97-3-65 (1)(a) of the Mississippi Code of 1972, as amended; and against the peace and dignity of the State of Mississippi." (R. 152).

Mr. Smith was never indicted by the Grand Jury of Pearl River County, Mississippi.

On September 7, 2007, Mr. Smith appeared in Court with his retained attorney, Jonathan Farris in the Circuit Court of Pearl River County, Mississippi; Cause Number 2007-279H. Mr. Smith executed a *Waiver of Indictment* (R. 153) and signed a *Petition to Enter an Alford Plea of Guilty* (R. 154-158) that was prepared by Mr. Farris. Mr. Farris informed the Court that Mr. Smith would be entering a "best interest" Alford plea to the *Information Charging Cedric E. Smith with Statutory Rape* (R. 152), and the hearing proceeded.

On January 25, 2008, the Court sentenced Mr. Smith to a term of twenty (20) years in the custody of the Mississippi Department of Corrections with thirteen (13) years suspended leaving seven (7) years to serve, followed by five (5) years of Post Release Supervision. (R. 159-162).

On or about August 25, 2010, Cedric Smith filed his *Motion for Post-Conviction Relief* (R. 2-67) and *Brief in Support of Motion for Post-Conviction Relief* (R. 68-150) in the Pearl

River County Circuit Court pursuant to Miss. Code Ann. § 99-39-1 et. seq. seeking review of his case, revocation of his pleas of guilty, dismissal of the charges against him and an order directing the Mississippi Department of Corrections to immediately release him from custody.

On or about October 25, 2010 the Circuit Court of Pearl River County, Mississippi rendered its *Memorandum Opinion and Order of Summary Dismissal* denying the *Motion for Post-Conviction Relief.* (R. 168-185).

On or about November 2, 2010, Cedric Smith filed his *Notice of Appeal* herein. (R. 186).

FACTS

On or about December 15, 2006, Cedric Smith (hereinafter sometimes referred to as "Mr. Smith") was arrested by the Poplarville Police Department for the alleged crime of Statutory Rape in violation of Section 97-3-65(1)(a) of Mississippi Code of 1972, as amended. It was alleged that ". . . on or about the 5th day of December, 2006, in said county and state, the defendant, Cedric E. Smith, being then and there a male person above the age of eighteen (18) years, to wit: thirty-five (35) years of age, did willfully, unlawfully and feloniously have sexual intercourse with A.H., a female who is at least fourteen (14) years of age, but under the age of sixteen (16) years, to wit: fourteen years of age, contrary to and in violation of Section 97-3-65 (1)(a) of the Mississippi Code of 1972, as amended; and against the peace and dignity of the State of Mississippi." (R. 152).

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Smith would be entering a "best interest" Alford plea to the *Information Charging Cedric E. Smith with Statutory Rape* (R. 152), and the hearing proceeded.

At the hearing on September 7, 2007, the State proffered the following as the factual basis for the charge against Cedric Smith:

> MS.BARNES: Your Honor, on behalf of the State, I'm prepared to proffer evidence in this case.
> THECOURT: All right.
> MS.BARNES: May I proceed?
> THE COURT: You may.
> MS.BARNES: If this case were to go to trial, the State would expect to prove through the testimony of the victim, initials A.H., that beginning her seventh grade year she and the defendant began text-messaging each other. At that time she was a student here in Poplarville and he was a coach and teacher here in Poplarville.
>
> In August of 2006, one of the victim's friends saw a text message from the defendant on her phone and she ceased text-messaging with him until approximately December of 2006. At that time they began text-messaging again, and the defendant asked the victim to delete the text messages as they were sent and received.
> On December the 5th, 2006, while the victim was 14 years old and the defendant was 35 years old, the defendant sent the victim a text-messaging saying, Can you get out. She replied yes and asked if he could get out. He replied that his wife was there, asked her what he was going to tell his wife. She replied, You could tell her that a friend had a flat tire. He text-messaged the victim, Do you have a condom. She replied no. The defendant called later and said he had passed by her house and had stopped by the Kangaroo station and bought a condom, and he told wife that he had left money on his desk school and had to turn off the lights.
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> The victim met the defendant near her house and got in the vehicle with him at the four-way stop in Poplarville. While they were riding in the car, the defendant told her to lean her seat back so no one would see her.
> As they approached the school, the defendant unlocked the gate, pulled in the gate, closed the gate, drove to the baseball field and parked behind the storage building. Once they were parked he began --they began to touch each other in a sexual manner. She was laid back in the seat, and he got on his knees on the floorboard. He told her to scoot to the end of the seat. He had sex with her. He disposed of the condom in front of the Poplarville police department on their way back to her house. He told the victim not to say anything. She text-messaged him later that she had made it home safely and she would talk to him tomorrow. He sent her a text message saying that his conscience was bothering him. She sent

him a text message saying that she felt bad and maybe they shouldn't have done it, but he text-messaged her back saying it's too late now.

