

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

CASE NO: 2014-CA-01285

**SHERAL LEE SMITH
Petitioner-Appellant**

v.

**STATE OF MISSISSIPPI
Respondent-Appellee**

APPEAL FROM THE CIRCUIT COURT OF RANKIN COUNTY

BRIEF FOR APPELLANT

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CERTIFICATE OF INTERESTED PARTIES

Sheral Lee Smith
Appellant

v.

CASE NO: 20143-CA-01285

State of Mississippi
Appellee

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.

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3. Counsel for Respondents – Michael Guest, DA 20th Dist., Lee Wilkins, ADA, 20th Dist.
4. Family of John Doe, alleged minor victim
5. Trial Counsel for State - Michael Guest, DA 20th Dist., Jacque Purnell, ADA, 20th Dist.
6. Trial Counsel for Appellant – John M. Colette, Esq., Matthew A. Baldridge, Esq.

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STATEMENT OF ISSUES

- 1) Ms. Smith was denied her right to effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, and the Mississippi Constitution when trial counsel made false statements to her regarding the severity of the punishment she would receive if she pled guilty.
- 2) Ms. Smith was denied her right to effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, and the Mississippi Constitution when trial counsel refused to follow her instruction that they proceed to trial, rather than moving forward with a guilty plea.
- 3) Ms. Smith was denied her right to effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, and the Mississippi Constitution when trial counsel resorted to coercing and intimidating her into taking a guilty plea.
- 4) Ms. Smith was denied her due process rights guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and the Mississippi Constitution, when she was induced, coerced, and intimidated into pleading guilty involuntarily.
- 5) Ms. Smith was denied her trial rights guaranteed under the Sixth and Fourteenth Amendments to the United States Constitution and the Mississippi Constitution, when she was induced, coerced and intimidated into pleading guilty involuntarily.
- 6) There was sufficient evidence to afford Ms. Smith an evidentiary hearing on the issues of the voluntariness of her plea and the effectiveness of trial counsel.

STATEMENT OF THE CASE

This case involves an appeal of the summary denial of the Appellant, Sheral Smith's petition for post-conviction relief, wherein she prayed for relief from her guilty plea which she contends was made involuntarily, under the inducement of false promises of early release, and coercive threats from trial counsel, that she would face trial alone without representation, and receive maximum penalties if she did not comply with his demand that she plead guilty. The facts and testimony in the record below show that:

- a) Ms. Smith had been treating as an inpatient resident at the State Hospital at Whitfield for the nine months directly prior to her plea. She had been diagnosed by the state Region 8 mental health center with Bipolar Disorder with severe hypomanic episodes, as well as unspecified anxiety disorder and possible personality disorder. (*PCR Pet. 3; PCR Ex. 1*).¹
- b) Ms. Smith and her family had little to no notification whatsoever that she was appearing on the date in question for a competency hearing followed immediately by a plea or trial. (*PCR Pet. 4; PCR Ex. 2, 3, 4*).
- c) Trial counsel made multiple representations to both Ms. Smith and her family that if she would only plead guilty, she would receive meritorious earned time, trustee time, the possibility of parole, and that she could be out of prison in as early as three years. (*PCR Pet. 4; PCR Ex. 3, 4, 5*).
- d) When Ms. Smith steadfastly refused to plead guilty, and instructed trial counsel that she wished to go to trial, trial counsel became belligerent and angry and threatened to quit that day, the day of trial, if she did not plead guilty. (*PCR Pet. 4; PCR Ex. 4, 5, 6*).
- e) Trial counsel further represented that if he quit that day, the trial would go forward and she would be unrepresented, and would receive 30 years in prison or more. (*PCR Pet. 4; PCR Ex. 4, 5, 6*).
- f) Trial counsel did not review the Petition to plead guilty with Ms. Smith, but showed her where to sign the document and instructed her on how to answer the

¹ This document will cite to the Post-Conviction Relief Petition filed with the Court below as "PCR Pet." followed by a page number. Similarly, exhibits to that document will be notated as "PCR Ex." followed by an exhibit number. Cites to the original court record as made as "R" both within the petition itself and within this document. Any other document is cited by name. Cites to the original Court sentencing transcript are notated "T" followed by a page number.

judge during the colloquy so that the plea would be accepted by the Court. (*PCR Pet. 4; PCR Ex. 4, 5, 6*).

- g) Rankin County Circuit Judge Samac Richardson found that Ms. Smith's plea had been freely and voluntarily given, and convicted her on all four counts (T15). She was sentenced to 20 years with 13 suspended, seven to serve, with five years post-release supervision on each count, to run concurrent (T20-21).
- h) When Ms. Smith brought these claims on petition for post-conviction relief, the State made no substantive objection to any of the claims, citing rightly that most allegations were based in confidential attorney-client communications. (*See Generally, State's Answer and Motion to Dismiss*).

