IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

CAUSE NO. 2010-CP-00333-COA

TROY ANTHONY WILLIAMS
Appellant

vs.

STATE OF MISSISSIPPI
Appellee

APPEAL
From the Circuit Court of Jackson County, Mississippi

BRIEF OF THE APPELLANT

ATTORNEY FOR THE APPELLANT:

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IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

TROY ANTHONY WILLIAMS **APPELLANT**

VS. **CAUSE NO. 2010-CP-00333-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.

Hon. Kathy King Jackson, Circuit Court Judge
Circuit Court of Jackson County, Mississippi
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Columbia, MS 39429

SO CERTIFIED, this the 19th day of July, 2010.

Jeanine M. Carafello (MSB #10487)

TABLE OF CONTENTS

TABLE OF CASES

Statutes:

Cases:

Rules of Court

STATEMENT OF THE ISSUES

1. The trial court was without jurisdiction to impose the sentence;

2. The guilty plea and/or Alford plea, and sentence imposed were unlawful and violated Mr. Williams' constitutional rights; and

3. The counsel for Mr. Williams was so deficient and ineffective that Mr. Williams's constitutional rights were violated.

STATEMENT OF THE CASE

On or about February 4, 2005, Troy Anthony Williams was indicted by the Grand Jury in Jackson County, Mississippi. The two count indictment alleged, inter alia, that Mr. Williams committed the crime of Sexual Battery in violation of Section 97-3-95(1)(d) of Mississippi Code of 1972, as amended. (R. 10).

On January 10, 2007, in the cause styled *State of Mississippi vs. Troy Anthony Williams*, In the Circuit Court of Jackson County, Mississippi; Cause Number 05-10,173, a *Petition to Plead Guilty* was prepared by Mr. Williams' attorney, Rufus Allredge, but does NOT bear the signature of Mr. Williams. (R. 233). Mr. Williams either plead guilty or entered a "best interest" Alford plea to both counts of the indictment against him as is set forth in the Transcript of Plea and Sentencing (R. 236-261). As to Count One of the Indictment, the Court sentenced Mr. Williams to a term of twenty (20) years in the custody of the Mississippi Department of Corrections with ten (10) years suspended leaving ten (10) years to serve without benefit of parole, followed by five (5) years of Post Release Supervision, and a fine of Two Thousand Dollars ($2,000.00). As to Count Two of the Indictment, the Court sentenced Mr. Williams to a term of twenty (20) years in the custody of the Mississippi Department of Corrections with ten (10) years suspended leaving ten (10) years to serve without benefit of parole, followed by five (5) years of Post Release Supervision, and a fine of Two Thousand Dollars ($2,000.00). The sentences were ordered to be served concurrently. (R. 262).

On or about January 8, 2010, Mr. Williams filed his Motion for Post-Conviction Relief in the Jackson 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.

(R. 3).

On or about January 29, 2010, the Jackson County Circuit Court rendered its Order denying the Motion for Post-Conviction Relief. (R. 273).

On or about February 10, 2010, Troy Anthony Williams filed his Notice of Appeal herein. (R. 280).

FACTS

On or about February 4, 2005, Troy Anthony Williams was indicted by the Grand Jury in Jackson County, Mississippi. The two count indictment alleged, inter alia, that Mr. Williams committed the crime of Sexual Battery in violation of Section 97-3-95(1)(d) of Mississippi Code of 1972, as amended. (R. 10).

Count I of the Indictment charged that Mr. Williams "in Jackson County, Mississippi, on or about 2002 to 2004, did willfully, purposely, unlawfully and feloniously commit Sexual Battery upon A.S.[1], a child who was, at the time in question, under the age of fourteen (14) years, and Troy Williams was, at the time in question, twenty-four (24) months older than A.S., by engaging in the act of sexual penetration, to wit: by inserting his finger in her vagina." (R. 10).

Count II of the Indictment charged that Mr. Williams "in Jackson County, Mississippi, on or about 2002 to 2004, did willfully, purposely, unlawfully and feloniously commit Sexual Battery upon A.S., a child who was, at the time in question, under the age of fourteen (14) years, and Troy Williams was, at the time in question, twenty-four (24) months older than A.S., by engaging in the act of sexual penetration, to wit: by inserting his penis in her vagina." (R. 10).

