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IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

RICHARD PARTAIN

APPELLANT

VS.

FILED

NO. 2010-CP-00896

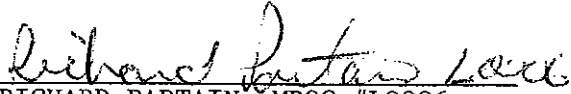
STATE OF MISSISSIPPI

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APPELLEE

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BRIEF OF THE APPELLANT


RICHARD PARTAIN, MDOC #L0006
MSP/Unit 29-A
Parchman, Mississippi 38738

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

RICHARD PARTAIN

APPELLANT

VS.

NO. 2010-CP-00896

STATE OF MISSISSIPPI

APPELLEE

CERTIFICATE OF INTERESTED PERSONS

The undersigned appellant 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 this Court may evaluate possible disqualification or recusal.

1. State of Mississippi
2. Richard Partain, Appellant
3. Honorable Celeste Wilson, Assistant District Attorney
4. Honorable Robert P. Chamberlin, Circuit Court Judge

This the 24th day of December, 2010.

Respectfully Submitted,

BY:

Richard Partain 2010
Richard Partain, Appellant

Richard Partain, MDOC #L0006
MSP/Unit 29-A
Parchman, Mississippi 38738

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STATEMENT OF THE ISSUES

ISSUE I. RICHARD'S GUILTY PLEA WAS NOT VOLUNTARILY, AND INTELLIGENTLY MADE.

ISSUE II. RICHARD WAS DENIED HIS SIXTH AND FOURTEENTH AMENDMENTS RIGHTS TO THE EFFECTIVE ASSISTANCE OF COUNSEL.

ISSUE III. THE TRIAL COURT'S FACTUAL FINDINGS WERE CLEARLY ERRONEOUS AND REQUIRE REVERSAL AND REMAND FOR AN EVIDENTIARY HEARING ON ISSUES I & II.

STATEMENT OF THE CASE

This is an appeal from the order of the Circuit Court of DeSoto County which summary denied Richard's PCR. On September 11, 2009, Richard filed his PCR in the Circuit Court of DeSoto County, Mississippi. The court summary dismissed, with prejudice, Richard's PCR on April 19, 2010. [T. 37-42].

FACTS

As alleged by the trial court, "[P]artain was indicted in CR2008-65CD in January of 2008 for DUI death and possession of oxycodone. His counsel asked for a preliminary hearing although Partain had already been indicted. On August 12, 2008, the Court entered an order to remand both counts of the indictment. On the same date, the District Attorney filed in CR2008-634CD a bill of information charging Partain with manslaughter by culpable negligence. On the same date, Partain signed a waiver of right to grand jury procedure and petition to proceed on information and to enter a plea of guilty. Also, on the same date, Partain submitted a petition to enter plea of guilty to the manslaughter charge. The Court sentenced Partain to fifteen (15) years to serve in the Mississippi Department of Corrections followed by five (5) years of post-release supervision. The Court also fined Partain \$1,000 and assessed \$48,713.36 in restitution unless "said sum or more is paid by liability carrier."" [T. 37-38 at (¶1)].

SUMMARY OF THE ARGUMENTS

The trial court erred in accepting Richard's guilty plea when he was not properly advised of the elements of the crime, and the likely consequences thereof. Bradshaw v. Stumpf, 545 U.S. 175 (2005); and, Jones v. State, 936 So. 2d 993 (Miss.Ct.App. 2006).

The trial court erred in its finding that Richard was not denied of his right to the effective assistance of counsel, where court-appointed and retain counsels were not present at the arraignment hearing. Also, retain counsel was ineffective in his overall performance. Moody v. State, 644 So.2d 451 (Miss.1994); and, Hayes v. State, 944 So.2d 121 (Miss.2006).

The trial court was clearly erroneous in its finding that the offer of proof given by the State did not include proof of the blood test. Moreover, the trial court erred in summary denying the PCR without an evidentiary hearing.

ARGUMENTS

ISSUE I. RICHARD'S GUILTY PLEA WAS NOT VOLUNTARILY, AND INTELLIGENTLY MADE.