On the day of Ms. Smith's trial, a date for which her and her family were given little or no notice, Ms. Smith's family was told by her attorney that they must convince her to take a guilty plea, and that if she did, she could count on parole, trustee time, and earned time to reduce her sentence to three years, but if she did not, it was certain that she would be sentenced to at least 30 years in prison. In the face of her continued persistence in her refusal to agree to a guilty plea, he told her that if she did not take the plea, he would quit and she would go to trial without counsel that afternoon. Faced with the prospect of defending herself against the State under the threat of a draconian prison sentence, she acquiesced, pled guilty, was found guilty, and was sentenced to seven years to serve day-for-day with no chance of parole and early release, and with the obligation to register as a sex offender for the remainder of her life. When she brought

PROCEDURAL HISTORY

Ms. Smith was originally arrested on or about September 17 2008, and charged by police with one count of statutory rape and one count of transfer of a controlled substance. *R 1-4*. On October 02 2008 for additional charges of statutory rape were filed against her in Rankin County Court. *R5-12*.

Ms. Smith was indicted on November 25 2008, by a Rankin County grand jury on four counts of statutory rape, alleging that she had sex with a fourteen year-old friend of her son. The

acts were alleged to have taken place between June 1, 2008 and August 27, 2008, at both the boy's and her own home, both in Rankin County. R.15-17.

On September 25, 2009, the Court entered an order to send Ms. Smith to the Mississippi State Hospital at Whitfield for an evaluation for competence to stand trial. R18-21. She was admitted and remained there until shortly before her trial date on June 7, 2010.

On June 7 2010, she was ruled competent to stand trial, and trial was ordered to begin that afternoon, however, she pled guilty before the trial commenced.

Ms. Smith filed her PCR petition with the Rankin County Circuit Court on June 5, 2013. The Petition was dismissed without a hearing under Miss. Code Ann. 99-39-11(2) by the Honorable Judge William Chapman on August 15, 2014. Ms. Smith filed her notice of appeal on September 4, 2014.

STATEMENT OF THE FACTS

Ms. Smith was arrested on or about 17 September 2008, and charged by police with one count of statutory rape and one count of transfer of a controlled substance. R 1-4. Her family retained the services of Jackson attorney John M. Collette to head off criminal charges if possible, and represent her if charges were formally filed and an indictment made against her. On 02 October, 2008 for additional charges of statutory rape were filed against her in Rankin County Court. R5-12.

Before ruling on a bond for Ms. Smith, Rankin County Judge Kent McDaniel ruled *sua sponte* that Ms. Smith should undergo a psychological evaluation the Region VIII Mental Health Commission. R13. As a result of the Region VIII Mental Health Commission evaluation, the Court ruled that she was to begin mental health treatment immediately through that facility, as a condition of her bond, and to comply with their recommendations and treatment plan. R14.

It is important to note that the Court made these motions and orders *sua sponte*, and not at

the behest of the Defendant's counsel. Even at this early stage, if Ms. Smith was going to receive any protection of her rights and treatment, it would have to come from the Court's own initiative, as Defense counsel failed to examine and recognize these key issues, let alone move to act on them.

Region VIII diagnosed Ms. Smith as having Bipolar Disorder with severe hypomanic episodes, as well as an unspecified Anxiety Disorder, and possible Personality Disorder. They prescribed Abilify, as well as Trazodone. (*PCR Ex. 1*).

Ms. Smith was finally indicted on 25 November 2008, by a Rankin County grand jury on four counts of statutory rape, alleging that she had sex with a fourteen year-old friend of her son. The acts were alleged to have taken place between June 1, 2008 and August 27, 2008, at both the boy's and her own home, both in Rankin County. *R.15-17*.

On 09/25/2009, the Court entered an order to send Ms. Smith to the Mississippi State Hospital at Whitfield for an evaluation for competence to stand trial. *R18-21*. Prior to her admission to Whitfield, Ms. Smith had been out on house arrest treating as an outpatient at Region VIII. Once at Whitfield, she would remain there for the next nine months, without contact or visitation from her attorney. She was taken off of all of her medications. See 29 March 2013 Affidavit of Sheral Smith, attached as *Exhibit 2*.

Several days before her June 07, 2010 competency hearing and trial, she was transported back to Rankin County. Her attorney did not notify her or her family that she had been moved, or that she was facing trial in a matter of days. On June 07, 2010 Sheral Smith appeared in Rankin County Circuit Court for her competency hearing. To her family she looked disheveled and confused. (*PCR Ex. 2, 3, 4*). At that hearing, Mr. Collette and/or his associate Mr. Baldridge met with Ms. Smith's family to enlist them in convincing Ms. Smith to take a plea

bargain. (PCR Ex. 2, 4, 5).