The indictment stemmed from an investigation conducted by the Gautier Police

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[1]A.S. has been substituted for the name of the minor child.

Department beginning on June 6, 2004. The investigation began after Mr. Williams' wife, Jaime Williams, reported to the Gautier Police Department that her husband, Mr. Williams, had told her that morning that he had, on more than one occasion, inappropriately sexually touched his step-daughter, A.S., but denied ever having sexually penetrated the child at any time. These facts are documented in the Gautier Police Offense Form. (R. 13). Jaime Williams signed criminal affidavits against Mr. Williams for the charges of Sexual Battery. (R. 30).

On June 7, 2004, Mr. Williams was arrested, charged and booked for the alleged crimes of Sexual Battery.

On June 7, 2004, Mr. Williams was interviewed by Detective Jerry Cooksey of the Gautier Police Department. During this interview, Mr. Williams admitted that he had fondled the child "on her privates," but denied that he had ever sexually penetrated the child. This interview is memorialized in the Transcripts from Taped Audio Interview. (R. 66-74).

On June 6, 2004, a medical exam of the child was conducted where "no obvious trauma noted at vaginal or rectal area," and the child denied that Mr. Williams had "ever hurt her down there." (R. 75-84).

Mr. Williams retained the services of the Honorable R. Keith Miller after his arrest and indictment. Mr. Williams was arraigned on April 18, 2005 for the charges of Sexual Battery, in the cause styled *State of Mississippi vs. Troy Anthony Williams*, In the Circuit Court of Jackson County, Mississippi; Cause Number 05-10,173. (R. 85).

On April 19, 2005, this Honorable Court entered a Notice of Trial setting this matter for trial on July 25, 2005. (R. 219).

On July 25, 2005, an Agreed Order of Continuance was filed and this Honorable Court entered a Notice of Trial setting this matter for trial on October 18, 2005. (R. 220-221).

On March 9, 2006, this Honorable Court entered a Notice of Trial setting this matter for trial on May 23, 2006. (R. 222).

On May 23, 2006, an Agreed Order of Continuance was filed and this Honorable Court entered an Order of Continuance setting this matter for trial on July 14, 2006. (R. 223-224).

On July 14, 2006, this Honorable Court entered an Order of Continuance setting this matter for plea on August 22, 2006. (R. 225).

Mr. Williams terminated the services of R. Keith Miller, and on August 21, 2006, the Honorable Rufus Allredge entered his appearance as counsel for Mr. Williams. (R. 226).

On August 22, 2006, a Motion for Continuance was filed and this Honorable Court entered an Order of Continuance and Notice of Trial setting this matter for trial on November 14, 2006. (R. 228-229).

On November 28, 2006, this Honorable Court entered an Order of Continuance setting this matter for trial on January 8, 2007. (R. 230).

On December 13, 2006, a Motion for Continuance was filed and this Honorable Court entered an Order of Continuance setting this matter for trial on June 10, 2007. (R. 231).

On December 15, 2006, this Honorable Court entered a Notice of Trial setting this matter for trial on January 8, 2007. (R. 232).

On January 10, 2007, in the cause styled *State of Mississippi vs. Troy Anthony Williams*, In the Circuit Court of Jackson County, Mississippi; Cause Number 05-10,173, a *Petition to Plead Guilty* was prepared by Mr. Williams' attorney, Rufus Allredge, but does NOT bear the signature of Mr. Williams. (R. 233). Mr. Williams either plead guilty or entered a "best interest" Alford plea to both counts of the indictment against him. (R. 236-261). As to Count One of the Indictment, the Court sentenced Mr. Williams to a term of twenty (20) years in the custody of the

Mississippi Department of Corrections with ten (10) years suspended leaving ten (10) years to serve without benefit of parole, followed by five (5) years of Post Release Supervision, and a fine of Two Thousand Dollars ($2,000.00). As to Count Two of the Indictment, the Court sentenced Mr. Williams to a term of twenty (20) years in the custody of the Mississippi Department of Corrections with ten (10) years suspended leaving ten (10) years to serve without benefit of parole, followed by five (5) years of Post Release Supervision, and a fine of Two Thousand Dollars ($2,000.00). The sentences were ordered to be served concurrently. (R. 262).