For a guilty plea to be valid it must be entered into "voluntarily, knowingly, and intelligently,'with sufficient awareness of the relevant circumstances and likely consequences.'" Carroll v. State, 963 So.2d 44, 46(P8) (Miss. Ct. App. 2007)(quoting Bradshaw v. Stumpf, 545 U.S. 175, 183 (2005)). "To determine whether the plea is voluntarily, knowingly, and intelligently given, the trial court must advise the defendant of his rights, the nature of the charge against him, as well as the consequences of the plea." Burrough v. State, 9 So.3d 368, 373 (P11)(Miss. 2009). The burden of proving that a guilty plea was invalid rests with the defendant and must be proven by a preponderance of the evidence. Terry v. State, 839 So.2d 543, 545 (P7)(Miss. Ct. App. 2002). Ultimately, the validity of a guilty plea is determined on a case-by-case basis. Williams v. State, 752 So.2d 410, 412 (P4)(Miss. Ct. App. 1999).

Here, Richard informed Attorney Gilder that he had not been drinking nor using drugs prior to the vehicle accident; therefore, he was not willing to negotiate into any plea bargaining. Richard even requested that Attorney Gilder provide him with the discovery materials so he could assist in proving his innocence. (See infra "Issue II"). Nevertheless, Attorney Gilder persisted by use of coercion, to make Richard sign unidentifiable papers^{*}, which were later discovered to be a guilty plea petition, however, Richard is unaware of exactly what other papers he signed at the advice of his ineffective assistance of counsel. On August 11, 2008, Attorney Gilder called to the Desoto

* Richard asked Attorney Gilder to bring him his eye-glasses because he could not read without them, but to no avail.

County jail and talked briefly with Richard. During this brief conversation Attorney Gilder informed Richard that the charges in the indictment (Cause No. CR2008-0065-CD) had been dropped, however, he had to plea guilty to the charge of manslaughter. When Richard asked what he was talking about, Attorney Gilder stated, "I will explain everything to you in court tomorrow." Before Richard could inquire further, the phoneline disconnected.

On August 12, 2008, Richard was transferred to the courthouse where he met with Attorney Gilder. Attorney Gilder told Richard that they don't have much time, so he needed him to sign the bottom blanks on each standardized form and a few more papers. As Richard was asking Attorney Gilder what was going on, Ms. Celeste Wilson, the assistant district attorney, stuck her head in the door and stated, "hurry up Jefferson we don't have much time". Once again, Richard asked Attorney Gilder what's going on. Attorney Gilder told Richard to just sign the papers and he would explain everything later. When Richard refused, Attorney Gilder produced an acknowledgement form for him to sign. [T. 20]. Basically, Richard understood this acknowledgement as meaning that if he didn't sign the papers, he would surely get twenty-eight (28) years to thirty-three (33) years in prison. Therefore, Richard signed the papers and entered the courtroom with his attorney. Attorney Gilder told Richard that he had to answer the judge's questions in a fashion to get the guilty plea accepted; therefore, Richard lied under oath at his plea hearing. A review of the plea hearing transcript supports that Richard was coerced at the plea hearing.

The following colloquy is quoted from the plea hearing transcript which is attached to the above Motion for Modification of the Record:

BY THE COURT: (Continuing)

Q. Mr. Partain, do you understand and recall the events which bring you before this Court today?

A. Yes, sir.

Q. Do you have any disagreements with anything the State says they could prove at your trial if your case went to trial?

A. No, sir.

BY MR. GILDER: Your Honor, for the record, he doesn't recall the events of the day. His knowledge is based on the affidavits and the discovery that's been provided in this case and my investigation.

BY THE COURT: (Continuing)

Q. Well, which is it, Mr. Partain, the answer you gave me or what Mr. Gilder just said?

A. What Mr. Gilder said, sir.

Q. So do you or do you not remember what happened?

A. I don't remember what happened, sir.

Q. Now, Mr. Partain, I want to go through all of this. You've indicated you don't have any disagreements with anything Ms. Wilson said she could prove; is that right?

A. Yes, sir.

Q. I assume we're talking what parts you can recall? Is that fair or not?

A. That's fair, sir.

Q. And determined from all of those that you agree that what Ms. Wilson said happened is exactly what occurred; is that correct?

A. Yes, sir.

[Plea hearing transcript at p. 8-9]

There are several pages of transcript that has been deleted from the actual discussion that was had between Richard, Judge Chamberlin, Attorney Gilder and Ms. Wilson, which would have soon what Richard said that led to Attorney Gilder's outburst into the record.