At that time, representations were made to the family that if Ms. Smith took the guilty plea, she would be sentenced to serve 5 years, and would receive meritorious earned time, “30 for 30” trustee time, and have the possibility of parole, and would most likely be out in 3 years. They were told to relay this information to Ms. Smith. (PCR Ex. 3,4,5).

Ms. Smith’s sister, Denise Sinclair and James Steven Smith, Ms. Smith’s husband, met with Ms. Smith before the competency hearing to convince her to take the plea, but she refused. (PCR Ex. 3, 4).

After the competency hearing, Denise Sinclair and another of Ms. Smith’s sisters, Sherry Bryant, met with Ms. Smith to again convince her to take the guilty plea. She adamantly persisted in her refusal. (PCR Ex. 3, 4).

Upon being informed that Ms. Smith would not take the plea agreement, Mr. Collette met with Ms. Smith herself, as well as Ms. Bryant, Ms. Sinclair, and possibly his associate, Matthew Baldrige. (PCR Ex. 4, 5). During this meeting, Mr. Collette re-iterated his previous statements regarding her eligibility for meritorious earned time, trustee time, and a parole date, as well as the representation that she would probably be out in three years. (PCR Ex. 4, 5, 6). Also during this meeting, Mr. Collette further represented that her time would be reduced by the amount of time that she served on house arrest. (PCR Ex. 5).

When Ms. Smith continued to refuse to agree to plead guilty, Mr. Collette became agitated and aggressive, and “loud and obviously angry” with Ms. Smith. He informed her that if she would not agree to the plea arrangement, he would resign immediately as her attorney, and that she would go to trial *that afternoon without an attorney*, and would receive 30 years to serve or more. (PCR Ex. 4, 5, 6).

When Ms. Smith tearfully acquiesced to Mr. Collette's threats, Mr. Collette showed her where to sign the plea petition, but did not review it with her. He instructed her on how to answer the judge during the colloquy and not to say anything that he did not instruct her to say, or that she would be serving 30 years. (*PCR Ex. 4, 5, 6*).

Shortly thereafter, Ms. Smith appeared in front of Rankin Circuit Court Judge Samac Richardson, and pled guilty. The standard colloquy was performed in which Judge Richardson asked whether Ms. Smith's plea was voluntary, and whether she had been coerced into making the plea (T8-9). She answered that the plea was voluntary, as Mr. Collette had instructed her, and answered that nobody had coerced her, just as Mr. Collette had instructed her (T9). The trial Judge found that Ms. Smith's plea had been freely and voluntarily given, and convicted her on all four counts (T15). She was sentenced to 20 years with 13 suspended, seven to serve, with five years post-release supervision on each count, to run concurrent (T20-21).

SUMMARY OF ARGUMENT

Sheral Smith was a mentally and emotionally compromised individual. While she was untreated before her arrest for an ongoing affair with a friend of her son, it became apparent to all involved that she needed mental treatment, almost immediately after her arrest. So apparent, in fact, that Judge McDaniel ordered that she be treated before she was ever indicted, and made her ongoing treatment a condition of her pre-trial house arrest. Her mental frailty was so acute and well-documented that she was sent for in-patient treatment as a resident at the Whitfield State Mental Hospital for nine months before she was declared competent to stand trial.

Sheral Smith, more than most, was vulnerable to persuasion and intimidation, and her trial counsel used this to impose his decisions regarding her defense upon her unwillingly. Sheral Smith wished to go to trial, her trial counsel did not. The trial judge forced the issue,

demanding a plea or immediate trial. In his attempts to cajole the defendant into taking a plea, trial counsel made legally incorrect representations, first to her family and then to her, regarding her eligibility for early release, and that she would be out in a maximum of 3 years. He also made factually incorrect representations that the State would recommend a 5-year sentence. When she continued to demand her Constitutional Right to a jury trial, trial counsel became irate and bullied his own client, screaming at her that if she refused to take a plea, he would quit that day, and she would face trial alone and without counsel, and would receive 30 years or more. More than one witness testified to this haranguing, and that Ms. Smith was completely broken and crying when she acquiesced – badgered and frightened into signing a plea by her attorney. Eyewitnesses further testify that her trial counsel instructed her to answer the judge in specific ways so that the trial Court would accept her plea as voluntary, and admonished her that if she went off-script she would be facing 30 years. She did as she was told, and within an hour found herself serving a day-for-day 10 year sentence as a sex offender, with no recommendation from the state of 5 years, and no chance for early release.