Mr. Williams is before this 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.

SUMMARY OF THE ARGUMENT

I. The Circuit Court of Jackson County, Mississippi did not have jurisdiction of the subject matter in this case in that there is no proof whatsoever that the alleged acts occurred in Jackson County, Mississippi. The trial Court never made a finding that any of the offenses took place in Jackson County, Mississippi. The State never offered any facts at the hearing regarding the guilty plea that the alleged acts occurred in Jackson County, Mississippi, and therefore no factual basis for jurisdiction could be found by the trial court, and none ever was. The trial Judge did not make a finding on the record that the alleged acts occurred in Jackson County, Mississippi. If the Jackson County Circuit Court was without jurisdiction in this matter, then the sentence in this case is unlawful and must be vacated.

II. The guilty plea and sentence imposed were unlawful and violated Mr. Williams' constitutional rights. First, the Court failed to make an on the record determination that a sufficient factual basis existed for accepting Mr. Williams' guilty plea. In fact, the trial Court did not ask the State to explain the factual basis for the charges against Mr. Williams during the guilty plea hearing. Second, at no point during the plea hearing did Mr. Williams admit to any facts that would constitute Sexual Battery. In fact, his admissions on the date of the plea (which were consistent with his statements since before the date of his arrest) would only have supported a finding of guilt as to the charge of Gratification of Lust, in violation of Miss. Code Ann. Section 97-5-23(2), and not Sexual Battery for which he was convicted. Third, Mr. Williams' 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. Fourth, Mr. Williams was not informed of the "elements" to support the charges against him. Fifth, the Court failed to accept Mr. Williams' guilty plea and failed to adjudicate

him guilty.

III. Mr. Williams was denied effective assistance of counsel in this matter and his counsel's deficiencies severely prejudiced Mr. Williams' rights.

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. THE CIRCUIT COURT OF JACKSON 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 Jackson County, Mississippi. During the guilty plea hearing, the trial Court never made a finding that any of the offenses took place in Jackson County, Mississippi. (R. 89-114 & Vol. 1). The State never offered any facts at the hearing regarding the guilty plea that the alleged acts occurred in Jackson County, Mississippi, and therefore no factual basis for jurisdiction could be found by the trial court, and none ever was. (R. 89-114 & Vol. 1). The trial Judge did not make a finding on the record that the alleged acts occurred in Jackson County, Mississippi. (R. 89-114 & Vol. 1).

In Mr. Williams' case, the was no showing that the acts alleged in the Indictment occurred in Jackson County, Mississippi. The Indictment in this case alleges that the acts

occurred "on or about 2002 to 2004." (R. 10). In fact, Mr. Williams and his family, which included his step-daughter, the victim herein, lived in the State of Pennsylvania from November of 2001 through April of 2003 before moving to Jackson County, Mississippi. As such, any alleged criminal acts occurring from November of 2001 through April of 2003, which would have been encompassed by the time frame in the Indictment, could NOT have occurred within the jurisdictional limits of Jackson County, Mississippi, or in the State of Mississippi. As such, the Circuit Court of Jackson County, Mississippi was without jurisdiction of the subject matter of this criminal case against Mr. Williams and the charges against him should be dismissed in toto.

II. THE GUILTY PLEA AND SENTENCE IMPOSED WERE UNLAWFUL AND VIOLATED MR. WILLIAMS' 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. Williams 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. Williams' case, the Court failed to make an on the record determination that a sufficient factual basis existed for accepting Mr. Williams' guilty plea. (R. 89-114 & Vol. 1). In fact, the trial Court did not ask the State to explain the factual basis for the charges against Mr. Williams during the guilty plea hearing. (R. 89-114 & Vol. 1). Unsolicited, Assistant District Attorney Angel Meyers stated "...I

would just say that at trial, the State would put forth evidence, including the child's testimony, as well as other corroborating evidence, that in fact there was digital penetration and that he did in fact insert his penis as well." (R. 102). This statement by Ms. Meyers, does not rise to the level of a factual basis since it did not state the dates these alleged acts occurred on, whether they occurred in Jackson County, Mississippi, whether she meant Mr. Williams when she stated "he", where on the victim's body the alleged penetration occurred, or the name of the alleged victim.