Clearly, it is evident in the colloquy supra, that Richard was coerced by his ineffective counsel and asked leading questions by Judge Chamberlin. Moreover, no one ever advised Richard of the elements of the charge for which he was pleading guilty to, neither was he informed of the consequences which he would be facing once he plead guilty. The plea petition, which Richard was coerced into signing, only makes mention of the "charge in the indictment". [See. Plea Petition attached to Motion for Modification of the Record, as Exhibit "B"]. In paragraphs 3,4,6,8, and 9 of this standardize petition, the word "indictment" is used, however, there is no reference to the word or term "information or bill of information". The court did not refer to the elements of the crime during the plea hearing, nor did the court ask counsel if the elements had been explained to Richard. And, the Judge Chamberlin only made reference to the plea petition during the plea hearing.

Where a defendant pleads guilty to a crime without having been informed of the crime's elements,...the plea is invalid. Henderson v. Morgan, 426 U.S. 637 (1976). The United States Supreme Court held, "[A] trial court must assure itself [during a plea hearing accepting a guilty plea] that a defendant understands the nature and elements of the crime for which he is admitting guilt." Bradshaw v. Stumpf, 545 U.S. 175, 183 (2005). In a case on all fours, Jones v. State, 936 So.2d 993 (Miss.Ct.App. 2006), the defendant Jones pleaded guilty to the crime of sexual battery of a minor child under the age of fourteen. Id. at 994 (P2). Jones later filed a PCR petition claiming that his guilty plea was invalid because he was not informed of the elements of his charge. Id. at (P3). As in the case sub judice, in Jones, this Court found that the trial court did not refer to the elements of the crime during the plea hearing, nor did the court ask counsel if the elements were explained to Jones. Id. at 996 (P12). There, this Court found that a question existed as to whether Jones knowingly entered his plea and remanded the matter back to the trial court for a determination as to whether the elements had been explained to Jones prior to the trial court's acceptance of the guilty plea. Id. at 996-97 (PP13-23).

In the case at bar, Richard has attempted to provide this Court with the plea petition and plea hearing transcripts, via Motion for Modification of the Record, which is sufficient evidence on its face in support of this issue. As it is clearly shown that the Stumpf requirement, "that the 'record accurately reflects the nature of the charge and the elements of the crime were explained to the defendant' by his counsel or by the court", were not followed. Jones, 936 So.2d at 997-98 (P17). Moreover, Richard was not advised of the likely consequences of his plea. Although the plea petition only makes

reference to the indictment, the pertinent information was written in this petition some time after the hearing. Reading the petition alone, it appears that an agreement was settled prior to the hearing. However, the following colloquy took place:

BY THE COURT: Ms. Wilson, Mr. Gilder, it appears to me that this is before the Court on a negotiated plea, a 20 year sentence, 15 to serve, 5 post-release supervision, fines, costs and assessments and restitution. Is that the State's understanding?

BY MS. WILSON: Almost, Your Honor. We kind of hit a small lip (sic), and I know you have a jury out, but we just had a small argument as to the restitution. I don't believe the restitution amount is contested but whether or not the Defendant will pay or the insurance will. I think we're going to leave that up to the Judge's discretion.

BY THE COURT: Mr. Gilder?

BY MR. GILDER: Well, he has \$100,000 in liability insurance that has been tendered but has not been accepted, and I think there is a dispute as to whether or not they're made whole; and we think it's entitled to credit for restitution.

BY THE COURT: Anything else regarding the negotiated plea?

BY MS. WILSON: No, sir. Just they have a civil attorney that's handling some of the restitution issues, and he has said that that is collateral; and, therefore, the Defendant should be responsible for that amount. But we're leaving it to the Court's discretion.

[Plea transcript p.13-14].

A careful review of the petition and transcript will establish that Richard was not advised of the likely consequences of his guilty plea. As noted above Attorney Gilder and Ms. Wilson had not agreed upon the restitution, and Ms. Wilson suggested that it be left up to the Court's discretion. However, Richard would not have willingly, and knowingly accepted a plea bargain which required him to pay fines and/or restitution. Richard has shown, by a preponderance of evidence, that his guilty plea was invalid. Terry, 839 So.2d at 545 (P7). Based on Jones, this case should be remanded back to the trial court. Jones, 996-97 (PP13-23).