Upon timely filing her Post-Conviction Relief petition, the State made no answer. When finally forced by Court order to make an answer, the State pled, rightly in the estimation of the Ms. Smith, that Ms. Smith's allegations sounded in her communications with her attorney, and the State did not have information sufficient to admit or deny her allegations (and therefore denied them). The nature of Ms. Smith's allegations of ineffective assistance of counsel and being railroaded into a plea by counsel, along with the State's response indicating that they could not comment on the substantive allegations one way or the other meant that the only way to get to the bottom of Ms. Smith's allegations, was to let her trial counsel be heard on the matter. This never happened. Instead, her petition was summarily dismissed under Miss. Code Ann. §99-39-

11(2), the Court ruling that from the face of the pleadings it appeared that Ms. Smith had no basis for relief, but not commenting further. While the Appellant recognizes that where there is only the appellant's affidavit, and it is contradicted by his or her own sworn testimony, summary dismissal of the PCR petition is allowable under Sec. 99-39-11(2), however, this is not the case at bar. Here there are multiple witnesses, a defendant who was especially vulnerable to manipulation, and multiple allegations, corroborated by multiple witnesses, that the defendant's attorney did manipulate her into taking a plea through misrepresentations and intimidation. Ms. Smith should have been granted a hearing on the matter.

ARGUMENT

I. Ms. Smith's Trial Counsel was ineffective in his representation of her regarding her decision to plead guilty or go to trial when he supplanted her authority to make fundamental decisions about her defense by misrepresenting to her the severity of her sentence, and threatening and intimidating her into pleading guilty.

A. Appropriate standards for judging effectiveness of counsel

1. The *Strickland* Standard & Mississippi Interpretation

Even though she ultimately pled guilty, Smith was denied her Sixth Amendment right to the effective assistance of counsel during preparation for her trial within the meaning of *Strickland v. Washington*, 466 U.S. 668 (1984) and its federal progeny, her federal constitutional due process rights, as well as her rights guaranteed by corresponding portions of the Mississippi Constitution and Mississippi case law.

The Counsel Clause of the Sixth Amendment to the federal constitution provides that a criminal defendant:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have

compulsory process for obtaining witnesses in his favor, *and to have the assistance of counsel for his (her) defense* .
United States Constitution, Sixth Amendment; emphasis added.

The guarantees of the Sixth Amendment were made applicable to the states in the case of *Gideon v. Wainwright*, 372 U.S. 335 (1963):

We accept *Betts v. Brady's* assumption, based as it was on our prior cases, that a provision of the Bill of Rights which is “fundamental and essential to a fair trial” is made obligatory upon the States by the Fourteenth Amendment. We think the Court in *Betts* was wrong, however, in concluding that the Sixth Amendment's guarantee of counsel is not one of these fundamental rights.
Id., at 372 U.S.342.

The United States Supreme Court has interpreted the counsel clause to mean that “the right to counsel is the right to the effective assistance of counsel.” *McMann v. Richardson*, 397 U.S. 759 (1970), at 771, FN14, cited in *Strickland v. Washington*, at 466 U.S. 686. The *Strickland* Court opined:

That a person who happens to be a lawyer is present at trial alongside the accused, however, is not enough to satisfy the constitutional command. The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results. An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair.
Strickland, at 466 U.S. 685.

The Supreme Court of the United States provided the following standard to employ in considering claims of ineffective assistance of counsel in criminal representations:

A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. 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. 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. 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.
Id., at 466 U.S. 68.

Therefore, reversal of a conviction under the standard elucidated by the *Strickland* Court requires showing two elements, first, that counsel's performance was deficient, and secondly, that the deficiency prejudiced the result. *Strickland* requires that courts be guided by the purpose--"to ensure a fair trial"--and that thereforeThe benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.² *Strickland*, at 466 U.S. 686.

In order to prevail on a Sixth Amendment claim, a petitioner must prove both that counsel's representation "fell below an objective standard of reasonableness measured under "prevailing professional norms," *Id.* at 688, and that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694

This standard was revisited in the case of *Williams v. Taylor*, 529 U.S. 362 (2000) at 390-91; *See also*, *United States v. Bagley*, 473 U.S. 667 (1985) at 682 (*citing Strickland*, 466 U.S. at 694); *Connell v. State*, 691 So.2d 1004 (Miss. 1997). *See also Wiggins v. Smith*, 539 U.S. 510 (2003), at 521.

The Supreme Court has alsoe defined "Reasonable probability," as "a probability sufficient to undermine confidence in the outcome." *Strickland*, at 466 U.S. 694. *See also*, *Williams v. Taylor*, 529 U.S. at 391, *United States v. Bagley*, 473 U.S. at 682.

The United States Supreme Court has in two other ineffective assistance of counsel cases *Mickens v. Taylor*, 122 S.Ct. 1237 (2002), and *Bell v. Cone*, 122 S.Ct. 1843 (2002), established

² The Supreme Court of Mississippi has looked to this very definition from *Strickland* to find the benchmark for a claim of ineffective assistance of counsel *See Leatherwood v. State*, 473 So.2d 964 (Miss. 1985) at 968 (*citing Strickland*, 104 S.Ct. at 2064).

a “general default” rule requiring a defendant challenging his counsel’s representation under the Sixth Amendment to demonstrate *Strickland* prejudice, i.e., a “reasonable probability that, but for counsel’s errors, the result of the proceeding would have been different.” *Mickens v. Taylor*, 122 S.Ct. at 1240 (quoting *Strickland v. Washington*, 466 U.S. 668 (1984)).