The State would then introduce the testimony of a friend of the victim, initials H.F., that she was with the victim on that evening, December 5th, 2006, at the victim's house and that the victim left the house around 10:00 p.m. to meet someone and returned later.

The State would also introduce the testimony of Carl Merritt, school personnel, that he called the defendant to ask him to bring a copy of his cell phone records to the school and the defendant told him that he had text-messaged the victim some. The State would introduce the testimony of Poplarville police department detective John Kramer. After receiving the report from the school that the victim had admitted having sex with the defendant at school, Detective Kramer obtained a copy of the defendant's cell phone records dated March 30th, 2006, through December 15th, 2006. Those records revealed that during the period of time the defendant text-messaged the victim 566 times with 106 text messages occurring on the date of the incident. The content of the text message sent on December 15th, 2006, the day this all came to light, was, What have you done to me. Detective Kramer would also testify that he obtained video from the Kangaroo gas station from the date of the incident, and the video showed the defendant was at the Kangaroo store on the date as the victim said.
That's all I have, Your Honor.

(R. 264-267).

On January 25, 2008, the Court sentenced Mr. Smith to a term of twenty (20) years in the custody of the Mississippi Department of Corrections with thirteen (13) years suspended leaving seven (7) years to serve, followed by five (5) years of Post Release Supervision. (R. 159-162).

On or about August 25, 2010, Cedric Smith filed his *Motion for Post-Conviction Relief* (R. 2-67) and *Brief in Support of Motion for Post-Conviction Relief* (R. 68-150) in the Pearl River County Circuit Court pursuant to Miss. Code Ann. § 99-39-1 et. seq. seeking review of his case, revocation of his pleas of guilty, dismissal of the charges against him and an order directing the Mississippi Department of Corrections to immediately release him from custody.

On or about October 25, 2010 the Circuit Court of Pearl River County, Mississippi rendered its *Memorandum Opinion and Order of Summary Dismissal* denying the *Motion for Post-Conviction Relief.* (R. 168-185).

Aggrieved of this decision, Cedric Smith appeals to this honorable Court.

SUMMARY OF THE ARGUMENT

I. Cedric Smith's conviction for Statutory Rape was unconstitutional under Article 3, section 27 of the Mississippi Constitution because he was not indicted by a grand jury for the crime of Statutory Rape.

II. The Circuit Court of Pearl River County, Mississippi was without jurisdiction in this case since there was no proof whatsoever that the alleged acts occurred in Pearl River County, Mississippi, the trial Court never made a finding that any of the offenses took place in Pearl River County, Mississippi, and the State never offered any facts at the hearing regarding the guilty plea that the alleged acts occurred in Pearl River County, Mississippi.

III. The guilty plea and sentence imposed were unlawful and violated Cedric Smith's constitutional rights. First, the Court failed to make an on the record determination that a sufficient factual basis existed for accepting Mr. Smith' guilty plea. Second, Cedric Smith's entry of a guilty plea in this case was not freely, knowingly, voluntarily and intelligently entered in that the Judge did not, and could not have, found a legally factual sufficient basis for the plea in this matter. In this case, there was no indictment and the trial judge did not even require the district attorney to read the Bill of Information to Mr. Smith and the record in this case does not support a finding that the Judge and the defendant knew what the charges consisted of. At no point in time did the Judge state the elements of Statutory Rape that the State would have to prove at trial.

IV. Mr. Smith was denied effective assistance of counsel in this matter and his counsel's deficiencies severely prejudiced Mr. Smith's rights. But for the deficiencies of counsel, the result in Mr. Smith's case would have been vastly different. First, Mr. Smith's counsel never properly informed him of the elements of the crime of Statutory Rape. Second, Mr. Smith's counsel erroneously told Mr. Smith that the rape shield laws contained in M.R.E. Rule

412(b)(2)(A) prevented him from presenting **any** evidence of the alleged victim's sexual history, when, in fact, the rule only prevents evidence of "past sexual behavior." Third, Mr. Smith' counsel failed to explain to Mr. Smith what an Alford plea was. Fourth, Mr. Smith's counsel failed to explain to Mr. Smith what was meant when he waived indictment in this case. Fifth, Mr. Smith's counsel erroneously told Mr. Smith that the State had actual possession of hundreds of alleged text messages between Mr. Smith and the alleged victim. All of these errors by defense counsel severely prejudiced Mr. Smith.