**ISSUE II. RICHARD WAS DENIED HIS SIXTH AND
FOURTEENTH AMENDMENTS RIGHTS TO THE EFFEC-
TIVE ASSISTANCE OF COUNSEL.**

To succeed on a claim of ineffective assistance of counsel, the defendant must prove that: (1) his trial counsel's performance was deficient, and (2) that trial counsel's deficiency prejudiced his defense. Cole v. State, 918 So.2d 890, 894 (Miss.Ct.App.2006)(citing Strickland v. Washington, 466 U.S. 668, 687 (1984)). There is a "strong but rebuttable presumption that [trial counsel's] performance falls within a wide range of reasonable professional assistance and that the decisions made by trial counsel are strategic." Vielee v. State, 653 So.2d 920, 922 (Miss.1995). The defendant may rebut this presumption upon a showing that his trial counsel committed "unprofessional errors of substantial gravity," and but for trial counsel's errors, he would not have entered a guilty plea. Cole, 918 So.2d at 894.

In the case at bar, there were two (2) counsels involved at the trial level: 1) Attorney William Travis, and 2) Attorney Jefferson Gilder. Attorney Travis was appointed by the trial court to represent Richard in Cause No. CR-2008-65CD, by order dated February 5, 2008. [See, Exhibit "C", attached to Motion]. However, Attorney Gilder was retained to represent Richard in said Cause No. on or about the 1st of December of 2007. Both attorneys acts and omissions contributed in Richard being denied his constitutional rights to the effective assistance of counsel. These unprofessional errors are listed and described as follows:

I.

1. Both Attorney Travis and Gilder were ineffective for failing to be available at, and/or secure Richard a Preliminary hearing.

On November 1, 2007, Richard was arrested, without an arrest warrant,

and detained in the DeSoto County Jail. [T.33]. Richard was taken to the courthouse, on November 28th, for his preliminary hearing. At which time, the hearing was postponed until December 28th, because no attorney was present to represent him. On December 16th, Attorney Gilder visited Richard for the first time at the Desoto County Jail. Richard explained to Attorney Gilder that he was arrested, without an arrest warrant, and taken from his sickbed and placed in a very uncomfortable jail cell. Also, Richard asked if he could expedite him another preliminary hearing to obtain a bond reduction and release from custody. Attorney Gilder said he was going to find out what was going on, and he would be right back. However, Richard did not see his attorney again until April 14, 2008. Prior to which, on January 31, 2008, Richard was brought back before the court for his arraignment. During which, a pretrial scheduling order was entered. [See., Exhibit "D" attached to Motion]. Also, an affidavit of financial eligibility was attempted, when Richard informed the court that Attorney Gilder has been retained to represent him; however, Attorney Gilder had not notified the court. [See., Exhibit "E" attached to Motion]. On April 21, 2008, Attorney Travis visited Richard for the first time at the county jail, and Richard informed him that Attorney Gilder had been retained to represent him, which led to their first and last communication. In effect, Richard was denied his right to counsel for his preliminary hearing and arraignment.

2. Attorney William Travis was ineffective by failing to communicate with Richard until April of 2008.

3. Attorney Gilder was ineffective by failing to secure an order substituting attorney, upon being retained. [See., Exhibit "F" attached to Motion]

4. Attorney Gilder was ineffective by filing a Petition for Writ of Habeas Corpus after the indictment was issued.

On February 11, 2008, Attorney Gilder submitted a Petition for Writ of Habeas Corpus for filing in Cause No. CR-2008-65CD. [See., Exhibit "G" attached to Motion]. It appears that said petition was duly filed by the court on February 12, 2008. [See., Exhibit "H" attached to Motion]. According to the petition, Attorney Gilder alleges that a request for a preliminary hearing was made in December, 2007, after he was retained. Further, he alleges that the City Court Clerk's office advised that Richard would not be given a preliminary hearing due to the fact that an indictment had issued. Clearly, this is inconsistent with the record. The general docket shows that the indictment was filed on January 15, 2008, and there is no request for a preliminary hearing filed prior to said petition. [See., Exhibit "H" supra.]. As such, this was an error of deficiency, which prejudiced Richard in the denial of his rights to due process and equal protection of the laws.

5. Attorney Gilder was ineffective by the abandonment of his Motion to Suppress filed on April 11, 2008.

On April 11, 2008, Attorney Gilder filed a Motion to Suppress in Cause No. CR-2008-65CD. [See., Exhibit "I" attached to Motion]. A review of this will show that Attorney Gilder was challenging the main evidence the State needed to obtain a conviction on the charge found in the indictment (DUI Death). The trial court noted in its ruling on Richard's PCR, that this motion was filed and never heard, without commenting on the merits of said motion. [T.37-42]. This deficiency prejudiced Richard's defense and forced him to be coerced into pleading guilty by his attorney.