The reason that *Strickland* delimits the appropriate rule for most Sixth Amendment violations stemmed from a majority of the Court’s view that the Sixth Amendment right to the assistance of counsel exists “not for its own sake but because of the effect it has on the ability of the accused to receive a fair trial.” *Mickens*, 122 S.Ct. at 1240 (quoting *United States v. Cronin*, 466 U.S. 648 (1984) at 658). Accordingly, “defects in assistance that have no probable effect upon the trial’s outcome do not establish a constitutional violation.” *Mickens* at 1240. There still remain, however, several well established exceptions to the general requirement of showing “probable effect upon the outcome.” *Id.*

The Supreme Court of the United States, in the case of *Hill v. Lockart*, 474 U.S. 52 (1985), held that the two-prong *Strickland* standard and analysis applied to a guilty pleas:

Although our decision in *Strickland v. Washington* dealt with a claim of ineffective assistance of counsel in a capital sentencing proceeding, and was premised in part on the similarity between such a proceeding and the usual criminal trial, the same two-part standard seems to us applicable to ineffective-assistance claims arising out of the plea process. Certainly our justifications for imposing the “prejudice” requirement in *Strickland v. Washington* are also relevant in the context of guilty pleas[.]
Hill. at 474 U.S. 57.

The *Hill* Court explicitly applied the two prong standard to guilty plea challenges:

We hold, therefore, that the two-part *Strickland v. Washington* test applies to challenges to guilty pleas based on ineffective assistance of counsel. In the context of guilty pleas, the first half of the *Strickland v. Washington* test is nothing more than a restatement of the standard of attorney competence already set forth in *Tollett v. Henderson*, *supra*, and *McMann v. Richardson*, *supra*. The second, or “prejudice,” requirement, on the other hand, focuses on whether counsel's constitutionally ineffective performance affected the outcome of the

plea process. In other words, in order to satisfy the “prejudice” requirement, the defendant must show that there is a reasonable probability that, but for counsel’s errors, he would not have pleaded guilty and would have insisted on going to trial. [footnote omitted]
Hill at 474 U.S. 58-59.

In Mississippi, however, the second prong of *Strickland* has been interpreted in plea situations to mean that a defendant is ‘prejudiced’ if, but for her attorney’s substandard performance, she would have pled guilty, regardless of any speculation as to what might happen at trial:

“Where a defendant enters a plea on advice of counsel, the attorney’s performance is deemed “deficient” for purposes of the *Strickland* standard if it falls below “the range of competence demanded of attorneys in criminal cases.” *Hill v. Lockhart*, 474 U.S. 52, 56, 88 L.Ed.2d 203, 106 S.Ct. 366, 369 (1985) quoted in *Wilson* [v. State, 577 So.2d 394 (Miss 1991)], 577 So.2d at 396. A defendant who pleads guilty to a crime is “prejudiced” by his counsel’s erroneous advice if “he would have insisted on going to trial if he had been correctly informed.” *Wilson*, 577 So.2d at 396; accord *Hill*, 474 U.S. at 59, 106 S.Ct. at 370-71.
Alexander v. State, 605 So.2d 1170, 1173 (Miss. 1992).

2. Presumed Prejudice under *Strickland*

There are also cases in which prejudice is assumed. These were spelled out by the *Strickland* Court:

In certain Sixth Amendment contexts, prejudice is presumed. Actual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice. So are various kinds of state interference with counsel’s assistance. See *United States v. Cronin*, 466 U.S., at 659, and n. 25, 104 S.Ct., at 2046–2047, and n. 25.... One type of actual ineffectiveness claim warrants a similar, though more limited, presumption of prejudice. In *Cuyler v. Sullivan*, 446 U.S., at 345–350, 100 S.Ct., at 1716–1719, the Court held that prejudice is presumed when counsel is burdened by an actual conflict of interest. In those circumstances, counsel breaches the duty of loyalty, perhaps the most basic of counsel’s duties.
Strickland at 466 U.S. 693.

As a gauge whereby to evaluate the performance of counsel the *Strickland* Court, in reviewing a claim of ineffective assistance of counsel, used the American Bar Association

(ABA) as one source of guidance as to what constitutes the standard of care: Prevailing norms of practice as reflected in the American Bar Association standards and the like . . . are guides to determining what is reasonable. *Id.* at 466 U.S. 688. ABA Criminal Justice Standard on Defense Function 4-5.1(b) (ABA Crim. Justice Standard DF) states: “Defense counsel should not intentionally understate or overstate the risks, hazards, or prospects of the case to exert undue influence on the accused’s decision as to his or her plea.”