STANDARD OF REVIEW:

"A trial court's finding of fact in post-conviction relief cases will not be overturned by an appellate court unless found to be clearly erroneous." *Jones v. State*, 976 So.2d 407, 410 (Miss. Ct. App. 2008) (citing *Hill v. State,* 940 So.2d 972, 973 (Miss.Ct.App.2006) (citing *Boyd v. State,* 926 So.2d 233, 235 (Miss.Ct.App.2005)). "However, questions of law are reviewed de novo." *Id.*

ARGUMENT:

I. CEDRIC SMITH DID NOT KNOWINGLY AND VOLUNTARILY WAIVE HIS RIGHT TO INDICTMENT

Cedric Smith's conviction for Statutory Rape was unconstitutional under Article 3, section 27 of the Mississippi Constitution because he was not indicted by a grand jury for the crime of Statutory Rape. Article 3, section 27 of the Mississippi Constitution provides that:

> No person shall, for any indictable offense, be proceeded against criminally by information, except in cases arising in the land or naval forces, or the military when in actual service, or by leave of court for misdemeanor in office or where a defendant represented by counsel by sworn statement waives indictment [.]

Cedric Smith did not knowingly and voluntarily waive his right to indictment in this matter. At the guilty plea proceeding, Mr. Smith, who was represented by trial counsel, did not acknowledged that he understood the nature and consequences of the charge against him and did not acknowledge on the record that he was entitled to have the matter presented to a grand jury. (R. 227-277).

Further, the Court did not accept Mr. Smith's waiver of indictment and did not inquire as to whether Mr. Smith understood that by entering a plea on a bill of information that he was giving up his right to be indicted by the Grand Jury. *Id.*

As such, Cedric Smith's conviction for Statutory Rape was unconstitutional under Article 3, section 27 of the Mississippi Constitution and should be vacated.

II. THE CIRCUIT COURT OF PEARL RIVER COUNTY, MISSISSIPPI DID NOT HAVE JURISDICTION OF THE SUBJECT MATTER IN THIS CASE.

In a criminal case, venue is jurisdictional, must be proved, and may be raised for the first time on appeal. *Crum v. State*, 216 Miss. 780, 788, 63 So.2d 242, 245 (1953). The venue of a criminal offense is in the county where the crime was committed, unless otherwise provided by law. *Miss.Code Ann. § 99-11-3(1) (Rev.2000)*. Proof of jurisdiction may be shown either by direct or circumstantial evidence. *Smith v. State*, 646 So.2d 538, 541 (Miss.1994).

There is no proof whatsoever that the alleged acts occurred in Pearl River County, Mississippi. The transcript of the plea hearing is devoid of such. (R. 227-277). The trial Court never made a finding that any of the offenses took place in Pearl River County, Mississippi. (R. 227-277). The State never offered any facts at the hearing regarding the guilty plea that the alleged acts occurred in Pearl River County, Mississippi, and therefore no factual basis for jurisdiction could be found by the trial court, and none ever was. (R. 227-277). The trial Judge did not make a finding on the record that the alleged acts occurred in Pearl River County, Mississippi. (R. 227-277). As such, the Circuit Court of Pearl River County, Mississippi was without jurisdiction of the subject matter of this criminal case against Mr. Smith and the charges against him should be dismissed in toto.

III. THE GUILTY PLEA AND SENTENCE IMPOSED WERE UNLAWFUL AND VIOLATED MR. SMITH'S CONSTITUTIONAL RIGHTS.

A. No Factual Basis Existed to Support a Finding of Guilty in this Matter.

Uniform Rules of Circuit and County Court Practice, Rule 8.04 imposes upon the Court certain duties and obligations to insure that a plea is knowing, intelligent and voluntary. *See Hodgin v. State*, 702 So.2d 113, (Miss. 1997). The Court failed in its duty to Mr. Smith surrounding the plea. Rule 8.04 (A)(3) states

> Before the trial court may accept a plea of guilty, the court must determine that the plea is voluntarily and intelligently made and that there is a factual basis for the plea. A plea of guilty is not voluntary if induced by fear, violence, deception, or improper inducements. A showing that the plea of guilty was voluntarily and intelligently made must appear in the record.