6. Attorney Gilder was ineffective by failing to investigate and interview potential witnesses.

In their first meeting on December 16th, Richard provided Attorney Gilder with the name of an eyewitness ("Dawn") to the accident, who could have testified that Richard did not cause the accident. Also, Richard provided the

name of his friend ("Don"), who could have testified that Richard had just left his (Don's) house prior to the accident. And that, Richard had not been drinking or using any drugs. Richard was unable to obtain affidavits from these witnesses, in support of his PCR, because he has not been successful in locating them. Nevertheless, Attorney Gilder made no attempt to interview these witnesses. Also, an investigation would have revealed that the State's alleged star eyewitnesses to the accident each gave inconsistent statements as to how the accident happened. Moreover, the witnesses statements were in direct conflict with the police's accident report. Attorney Gilder's lack of investigation is evident in the petition he filed. In his petition, Attorney Gilder alleged that Richard was incarcerated on the 28th day of October, when he wasn't incarcerated until November 1st. The petition also allege that Richard's bond was, yet, in the amount of One Million Dollars (\$1,000,000.00); however, the pretrial schedule order states that the bond was then set at One Hundred and Fifty thousand dollars (\$150,000.00). [See and compare, Exhibits "D" & "H"]. This deficiency prejudiced Richard, in that it left him defenseless to the charge in the indictment.

7. Attorney Gilder was ineffective for failing to seek a change of venue and/or mistrial for violation of Rule 9.01.

Attorney Gilder made no attempt to secure a change of venue and/or mistrial on the grounds of "Pretrial Publicity" in violation of Rule 9.01 of URCCCP. Several articles were published, in the local papers, of statements made by law enforcement officials and the prosecuting attorneys' office prior to the conclusion of the trial. In order to keep the documents at a minimum, Richard cites the pertinent information concerning those articles as follows:

A). DeSoto Co. Press quoted Lt. Mike Foshee, SPD. on 11/02/07.

- B). DeSoto County Press quoted Lt. Mike Foshee, SPD. on 10/30/07.
- C). DeSoto Times quoted Det. Mark Little on 11/03/07.
- D). DeSoto Times quoted Mr. John Champion, D.A. on 11/13/07.
- E). DeSoto Times quoted Police Chief Tom Long on 02/23/08.

Each of the above referenced, quoted by law enforcement officials and prosecuting attorney, alleged that Richard was drunk and caused the accident which led to the death of the victim. Also, the information was released prior to the conclusion of the trial and inferred that Richard was guilty as charged.

Rule 9.01 "Pretrial Publicity" states:

"Prior to conclusion of the trial, no defense attorney, prosecuting attorney, clerk, deputy clerk, law enforcement official or other officer of the court, may release or authorize release of any statement for dissemination by any means of public communication on any matter concerning:

1. The prior criminal record of the defendant or the defendant's character or reputation;
2. The existence or contents of any confession, admission or statement given by the defendant; or the refusal or failure of the defendant to make any statement;
3. The defendant's performance on any examination or tests, or the defendant's refusal or failure to submit to an examination or test;
4. The identity, testimony, or credibility of prospective witnesses;
5. The possibility of a plea of guilty to the offense charged, or a lesser offense; and
6. The defendant's guilt or innocence, or other matters relating to the merits of the case, or the evidence in the case.

Rule 9.01 of URCCCP.

Richard discussed these article with Attorney Gilder prior to the plea, however, to no avail. This deficiency prejudiced Richard, in that it would have been difficult to select an impartial jury of his peers, had he went to trial.