At no point during the plea hearing did Mr. Williams admit to any facts that would constitute Sexual Battery. (R. 89-114 & Vol. 1). In fact, his admissions on the date of the plea (which were consistent with his statements since before the date of his arrest) would only have supported a finding of guilt as to the charge of Gratification of Lust, in violation of Miss. Code Ann. Section 97-5-23(2) which reads as follows:

> (2) Any person above the age of eighteen (18) years, who, for the purpose of gratifying his or her lust, or indulging his or her depraved licentious sexual desires, shall handle, touch or rub with hands or any part of his or her body or any member thereof, any child younger than himself or herself and under the age of eighteen (18) years who is not such person's spouse, with or without the child's consent, when the person occupies a position of trust or authority over the child shall be guilty of a felony and, upon conviction thereof, shall be fined in a sum not less than One Thousand Dollars ($1,000.00) nor more than Five Thousand Dollars ($5,000.00), or be committed to the custody of the State Department of Corrections not less than two (2) years nor more than fifteen (15) years, or be punished by both such fine and imprisonment, at the discretion of the court. A person in a position of trust or authority over a child includes without limitation a child's teacher, counselor, physician, psychiatrist, psychologist, minister, priest, physical therapist, chiropractor, legal guardian, parent, stepparent, aunt, uncle, scout leader or coach.

Had the Court merely inquired into the factual basis for the plea, it would have readily determined that Mr. Williams had committed no crime as to count one (1) and no crime as to count two (2). Mr. Williams steadfastly maintained that he had never penetrated the victim in this matter, while admitting that he has inappropriately touched the victim. There was no

physical trauma to the victim's vaginal or anal area, supporting Mr. Williams' statements. (R. 75-84).

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. Williams' guilty plea was simply erroneous. There was no factual basis for finding guilt under any circumstance as to counts one or two. The Court wholly failed to make an inquiry into the factual basis for the plea. The record is devoid of any findings and is devoid of an adjudication of guilt. (R. 89-114 & Vol. 1).

"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))).

In this case the Court failed in its duty to explain the nature of the crime to Mr. Williams. 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, the trial judge did not even require the district attorney to read the indictment to the defendant and the record in this case does not support a finding that the Judge and the defendant knew what the charges consisted of. (R. 89-114 & Vol. 1). At no point in time did the Judge state the elements of Sexual Battery that the State would have to prove at trial. (R. 89-114 & Vol. 1). "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. Williams of the charges against him. The Court never conducted an inquiry into the elements of the offense. (R. 89-114 & Vol. 1). Under the aforementioned cases, the Court must vacate Mr. Williams' sentence.

If the trial court had inquired into the facts of this case, the Court would have known that Mr. Williams had not committed the crime of Sexual Battery and could not plead guilty to such. 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. Williams cannot be factually or legally guilty of the violations contained in count one of the indictment. 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. Troy Williams' Entry of a Guilty Plea in this Case Was Not Freely, Knowingly, Voluntarily and Intelligently Entered.

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. Williams was not informed of the "elements" to support the charges against him. (R. 89-114 & Vol. 1). Mr. Williams was charged with two counts of Sexual Battery. 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. Williams. (R. 89-114 & Vol. 1). Thus, Mr. Williams' 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. Williams, 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. In virtually every case that has come before the Mississippi Supreme Court on the issue of voluntariness and intelligent waiver concerning a guilty plea, there was at least some recitation or statement of facts as they related to charges against an accused. In Mr. Williams' case, even those things are absent.