Uniform Rules of Circuit and County Court Practice, Rule 8.04 (A)(3).

In Mr. Smith' case, the Court failed to make an on the record determination that a sufficient factual basis existed for accepting Mr. Smith' guilty plea.

At the hearing , the State proffered the following:

> MS.BARNES: Your Honor, on behalf of the State, I'm prepared to proffer evidence in this case.
> THECOURT: All right.
> MS.BARNES: May I proceed?
> THE COURT: You may.
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That's all I have, Your Honor.

(R. 264-267).

This statement by Ms. Barnes, does not rise to the level of a factual basis since she did not state that there was penetration. "To establish the offense of rape, the State must prove that there was "some penetration" of the victim's vagina by the defendant's penis." *McDaniel v. State*, 790 So.2d 244, 247 (Miss. App. 2001) (citing *Wilson v. State,* 606 So.2d 598, 599 (Miss.1992); *Davis v. State,* 406 So.2d 795, 801 (Miss.1981); *Lang v. State,* 230 Miss. 147, 158, 87 So.2d 265, 268 (1956)). The State did not proffer that there was penetration of the alleged vicitm's vagina by the defendant's penis, so not factual basis for Statutory Rape was proffered by the State and none could be or was found by the Court.

This statement by Ms. Barnes, does not rise to the level of a factual basis since she did not state whether these alleged acts occurred in Pearl River County, Mississippi, the name of the alleged victim, the date of birth of the alleged victim.

The United States Supreme Court case of *Boykin v. Alabama,* 395 U.S. 238, 242, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969), provides the standard for determining whether a guilty plea is knowingly, voluntarily and intelligently made by a defendant. (*See also Vittitoe v. State,* 556 So.2d 1062 (Miss.1990)). "The record must reflect that the trial court thoroughly discussed with the defendant all of the consequences of a guilty plea, including the waiver of rights, satisfaction with one's attorney and advisement on the maximum and minimum penalties one can acquire for the crime committed." *Barnes v. State,* 803 So.2d 1271, 1274 (Miss. 2002) (*citing Alexander v. State,* 605 So.2d 1170 (Miss. 1992); *Gardner v. State,* 531 So.2d 805 (Miss. 1988).

"A guilty plea may not be accepted where the defendant did not plead of his own volition." *Barnes v. State*, 803 So.2d 1271, 1274 (Miss. 2002) (*citing Boykin v. Alabama,* 395 U.S. 238 (1969)). "Ignorance, incomprehension, coercion, terror, inducements, subtle or blatant threats might be a perfect cover-up of unconstitutionality." *Barnes v. State*, 803 So.2d 1271, 1274

(Miss. 2002) (*citing Kercheval v. United States,* 274 U.S. 220 (1927). Mr. Smith' guilty plea was simply erroneous. There was no factual basis for finding guilt under any circumstance as to the alleged crime of statutory rape.

"Before the trial court may accept a plea of guilty, the court must determine that the plea is voluntarily and intelligently made and that there is a factual basis for the plea." *Carreiro v. State*, 5 So.3d 1170, 1172-1173 (Miss. App. 2009) (quoting URCCC 8.04(A)(3). "A defendant can establish a factual basis for his plea of guilty simply by pleading guilty; however, his plea "must contain factual statements constituting a crime or be accompanied by independent evidence of guilt." *Carreiro v. State*, 5 So.3d 1170, 1172-1173 (Miss. App. 2009)(quoting *Hannah v. State*, 943 So.2d 20, 26-27(¶ 16) (Miss.2006)). "In other words, "a factual basis is not established by the mere fact that a defendant enters a plea of guilty.'" *Id.* "Rather, the record must contain those facts which are "sufficiently specific to allow the court to determine that the defendant's conduct was within the ambit of that defined as criminal.'" *Carreiro v. State*, 5 So.3d 1170, 1172-1173 (Miss. App. 2009) (quoting *Lott v. State*, 597 So.2d 627, 628 (Miss.1992) (quoting *United States v. Oberski*, 734 F.2d 1030, 1031 (5th Cir.1984))).