8. Attorney Gilder was ineffective for failing to put the State's case to a meaningful adversarial testing.

Richard retained Attorney Gilder on or about the 1st of December of 2007, to represent him against the charges alleged in the indictment. However,

concerned about his liberty and representation, Richard asked Attorney Gilder to provide him with a copy of all the documents and other evidence the State intended to use against him at trial. Pursuant to his request, Attorney Gilder provided Richard with the discovery from the district attorney and supplementations. In pertinent part, the cover letter states: "As you requested, I am enclosing most of the documents you requested. Those excluded were search warrant for your truck and a warrant for your personal possessions because 'there were no warrants'." [See., Exhibit "J" attached to Motion]. Notice that this letter was dated on May 27, 2008, and the State's response to defendant's motion for discovery was completed with the filing of its' Supplemental Discovery II on April 3, 2008. [See., Exhibit "H" supra.]. Sometime after his conviction, Richard's mother obtain a copy of the court's file in Cause No. CR2008-0065-CD, included were an affidavit for search warrant and search warrant both were dated on October 30, 2007. [See., Exhibit "K" & "L" attached to Motion, respectively]. However, there appears to be defects on the face of both these documents. The affidavit was not properly filed and the warrant was not properly sworn to and notarized. Moreover, Attorney Gilder stated in his letter that "there were no warrants". Clearly, there is something amiss? Either Attorney Gilder provided false information in his letter, or the State was in violation of the discovery rule. In any event, Attorney Gilder was ineffective in this regard, as he failed to put the State's case to a meaningful adversarial testing.

9. Attorney Gilder was ineffective for failing to object when the State changed his proposed sentence by attempting to impose fines and restitution.

This assignment of error has also been mentioned under "Issue I" supra. Although Ms. Wilson informed the court that there was a disagreement as to the restitution, Attorney Gilder made no objection to Richard being sentenced

to fines and restitution at the discretion of the court. [See., "Issue I" supra.]. This was a deficiency which prejudiced Richard by being sentenced to pay fines and restitution, which was not mentioned as a possible consequence of the plea.

10. Attorney Gilder was ineffective by failing to challenge Richard's arrest without warrant.

11. Attorney Gilder was ineffective by allowing items seized to be used as incriminating evidence against Richard, although a basis for attacking the legality of the search and seizure existed on lack of probable cause.

12. The totality of the errors and cumulative effects thereof denied Richard's rights to the effective assistance of counsel.

II.

To be successful under Strickland, Richard must demonstrate 1) that his counsels' performance was deficient, and 2) that his defense was prejudiced by the deficient performance. (e.g., Taylor v. State, 782 So.2d 166 (¶12)(Miss 2000)). Here, Richard has shown that he was completely without any counsel at his preliminary hearing on November 28, 2007; also, he was without counsel at his arraignment on January 31, 2008. When court-appointed counsel and retain counsel fails to appear in court, to represent their client at a very crucial stage in the proceedings, this denies one of counsel all together, not to mention the "effective assistance" of counsel. Their absence clearly rebuts the "strong...presumption that [trial counsel's] performance falls within a wide range of reasonable professional assistance and that the decisions made by trial counsel are strategic." (e.g., Covington v. State, 909 So.2d 160 (¶4) (Miss.2005)).

In Hannah v. State, the Supreme Court reiterated the significant and substantial relationship between the criminal defense lawyer and his client:

"The relationship of the accused to his lawyer provides a critical factual context here. As he stands before the bar of justice, the indicted defendant often has few friends. The one person in the world, upon whose judgment and advice, skill and experience, loyalty and integrity that defendant must be able to rely, is his lawyer. This is as it should be. Any rational defendant is going to rely heavily upon his lawyer's advice as to how he should respond to the trial judge's questions at the plea hearing. He may also rationally rely on his lawyer's advice what the outcome of the plea hearing will be. Yet it is the defendant, not the lawyer, whose constitutional rights are being waived at the plea hearing. It is the defendant's plea and accompanying waiver of rights which under established law must be voluntarily and intelligently given, with full appreciation of the consequences to follow."

Hannah v. State, 943 So.2d 20 (¶8)(Miss.2006)(citation omitted).

The above summarized version of a relationship between the criminal defense lawyer and his client, conveniently describes that of which was shared by Richard and Attorney Gilder. On August 12, 2008, Richard was faced with a last minute dilemma: 1). follow the advice of his lawyer and accept a plea offer of fifteen (15) years; or 2). go to trial with the likely consequences of receiving a thirty-three (33) year sentence. [See., T. 20]. Naturally, being pressured to make a decision, Richard followed the advice of his lawyer, and accepted a plea offer of fifteen (15) years. However, Richard was not advised, by Attorney Gilder nor the court that the consequence of his guilty would be twenty (20) years, with fifteen (15) years to serve, "and five (5) years of post-release supervision; also, one-thousand dollar fine plus court cost and forty-eight thousand and seven hundred and thirteen dollars and thirty-two cents (\$48,713.32) in restitution". Richard, reluctantly, agreed to a fifteen (15) year sentence, nothing more and anything less. [See., Acknowledgment supra at T.20]. The consequences of his plea was first mentioned by the court at sentencing. [See., Exhibit "A" attached to Motion]. A review of the record reveals that Attorney Gilder practically concluded a plea bargain with the state without his client's consent. "[D]efense counsel shall not conclude any plea bargaining on behalf of his client without his client's