ABA Criminal Justice Standard on Defense Function 4-5.2 states:

“(a) Certain decisions relating to the conduct of the case are ultimately for the accused and others are ultimately for defense counsel. The decisions which are to be made by the accused after full consultation with counsel include:

- (i) what pleas to enter;
- (ii) whether to accept a plea agreement;

...

Mississippi recognizes the broad definition of the standard of care for counsel’s performance to be the “reasonableness under prevailing professional norms.” *Loden v. State*, 43 So.3d 365 (Miss. 2010).

However, the Mississippi Supreme Court has ruled that ineffective assistance of counsel “may” be found where counsel misrepresents information about a plea, thus inducing a guilty plea, but ineffective assistance “would,” that is, shall lie where defense counsel purposefully lies to his client or asks his client to lie in court proceedings regarding his/her plea. *Barnes v. State*, 803 So.2d 1271, 1274(Miss. App. 2002); *Myers v. State*, 583 So.2nd 174, 177 (Miss. 1991).

B. Defense counsel provided ineffective assistance with presumed prejudice under United States and Mississippi Supreme Court jurisprudence

Mr. Collette and Mr. Baldridge made the following firm representations to Ms. Smith in order to induce her guilty 1) That the plea deal provided for a sentence of only 5 years to serve; 2) that she would receive time off from that sentence for earned time and trusty time; 3) that she

would be eligible for parole; 4) that she would get credit for her time served on house arrest; 5) that she would be out in three years. (*PCR Ex. 3, 4, 5, 6*) All of these were false, and defense counsel knew or should have known that.

Mr. Collette became ineffective counsel under *Loden* and *Barnes* the moment he and/or his associate, Mr. Baldrige lied to Ms. Smith and her family regarding her eligibility for early release in an effort to induce her to take a guilty plea, because such misrepresentations are not the prevailing norm of practice in criminal representation.

ABA Crim. Justice Standard DF 4-5.1 and 5.2 as listed above state a reasonable view of the prevailing norm of criminal defense practice regarding advising clients regarding plea bargains. Both of these standards were violated when Mr. Collette purposefully understated the effect of the guilty plea by claiming that MDOC would reduce her sentence through various programs, and then by not abiding by her choice not to take the plea arrangement, and instead threatening and intimidating her into a plea.

He compounded that ineffectiveness when he and/or his associate, Mr. Baldrige threatened her that if she did not take the plea, he would resign immediately and claiming (falsely) that she would stand trial that day without an attorney, in order to intimidate her into taking a guilty plea. (*PCR Ex. 4,5*).

When he began threatening his client that she would be facing an immediate trial without representation, both claims which any criminal practitioner, especially one as seasoned as Mr. Collette, would know to be false, then instructed her on what she must say to the court in order to defeat the Court's verification of voluntariness, the prejudice from his deficient performance became presumed 1) under *Myers* and *Barnes* because these cases specifically direct that counsel is ineffective when he purposefully lies to the client or instructs them to lie to the Court

regarding their plea; and, 2) under *Strickland* and *Cronic* (See ¶ 70, *supra*), because by telling her that if she did not plead guilty that she would go to trial without any counsel, she was constructively denied counsel for trial. Because of this purposeful misrepresentation to her, in her mind, the only way that she could face the court with the representation of counsel was to take the plea.

Finally, ineffective assistance is presumed under *Barnes* and *Myers* because once defense counsel had obtained consent to the guilty plea through misrepresentations and threats, he instructed her to make misrepresentations to the court regarding whether or not there had been inducements or threats, in order to defeat the Court's verification of voluntariness. (*Exhibits 4,5,6*).

Even if the second prong of the *Strickland* test were not to be presumed met, it is still met in actuality under *Wilson*, *Hill* and *Alexander* - the outcome would have been different, because, as Ms. Smith attests with independent verifying witnesses, were it not for defense counsel's mistaken or false promises of parole and other sentence-reducing mechanisms, coupled with his threats concerning his withdrawal and her facing her trial alone that day, she would not have made a guilty plea. (*PCR Ex. 4,5,6*).

Defense counsel used misrepresentations to understate the consequences of a guilty plea to Ms. Smith, threats to coerce Ms. Smith into a guilty plea, and provided instruction to Ms. Smith specifically designed to hide those misrepresentations and threats from the Court, all in violation of ABA Standards, and basic Constitutional principles as adjudicated and described on numerous occasions by both the United States and Mississippi Supreme Court. In doing so, he provided ineffective assistance of counsel with both actual and presumed prejudice, and Ms. Smith's guilty plea should be overturned.