The general rule is that penal statutes must be strictly construed. *Nelson v. City of Natchez*, 19 So.2d 747 (Miss. 1944). Under the plain language of the statute, Mr. Smith cannot be factually or legally guilty of the violations contained in the Bill of Information. In the case of *State ex rel District Attorney v. Winslow*, the Court stated that,

> "[t]he legislature, in the exercise of its power to declare what shall constitute a crime or punishable offense, must inform the citizen with reasonable precision what acts it intends to prohibit, so that he may have a certain understandable rule of conduct and know what acts it is his duty to avoid. If the meaning of a criminal statute cannot be judicially ascertained or if, in defining a criminal offense, it omits certain necessary and essential provisions which go to impress the acts committed as being wrongful and criminal, the courts are not at liberty to supply the deficiency, or undertake to make the statute definite and certain. If a statute

> uses words of no determinative meaning and the language is so general and indefinite as to embrace not only acts properly and legally punishable, but others not punishable, it will be declared void for uncertainty. It is axiomatic that statutes creating and defining crimes cannot be extended by intendment. Purely statutory offenses cannot be established by implication. There can be no constructive offenses. Before a man can be punished, his case must be plainly and unmistakably within a statute. A statute that either forbids or requires the doing of an act in terms so vague that men of common intelligence must guess as to its meaning and differ as to its application lacks the first essential of due process of law."

State ex rel. Dist. Atty. v. Winslow, 45 So.2d 574 (Miss. 1950)(*quoting* 14 Am.Jur., Section 19, Pages 773-774.)

"[T]he requirement of a factual basis for a defendant's plea is not a formality of the plea process, but it is required as part of a 'constitutionally valid and enforceable decision to plead guilty.'" *Carreiro v. State*, 5 So.3d 1170, 1172-1173 (Miss. App. 2009)(quoting *Carter v. State*, 775 So.2d 91, 98(¶ 28) (Miss.1999) (quoting *Lott*, 597 So.2d at 628). "Circuit courts of this state would do well not to gloss over this requirement of the trial court to ensure that a factual basis for a defendant's plea exists in the record." *Carreiro v. State*, 5 So.3d 1170, 1172-1173 (Miss. App. 2009).

[T]he trial court should compare the conduct to which the defendant admits with the elements of the offense charged in the indictment." *Carreiro v. State*, 5 So.3d 1170, 1172-1173 (Miss. App. 2009). As in the case subjudice, "[w]ithout a match, there is no factual basis for the plea, and as such, the guilty plea should not be accepted." *Carreiro v. State*, 5 So.3d 1170, 1172-1173 (Miss. App. 2009).

B. Cedric Smith' Entry of a Guilty Plea in this Case Was Not Freely, Knowingly, Voluntarily and Intelligently Entered.

In this case the Court failed in its duty to explain the nature of the crime to Mr. Smith. In *McCarthy v. United States*, 394 U.S. 459 (1969), the Supreme Court held that counsel's statement

that he explained the nature of the charges to defendant did not absolve the judge of his personal obligation to inform the defendant of the nature of those charges. *McCarthy,* 89 S.Ct. at 1173; *Id.* 89 S.Ct. at 1176 (Black, J. concurring). "Although a judge may have the district attorney read the indictment to the defendant in the judge's presence, instead of reading it to the defendant himself, a judge cannot personally assure himself that a defendant understands the nature of the offense with which he is charged without ensuring first-hand that both he and the defendant know what those charges consist of. Where some of the elements of the offense remain unstated, misunderstandings are likely to occur." *United States v. Roberts,* 570 F.2d 999, 1011 (D.C.Cir.1977).

In this case, there was no indictment and the trial judge did not even require the district attorney to read the Bill of Information to Mr. Smith and the record in this case does not support a finding that the Judge and the defendant knew what the charges consisted of. At no point in time did the Judge state the elements of Statutory Rape that the State would have to prove at trial. "Whenever the Rule 11 disclosure is incomplete, there is a possibility of a misunderstanding; and whenever this possibility is present and the defendant before sentencing claims that it was a reality, the courts should be loathe to deny an accused his right to trial." *Id.* This Court never advised Mr. Smith of the charges against him. The Court never conducted an inquiry into the elements of the offense. Under the aforementioned cases, the Court must vacate Mr. Smith' sentence.

For a guilty plea to be valid, the defendant must be instructed on the elements of the charge against him. *Gilliard v. State,* 462 So.2d 710, 712 (Miss.1985). It is clear from the evidence in the case, along with a reading of the transcript of the entry of the guilty plea, that Mr. Smith was not informed of the "elements" to support the charges against him. (R. 227-277).