"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. 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. *Id.*

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. Williams did not understand the "nature" of the charges against him and there is no evidence in the record that he did. (R. 89-114 & Vol. 1). There is no evidence in the record to demonstrate that the trial judge even knew what evidence existed. (R. 89-114 & Vol. 1). If there had been, certainly the judge could have made the determination that the crimes charged did not meet the acts that Mr. Williams did. Mr. Williams 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. Williams'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. Williams' case failed to undertake such an inquiry into the factual basis for the plea. (R. 89-114 & Vol. 1). The trial judge also failed to place any evidence in the record to indicate that Mr. Williams actually understood the facts of the case as it relates to the law in his case. (R. 89-114 & Vol. 1). Under the *McCarthy* reasoning, Mr. Williams' plea is involuntary and must be set aside and remanded for another hearing. This is the relief that Mr. Williams urges this Court to grant.

In conclusion, Mr. Williams' 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. (R. 89-114 & Vol. 1). The trial judge failed to make the requisite findings of

voluntary and intelligent waiver of Mr. Williams' rights. (R. 89-114 & Vol. 1). 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.

C. Troy Williams has Never Been Adjudicated Guilty By the Circuit Court of Jackson County, Mississippi.

The Court failed to accept Mr. Williams' guilty plea and failed to adjudicate him guilty. *Mississippi Rules of Circuit and County Court Practice*, Rule 11.01 states

> Where the defendant is **adjudged guilty** of the offense charged, sentence must be imposed without unreasonable delay. A defendant is adjudged guilty when the defendant has been found guilty by a verdict of the jury, **found guilty by the court sitting as the trier of fact, on the acceptance of a plea of guilty**, or on acceptance of a plea of nolo contendere.
>
> The sentence shall be pronounced in open court st any time after conviction, in the presence of the defendant . . . .

Mississippi Rules of Circuit and County Court Practice, Rule 11.01 (Emphasis added). The record is devoid of any findings. (R. 89-114 & Vol. 1). The record is devoid of a finding of guilt by the Court. (R. 89-114 & Vol. 1). The record is devoid of a finding of acceptance of a guilty plea. (R. 89-114 & Vol. 1). Therefore, the sentence imposed in this case is illegal due to the fact that no court has accepted Mr. Williams' guilty plea let alone adjudged him guilty of any crime. Therefore, the Court should dismiss the cases and/or the sentence imposed in this case against Mr. Williams.

III. INEFFECTIVE ASSISTANCE OF COUNSEL

Mr. Williams was clearly prejudiced by his counsel's ineffectiveness. In order to

demonstrate ineffective assistance of counsel, Mr. Williams 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. *Williams 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. Williams 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. Williams 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. Williams clearly meets the elements of standards set forth above. Mr. Williams's

counsel was deficient in several distinct ways. Those deficiencies severely prejudiced Mr. Williams's rights. But for the deficiencies of counsel, the result in Mr. Williams's case would have been vastly different. First, Mr. Williams's counsel never properly informed him of the elements of the crime of Sexual Battery contained in the indictment. Second, Mr. Williams's counsel failed to inform Mr. Williams that the State's evidence did not meet the elements in counts one (1) and two (2) of the Indictment. Third, Mr. Williams' counsel failed to keep Mr. Williams informed of the status of the case and the fact that the case had been set for trial. Fourth, Mr. Williams' counsel failed to explain to Mr. Williams what an Alford plea was and that he would be representing to the Court that Mr. Williams was entering such a plea.

First, Mr. Williams's counsel never properly informed him of the elements of the crime of Sexual Battery contained in the indictment. Mr. Williams's counsel clearly demonstrated his ineffectiveness by advising Mr. Williams to plead guilty to the offense of Sexual Battery when the facts did not support such a charge. The advice given to Mr. Williams was so legally and factually deficient that Mr. Williams would have been better off without his advice. Because of his ineffective assistance of counsel, in violation of his constitutional rights, Mr. Williams' guilty please 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 January 29, 2010, Order denying the Defendant's Motion for Post-Conviction Relief and grant the Defendant's Motion for Post-Conviction Relief on the grounds herein argued.

Respectfully submitted, this the 18th day of July, 2010.

TROY ANTHONY WILLIAMS

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:

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This service effective this, the 19th day of July, 2010.

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