II. Ms. Smith's plea was rendered involuntary when she was misled and intimidated into making it.

A. Appropriate Legal Standard

It has long been accepted that a guilty plea may be subject to collateral attack where the defendant did not plead of their own volition. See *Boykin v. Alabama* 395 U.S. 238 (1969). Mississippi has hewed to this opinion in a longstanding line of jurisprudence. "...a plea of guilty is more than an admission of conduct; it is a conviction. Ignorance, incomprehension, coercion, terror, inducements, subtle or blatant threats might be a perfect cover-up of unconstitutionality." *Alexander v. State*, 226 So.2d 905 (Miss. 1969); *Taylor v. State*, 285 So.2d 172 (Miss. 1971); *Myers v. State*, 583 So.2d 184 (Miss. 1991); *Boyd v. State*, 797 So.2d 356 (Miss. App. 2001); *Barnes v. State*, 803 So.2d 1271 (Miss. App. 2002); *Richardson v. State*, 856 So.2d 758 (Miss. App. 2003).

A similar, though less extreme, case of an attorney misrepresenting the consequences of a plea to a defendant, was explored in *Sanders v. State*, 440 So.2d 278, 283 (Miss. 1983)(superseded by statute on other grounds concerning the statute of limitations on bringing a claim), where an attorney assured his client of receiving a specific minimum sentence. In that case the court declared:

"The question of whether a plea of guilty was a voluntary and knowing one necessarily involves issues of fact. Advice received by the defendant from his attorney and relied upon by him in tendering his plea is a major area of factual inquiry. *Chavez v. Wilson*, 417 F.2d 584, 586 (9th Cir.1969). For example, counsel's representation to the defendant that he will receive a specified minimal sentence may render a guilty plea involuntary. *Mosher v. Lavalley*, 491 F.2d 1346 (2d Cir.) cert. denied, 416 U.S. 906, 94 S.Ct. 1611, 40 L.Ed.2d 111 (1974).

The *Sanders* court goes on to explicitly describe the rule for circumstances matching those in the case at bar:

Where defense counsel lies to the defendant regarding the sentence he will receive, the plea may be subject to collateral attack. Where defense counsel advises the defendant to lie and tell the court that the guilty plea has not been induced by promises of leniency (when in fact it has), the plea may be attacked. The law is clear that where the defendant receives any such advice of counsel, and relies on it, the plea has not been knowingly and intelligently made and is thus subject to attack. *Burgin v. State*, 522 S.W.2d 159 (Mo.App.1975).

Sanders at 283-84

As a corollary rule, the Mississippi Supreme Court reverses convictions where a guilty plea is entered when the defendant is not made aware of mandatory minimum sentences. *Alexander v. State*, 605 So.2d 1170, 1172 (Miss. 1992); *See also Vittitoe v. State*, 556 So.2d 1062 (Miss 1990), *Washington v. State*, 620 So.2d 966.

B. Ms. Smith's Guilty Plea was made involuntarily under *Boykin*, *Sanders*, and *Alexander*.

In *Alexander*, the Defendant pled guilty to a charge of armed robbery, knowing that the recommended sentence would be 15 years, but having been told that he would be parole eligible after serving one-quarter of his sentence. He had not been told of the ten-year minimum sentence that he would have to serve. *Alexander* at 1171. In reversing the lower court's decision to dismiss Alexander's petition, the Mississippi Supreme Court cited *Vittitoe v. State*, where the defendant's guilty plea was thrown out on his post-conviction relief petition when he was able to show that he was not informed of the minimum sentence. *Vittitoe* 556 So.2d 1062, 1065 (Miss.1991)

Likewise, in the case at bar, the offenses that Ms. Smith was being asked to plead guilty to were sex crimes, which by law, must be carried out on a day-for-day basis with no reduction. The 'minimum' sentence is the actual sentence handed down by the judge with no chance of parole or amelioration through trusty or meritorious earned time. Ms. Smith was given a firm

representation from her attorney that this was not the case, and therefore went into the plea involuntarily.

While it is true that Ms. Smith took part in the colloquy with Judge Richardson, and recited that she was making the plea voluntarily, and understood that the crimes carried a day-for-day penalty, she did so at the instruction and under threats from her attorney that if answered in a way that differed from what he instructed her, the plea process would be upset, and she would go to prison for 30 years or more. (*PCR Ex. 6, see also PCR Ex. 4, 5*).

The Mississippi Supreme Court has already grappled with the question of what to do when a defendant goes through the plea colloquy, answering as their attorney presses them to, rather than honestly answering the colloquy questions, which would presumably stop the plea process.

In *Myers v. State*, 583 So.2d 174 (Miss. 1991), the defendant pled guilty to aggravated assault on assurances from his attorney that he would serve no more than twelve years, but that if he went to trial he would be sentenced to at least 23 years. The judge sentenced him to sixteen years. In reversing the lower Court's dismissal of Myers' post-conviction relief petition, the Court ruminated on why it was not only reasonable, but rational and normal that a defendant might be less than forthright with the judge at the plea colloquy:

“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.”