The trial judge, as evidenced by the transcript of the entry of the guilty plea did not explain the elements of the crime to Mr. Smith. (R. 227-277). Thus, Mr. Smith' rights could not have been knowingly, voluntarily or intelligently waived and his plea of guilty could not have been knowingly, voluntarily or intelligently entered.

Rule 8.04 of the Uniform Rules of Circuit and County Court Practice states in pertinent part:

> ***"Voluntariness.*** Before the trial court may accept a plea of guilty, the court must determine that the plea is voluntarily and intelligently made and that there is a factual basis for the plea. A plea of guilty is not voluntary if induced by fear, violence, deception, or improper inducements. A showing that the plea of guilty was voluntarily and intelligently made must appear in the record." URCCC 8.04.

"In order to meet constitutional standards, a guilty plea must be freely and voluntarily entered." *Weatherspoon v. State,* 736 So.2d 419 (Miss.Ct.App.1999) (*citing Schmitt v. State,* 560 So.2d 148 (Miss.1990)). "It is essential that an accused have knowledge of the critical elements of the charge against him, that he fully understand the charge, how it involves him, the effects of a guilty plea to the charge, and what might happen to him in the sentencing phase as a result of having entered the plea of guilty." *Gilliard v. State,* 462 So.2d 710, 712 (Miss.1985) (*citing Henderson v. Morgan,* 426 U.S. 637, 96 S.Ct. 2253, 49 L.Ed.2d 108 (1976)). *Gilliard* is clear on the point that the defendant must be apprised of the elements of the offense that he is pleading guilty to. *Id.* "Knowledge of the elements is obviously a prerequisite to an intelligent assessment by the defendant of: 1) whether he has in fact done anything wrong under the law, and 2) the likelihood that he stands to be convicted if he exercises his right to a jury trial." *Gaskin v. State,* 618 So.2d 103, 107 (Miss.1993). A plea is involuntary if the defendant does not know what the elements are in the charge against him, including an understanding of the charge and its relation to him, the effect of the plea, and the possible sentence. *Schmitt v. State,* 560 So.2d 148, 153

(Miss.1990). According to the United States Supreme Court, a complete record should be made of the plea proceeding to ensure that the defendant's plea was entered voluntarily. *Boykin v. Alabama,* 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). "A plea of guilty is binding only if it is entered voluntarily and intelligently." *Knight v. State,* 959 So.2d 598, 603-604 (Miss. App. 2007) (*citing Myers v. State,* 583 So.2d 174, 177 (Miss.1991)). "A plea is voluntary and intelligent when the defendant is informed of the charges against him and the consequences of his plea." *Id. (quoting Alexander v. State,* 605 So.2d 1170, 1172 (Miss.1992)). "It is not enough to ask an accused whether counsel has explained his constitutional rights. Nor is a standardized petition ... sufficient standing alone. The court must go further and determine in a face-to-face exchange in open court that the accused knows and understands the rights to which he is entitled." *Knight v. State,* 959 So.2d 598, 603-604 (Miss. App. 2007).

In *Boykin v. Alabama,* 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969), the U.S. Supreme Court held that the record must contain an "affirmative showing" that the defendant's guilty plea was intelligent and voluntary. *Id.* at 242, 89 S.Ct. 1709. Due to the nature of a guilty plea, which acts as both an admission of every element of the charge and as a verdict, the Court held that the prosecution must "spread on the record the prerequisites of a valid waiver" *Id.* "'Presuming waiver from a silent record is impermissible.' " *Id. (quoting Carnley v. Cochran,* 369 U.S. 506, 516, 82 S.Ct. 884, 8 L.Ed.2d 70 (1962)). "Several federal constitutional rights are involved in a waiver that takes place when a plea of guilty is entered in a state criminal trial. First, is the privilege against compulsory self-incrimination guaranteed by the Fifth Amendment and applicable to the States by reason of the Fourteenth. Second, is the right to trial by jury. Third, is the right to confront one's accusers. We cannot presume a waiver of these three important federal rights from a silent record." *Id.* at 243,89 S.Ct. 1709. In the case of Mr. Smith,

the record is not only silent, it is totally devoid of any information concerning the voluntariness and intelligence of the waiver of his rights. The record is devoid of any real explanation of the elements comprising the offense.