full and complete consent, being certain that the decision to plead is made by defendant. Defense counsel shall advise defendant of all pertinent matters bearing on the choice of plea to enter and likely results or alternatives." (See., Jefferson v. State, 556 So.2d 1016, 1023 (Miss.1989)).

For the sake of brevity, Richard cites for support of his ineffective assistance of counsel claim: Moody v. State, 644 So.2d 451 (Miss. 1994); and Hayes v. State, 944 So.2d 121 (Miss. 2006). In Moody, the Mississippi Supreme Court stated: "If defendant raises questions of fact regarding the deficiency of counsel's conduct or prejudice to the defendant, he is entitled to an evidentiary hearing on ineffective assistance of counsel. (citations omitted). Where this Court determines defendant's counsel was ineffective, the remedy is to remand for a new trial." (citation omitted). Id. 644 So.2d at 456. Richard has presented and demonstrated, with evidence and the record, that retained counsel and court-appointed counsel were absent, from his arraignment, on January 31, 2008. [See., Exhibit "D"]. This pretrial scheduling order states that Richard is being represented by William Travis, Esq.; also, it states that bond is set at one-hundred and fifty thousand dollars (\$150,000.00). However, The order appointing attorney was not entered until February 5, 2008. [See., Exhibit "C"]. Moreover, Richard was asked to apply for the appointment of counsel by signing an affidavit of financial eligibility form, and was advised that Attorney Gilder had not entered nor obtained an order for the substituting of attorney. [See., Exhibits "E" & "F"]. As a result of not having an attorney available, Richard was never advised by his attorney that his bond had been reduced. Yet, another example of Attorney Gilder's ineffectiveness is demonstrated in his Petition for Writ of Habeas Corpus filed on behalf

of Richard on February 12, 2008. In this petition, Attorney Gilder alleged that Richard was incarcerated on the 28th day of October, 2007; also, that the bond was excessive in the amount of one million dollars (\$1,000,000.00). However, the record clearly shows that Richard was not incarcerated until on November 1, 2007. [See., T.33]. Also, Richard's bond was reduced on January 31, 2008, during his arraignment hearing, to one-hundred and fifty thousand dollars (\$150,000.00). [See., Exhibit "D"]. Based on Moody, this Court should find that Attorney Gilder was ineffective and remand for a new trial; or, Richard should be, at least, entitled to an evidentiary hearing regarding the deficiency of counsel's conduct or prejudice to defendant. Id. 644 So.2d at 456.

The Strickland test is applied with deference to counsel's performance, considering the totality of the circumstances, to determine whether counsel's actions were both deficient and prejudicial. The test is to be applied to the attorney's overall performance. (Taylor v. State, 782 So.2d 166 (¶12)(Miss. 2001)). (citing Strickland, 466 U.S. at 695). Richard has alleged twelve errors which demonstrates Attorney Gilder's ineffectiveness. For example is the abandonment of his Motion to Suppress, filed on April 11, 2008, and never sought a hearing on it. "The party filing a motion has the duty to bring the motion to the attention of the trial judge and request a hearing on it". Taylor v. State, 744 So.2d 306 (¶45)(Miss.1999)(citing., Lambert v. State, 518 So.2d 621, 623 (Miss.1987); Billiot v. State, 454 So.2d 445, 456 (Miss. 1984)). Considering the totality of the circumstances, Attorney Gilder was ineffective and prejudiced to the defendant.

**ISSUE III. THE TRIAL COURT'S FACTUAL FINDINGS
WERE CLEARLY ERRONEOUS AND REQUIRE REVERSAL AND
REMAND FOR AN EVIDENTIARY HEARING ON ISSUES I & II.**

"When reviewing a lower court's decision to deny a petition for post-conviction relief this Court will not disturb the trial court's factual findings unless they are found to be clearly erroneous. However, where questions of law are raised the applicable standard of review is de novo." (See., Reeder v. State, 783 So.2d 711 (¶5)(Miss.2001)).