Myers 583 So.2d at 178, quoting *Sanders v. State*, 440 So.2d at 286.

The *Myers* and *Sanders* rulings, among a host of others passing on the voluntariness of a plea, illustrate the Mississippi Supreme Court's recognition that a defendant's answers to the plea colloquy are not indicative of the voluntariness of the plea, when that defendant is relying on the inducements and threats of their attorneys.

The *Myers* ruling noted also that the proper remedy for a defendant who is not honest with the Court at their plea hearing is prosecution for perjury, (*Myers* 583 So.2d at 178), rather than denying them fundamental constitutional rights by presuming that the colloquy with the Court had some curative effect over-and-above the effect of the inducements or intimidations made by defense counsel.

It is also noted in *Myers* that even if the defendant who pled guilty is successful in their petition for relief, it only means that the guilty plea is thrown out. The state can seek to prosecute, and seek sentences well in excess of what was given as a result of the tainted plea (*Myers* 583 So.2d at 178); in other words, the relief sought does not represent any windfall or stroke of mercy for the defendant. It simply places them back to the position which they occupied before the tainted plea.

In *Myers* and *Sanders*, the Defendant faced the two pronged dilemma of false representations of lowered sentences if they pled, and threats of certain disaster if they did not plea. In the case at bar, the Defendant faced a dilemma identical in form, but exponentially more catastrophic in severity: her attorney gave her and her family separately, firm representations that if she pled guilty to four counts of statutory rape – a serious sex crime – she would be parole eligible, and could get earned and trusty time, and that she would be out of prison in three years, but, that if she refused she would proceed to trial immediately that day, with no counsel, and would serve more than 30 years. Faced with the choice between 3 and 30 years, it is not difficult

to imagine why she might have felt compelled to answer the colloquy questions as her attorney instructed her, regardless of the veracity of her answer.

Ms. Smith was buffaloed into a plea by her attorney. His motives in doing so are unclear, but in the final analysis unimportant. In forcing his client into taking a guilty plea against her wishes through false representations of leniency, shouted threats of desertion and immediate trial without counsel, intimidation through threats of drastically long sentences, and controlling her testimony at the plea colloquy, her Fifth and Sixth Amendment rights, as well as her comparable rights under the Mississippi Constitution, were abrogated, and her guilty plea rendered involuntary and therefore unconstitutional. As in the cases cited *supra*, her plea should be thrown out for that reason.

III. Ms. Smith should have been afforded an evidentiary hearing on her Petition

The standard of review for a petition made under the Uniform Post Conviction Relief Act, such as the one at bar, is the same as for a Court considering a motion for summary judgment. *Harris v. State*, 578 So. 2d 617, 619 (Miss. 1991). The difference being that factual inferences are drawn in the favor of the petitioner, and the salient inquiry, assuming the materiality of the facts upon which the petition rests, is: *can the reviewing court be confident that at any evidentiary hearing the petitioner would be unable to prove their claim of ineffective assistance or involuntariness of plea?* If the question cannot be firmly answered in the affirmative, then the denial of the hearing is in error. *Neil v. State*, 525 So.2d 1279, 1281 (Miss. 1982). Evidentiary hearings, however, may be properly denied, however, where there is only the affidavit of the defendant, and it is contradicted by his in-court testimony. *Young v. State*, 731 So.2d 1120, 1122-23, (Miss. 1999).

In the case at bar, while the in-court testimony of Ms. Smith might appear to contradict her affidavit, it is supported by the affidavit of three independent eyewitnesses. Furthermore, there is no evidence to the contrary of these eyewitness accounts. In the civil context, the sworn affidavits of the eyewitnesses and petitioners would be more than ample evidence to overcome a motion for summary judgment, especially in a situation where there was no evidence to the contrary. The same rationale should apply here. The Rankin County Circuit Court should have afforded Ms. Smith an in-court opportunity to prove her claims.

CONCLUSION

WHEREFORE, for the foregoing reasons, this Court should reverse the decision of the lower Court, and find that Sheral Smith is entitled to post-conviction relief, and vacate her unconstitutionally obtained plea and conviction. In the alternative, this Court should, at a minimum, reverse the lower Court's decision to deny an in-court opportunity to Ms. Smith to prove her claims, and remand the case to the Circuit Court for additional proceedings.

Respectfully submitted this the 4th day of May, 2015.

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CERTIFICATE OF SERVICE

I, Bruce L. Barker, attorney for Appellant, do hereby certify that I have this day filed with the Court's electronic filing system, as well as mailed, via United States mail, postage prepaid, a true and correct copy of the foregoing copy of the BRIEF OF THE APPELLANT to:

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