"It is not enough to ask an accused whether counsel has explained his constitutional rights. Nor is a standardized petition to enter a plea sufficient standing alone. The court must go further and determine in a face-to-face exchange in open court that the accused knows and understands the rights to which he is entitled...." *Nelson v. State,* 626 So.2d 121, 126 (Miss.1993). A lack of a discussion by the trial judge of the elements of the crime in this case requires that the guilty plea be vacated and the case set over for a new trial or another plea. *See State v. Pittman,* 671 So.2d 62, 65 (Miss.1996); *Wilson v. State,* 577 So.2d 394, 397 (Miss.1991). Cases decided under the previous rules have held that "Rule 3.03 commands that the circuit court assess that there is substantial evidence to support the defendant's guilt in the crime for which he offered his guilty plea." *Gaskin v State,* 618 So.2d 103, 106 (Miss. 1993). Although the Court in *Gaskin* ruled against him, the *Gaskin* Court's record included a factual statement about the exact nature of the charges against him. The facts that must be proven are "a function of the definition of the crime and its assorted elements." *Gaskin* at 106. "It is acceptable that the court make its decision according to inferences of guilt on the part of the defendant." *Id.* In other words, "[a] factual showing does not fail merely because it does not flesh out the details which might be brought forth at trial. Rules of evidence may be relaxed at plea hearings." *Id.* **"However, the guilty plea itself is not sufficient to establish a factual basis.**"(emphasis added) *Gaskin,* 618 So.2d at 106. "The whole purpose of this Rule 3.03(2)'s 'factual basis' requirement is to push the court to delve beyond the admission of guilt lying on the surface and determine for itself whether there is substantial evidence that the petitioner did in

fact commit those crimes he is charged with and is not entering the plea for some other reason that the law finds objectionable. *Gaskin v State,* 618 So.2d 103, 106 (Miss. 1993).

In addition to the "factual basis" requirement, it is also essential that the defendant be advised and have knowledge of the crime with which he is charged and the elements of that crime. *Gilliard v. State,* 462 So.2d 710, 712 (Miss.1985). Not only must the defendant be armed with this information, but he must also fully understand the consequences brought about by a plea of guilty to that charge. *Id.* Mr. Smith did not understand the "nature" of the charges against him and there is no evidence in the record that he did. Mr. Smith certainly would have been in a much better position to plead guilty had the judge informed him of the law and the acts that were necessary to violate that law. In this case, there simply is no evidence to sustain a conviction.

It is Mr. Smith's position that his due process rights have been violated by the failure of the Court to make an inquiry into the factual basis for the plea. The Federal system has Rule 11 of the Rules of Criminal Procedure. The rule is comparable to Mississippi Uniform Rules of Circuit and County Court Rule 8.04 (A)(3). The federal rule requires that a judge make a specific finding that there is a factual basis for the plea. *See* Federal Rules of Criminal Procedure, Rule 11. The federal courts have held that in order for a waiver of constitutional rights to be valid under the Due Process Clause, it must be "an intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst,* 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938). "Consequently, if a defendant's guilty plea is not equally voluntary and knowing, it has been obtained in violation of due process and is therefore void. Moreover, because a guilty plea is an admission of all the elements of a formal criminal charge, it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the

facts." *McCarthy v. U.S.*, 394 U.S. 459, 465 (1969). The U.S. Supreme Court went further and stated that "in addition to directing the judge to inquire into the defendant's understanding of the nature of the charge and the consequences of his plea, Rule 11 also requires the judge to satisfy himself that there is a factual basis for the plea. The judge must determine 'that the conduct which the defendant admits constitutes the offense charged in the indictment or information or an offense included therein to which the defendant has pleaded guilty. Requiring this examination of the relation between the law and the acts the defendant admits having committed is designed to 'protect a defendant who is in the position of pleading voluntarily with an understanding of the nature of the charge but without realizing that his conduct does not actually fall within the charge.'" *Id.* at 468. The *McCarthy* court also ruled that the effect of the violation mandated that "when the district court does not comply fully with Rule 11 the defendant's guilty plea must be set aside and his case remanded for another hearing at which he may plead anew." *Id.*

The Mississippi Rule of Circuit and County Court practice are virtually identical in the requirement that a judge make a showing on the record that the plea was voluntary and intelligent and that a factual basis exists for the plea. The trial judge in Mr. Smith' case failed to undertake such an inquiry into the factual basis for the plea. The trial judge also failed to place any evidence in the record to indicate that Mr. Smith actually understood the facts of the case as it relates to the law in his case. Under the *McCarthy* reasoning, Mr. Smith' plea is involuntary and must be set aside and remanded for another hearing. This is the relief that Mr. Smith urges this Court to grant.