In denying Richard's PCR, the trial court found that, "[R]egarding the blood test, this allegation was made in a motion to suppress in the first case. Apparently 'the motion was never heard', but both charges were remanded and Partain entered a plea to culpable negligence manslaughter." [T.38, at (¶3)]. The fact that the motion was never heard has been alleged as a deficiency of counsel which prejudiced the defense. [See., "Issue II" supra at 5.]. Also, the court erroneously found that, "[T]he offer of proof given by the State did not include the proof of the blood test." [T.38-39, at (¶3)]. However, this finding is contradicted by the plea hearing transcript stating:

4 BY THE COURT: If the State would regarding Mr. Partain, give a brief statement of what you would be able to show at trial in this case if this case did in fact go to trial.

BY MS. WILSON: If this matter were to go to trial, the State would be prepared to prove beyond a reasonable doubt with credible and admissible evidence that on or about October 28th of 2007, this Defendant, Richard Partain, did willfully, unlawfully, feloniously -- willfully and feloniously kill one Lillian Esrey, a human being, by culpable negligence and without authority of law.

More specifically, the facts would show that some people were behind Mr. Partain in Horn Lake, Mississippi. They followed him to 51 at Church. They called the police because they felt that he was intoxicated. He was driving erratically and in the wrong lane. Ultimately, more cars called 911. Mr. Partain's truck took a left going north on Elmore. Several cars had to dodge into a ditch because he was going north in the southbound lane heading north. At that time he was driving negligently by driving in the wrong lane of traffic. 'Officers got there and did smell an intoxicating liquor, and they did ultimately take his BAC.'

[See., Exhibit "A"].

Clearly, the offer of proof given by the State did include the proof of the blood test ("BAC"). [Exhibit "A" supra at 6-7].

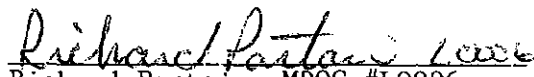
As for the preliminary hearing, initial appearance, being coerced and/or threatened at the hearing, no defense or investigation, restitution, and fines have each been litigated supra at "Issue II", as being contributed to ineffective assistance of counsel. Also, for all other issues not litigated in this appeal, for sake of brevity, Richard hereby reserves those for future proceedings, in the event of reversal.

As shown, the trial court's factual findings are clearly erroneous. Also, Richard has raised two (2) questions of law: 1). Whether his guilty plea voluntarily, and intelligently made?, and 2). Whether he was denied his Sixth and Fourteenth Amendments rights to the effective assistance of counsel? Therefore, this case require a reversal and remand for a new trial; or, in the alternative, remand for an evidentiary hearing. (e.g., Haynes v. State, 944 So. 2d 121 (¶7&8)(Miss.2006)).

Conclusion

This Court should find that Richard's plea was not voluntarily, and intelligently made, and that he was denied his right to the effective assistance of counsel. Reverse and remand for a new trial; or, in the alternative, remand for an evidentiary hearing.

Respectfully submitted,


Richard Partain, MDOC #L0006
MSP/Unit 29-A
Parchman, Ms. 38738

DATED: December 24, 2010.

Richard Partain, MDOC #L0006
MSP/Unit 29-A
Parchman, Ms. 38738

December 24, 2010

Ms. Kathy Gillis
Office of the Clerk
P. O. Box 249
Jackson, Ms. 39205

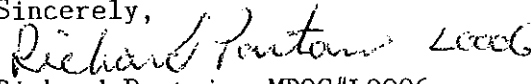
Re: Richard Partain v. State of Ms., No. 2010-CP-00896

Dear Ms. Gillis:

Please find enclosed for filing in the above styled cause, the original & four (4) copies of the appellant's brief and record excerpts. An extra copy was supplied for the return of a stamped "filed" copy of the same.

Also, enclosed for filing is the original and four (4) copies of a Motion for Modification of the Record. Likewise, an extra copy was provided for the return of a stamped "filed" copy. By copy of this letter, Hon. Celeste Wilson have been mailed the same to the address below.

Your usual attention in this matter is genuinely appreciated in advance.
Thank you.

Sincerely,

Richard Partain, MDOC#L0006
Appellant/Pro-Se

cc:
Ms. Celeste Wilson, Esq.
Office of the District Attorney
365 Loshier St., Suite 210
Hernando, Ms. 38632

pc