In conclusion, Mr. Smith' due process rights have been clearly violated. The trial judge failed to conduct any type of inquiry on the record to indicate that there was a factual basis for the plea. The trial judge failed to make the requisite findings of voluntary and intelligent waiver

of Mr. Smith' rights. The *Mississippi Rules of Circuit and County Court*, Rule 8.04 were established to insure that trial court judge determine that a factual basis exists for the plea. This rule plays an important role in protecting an accused due process rights and ensuring that a plea is knowing, intelligent and voluntary. A record which clearly demonstrates that Rule 8.04 was not complied with violates that due process requirement.

IV. INEFFECTIVE ASSISTANCE OF COUNSEL

Mr. Smith was clearly prejudiced by his counsel's ineffectiveness. In order to demonstrate ineffective assistance of counsel, Mr. Smith must pass the two prong test set forth affirmed by the Supreme Court. "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment to the United States Constitution. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. *Smith v. Taylor*, 529 U.S. 362, 120 S.Ct. 1495, 1511, 146 L.Ed.2d 389 (2000) (quoting *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). To demonstrate that counsel was ineffective, a petitioner must establish that counsel's representation fell below an objective standard of reasonableness. *See Id.* To show prejudice, he must show that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *See Id.* at 1511-12. Ineffective assistance of counsel claims are judged by the standard set forth in *Strickland v. Washington,* 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Under *Strickland,* in order to prevail on his ineffective assistance claim, Mr. Smith must show that (1) his counsel's performance was deficient, and (2) that the deficient performance prejudiced his defense. "Unless

a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable." *Knox v. State,* 901 So.2d 1257, 1261(¶ 11) (Miss.2005) (quoting *Stringer v. State,* 454 So.2d 468, 477 (Miss.1984)). In the instant case, Mr. Smith clearly demonstrated that his sentence resulted from a breakdown in the adversary process. The evidence of his offenses do not meet even the criteria for probable cause, much less conviction.

Mr. Smith clearly meets the elements of standards set forth above. Mr. Smith's counsel was deficient in several distinct ways. Those deficiencies severely prejudiced Mr. Smith's rights. But for the deficiencies of counsel, the result in Mr. Smith's case would have been vastly different. First, Mr. Smith's counsel never properly informed him of the elements of the crime of Statutory Rape. (R. 147-150). Second, Mr. Smith's counsel erroneously told Mr. Smith that the rape shield laws contained in M.R.E. Rule 412(b)(2)(A) prevented him from presenting **any** evidence of the alleged victim's sexual history, when, in fact, the rule only prevents evidence of "past sexual behavior." (R. 147-150). Third, Mr. Smith' counsel failed to explain to Mr. Smith what an Alford plea was. (R. 147-150). Fourth, Mr. Smith's counsel failed to explain to Mr. Smith what was meant when he waived indictment in this case. (R. 147-150). Fifth, Mr. Smith's counsel erroneously told Mr. Smith that the State had actual possession of hundreds of alleged text messages between Mr. Smith and the alleged victim. (R. 147-150).

All of these errors by defense counsel severely prejudiced Mr. Smith. *See* Affidavit of Cedric Smith (R. 147-150).

The advice given to Mr. Smith was so legally and factually deficient that Mr. Smith would have been better off without his advice. Because of his ineffective assistance of counsel, in

violation of his constitutional rights, Mr. Smith' guilty plea should be withdrawn, his sentence vacated, and the charges against his dismissed.

CONCLUSION

For all of the above and foregoing reasons, Appellant requests that this Honorable Court reverse the October 25, 2010 Memorandum Opinion and Order of Summary Dismissal, grant his Motion for Post Conviction Relief, dismiss the charges against him, withdraw his plea of guilty, vacate his sentence and release him from incarceration, or any other relief that this Court deems just and proper.

Respectfully submitted, this the 17th day of May, 2011.

CEDRIC SMITH

BY: _____
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CERTIFICATE OF SERVICE

I, Jeanine M. Carafello, do hereby certify that I have this day caused one (1) true and correct copy of the Brief for the Appellant to be forwarded, via United States Mail, postage prepaid, and addressed as indicated below to the following:

1. Hon. Circuit Court Judge Prentiss Harrell
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This service effective this, the 6th day of May, 2011.

Jeanine M. Carafello (MSB [redacted])