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Criminal Procedure - Can a Defense Attorney's Promise Make a Guilty Plea Involuntary - Sanders v. State

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CRIMINAL PROCEDURE – Can a Defense Attorney's Promise Make a Guilty Plea Involuntary – *Sanders v. State*, 440 So. 2d 278 (Miss. 1983).

The Coahoma County Grand Jury indicted Sylvester Sanders on two charges of aggravated assault. The indictment stemmed from two shootings on January 8, 1981, in which Sanders shot and seriously wounded two men. Sanders initially entered a plea of not guilty, and the court appointed two attorneys to represent him.

Sanders and his two attorneys appeared before the Circuit Court of Coahoma County on August 11, 1981, where Sanders announced his wish to change his plea to guilty. A lengthy interrogation followed to determine that his plea was "knowingly, understandingly, freely, and voluntarily [being] made."[1] The circuit court judge carefully inquired of Sanders whether he understood the charge and possible sentencing, and Sanders indicated to the court that he did and that no promises had been made to him regarding sentencing.

Sanders was sentenced on August 12, 1981, to two consecutive seventeen year sentences. On May 12, 1982, Sanders applied for a writ of error coram nobis.[2] In his supporting affidavit,[3] Sanders alleged that he was induced to plead guilty by his attorneys' promise that he would receive two five-year sentences. He further alleged that his attorneys told him to lie when the judge asked if he had been promised anything if he pleaded guilty.

The circuit court, on June 22, 1982, denied Sanders' application without a hearing. On appeal, the Mississippi Supreme Court reversed and remanded the case for an evidentiary hearing.

BACKGROUND

As one author has said, "Plea bargaining is not only an invisible procedure but, in some jurisdictions, a theoretically unsanctioned one. In order to satisfy the court record, a defendant, his attorney, and the prosecutor will at the time of sentencing often

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1. Sanders v. State, 440 So. 2d 278, 281 (Miss. 1983).

2. MISS. CODE ANN. § 99-35-145 (1972) recognizes by statute the writ of error coram nobis and provides for a hearing on the petition after leave to file has been granted. The court treated the petition as a writ of habeas corpus under Rule 8.08 of the Mississippi Uniform Criminal Rules of Circuit Court Practice, which provides for post-conviction relief through petition.

3. "Petitioner states that his attorney persuaded him to enter a plea of guilty, to two (2) counts of aggravated assault by promising him that he would receive two (2) five (5) year sentences; rather than face the threat of two (2) forty year sentences, if he did not plead guilty." *Sanders*, 440 So. 2d at 283.

ritually state to a judge that no bargain has been made."[4] Even where the practice is sanctioned, judges often view it with suspicion. For many busy defense attorneys, persuading an indigent defendant to plead guilty allows the attorney to collect his fee with a minimum amount of effort. According to Percy Foreman:

> [T]he 'optimum situation' for an economically motivated lawyer would be to take one highly publicized case to trial each year and then to enter guilty pleas in all the rest. 'One never makes much money on the cases one tries,' Foreman explained, 'but they help to bring in the cases one can settle.'[5]

Since abuse of plea bargaining is inherent in the criminal justice system, criminal appeals often aim at withdrawing or vacating a previously rendered plea of guilty. Where there is evidence that the parties agreed on a plea bargain that was not kept, courts have generally allowed the prisoner to withdraw his guilty plea.[6] The theory underlying this willingness to allow withdrawal involves more than just a contractual approach of giving the prisoner "the benefit of his bargain"[7] but relies also on the idea that a guilty plea must be entered voluntarily.[8] As one court declared, "A guilty plea, if induced by promises or threats which deprive it of the character of a voluntary act, is void."[9]

Relief from conviction by overturning a guilty plea is not easily obtained. The prisoner bears a heavy burden in proving the existence of his reasonable belief in a plea bargain. He must prove: "1) exactly what the terms of the alleged promise were; 2) exactly when, where, and by whom such a promise was made; and 3) the precise identity of an eye witness to the promise."[10]

In many cases, however, there is neither an actual plea bargain nor reasonable evidence that would lead the defendant to believe a plea bargain existed.[11] He may be induced to plead guilty in

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4. S. KADISH & M. PAULSEN, CRIMINAL LAW AND ITS PROCESSES, 758 (3d ed. 1975).

5. Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 YALE L.J. 1179, 1182 (1975).

6. The cases may be divided into two areas: 1) where an actual plea bargain existed, but was not kept; and 2) where there was evidence, which the prisoner reasonably believed, to suggest a plea bargain. Cases under the first category include: Santobello v. New York, 404 U.S. 257 (1971) (guilty plea withdrawn); Underwood v. Blackburn, 563 F. Supp. 273 (M.D. La. 1983) (guilty plea withdrawn). Cases under the second category include: Marchibroda v. United States, 368 U.S. 487 (1962) (guilty plea withdrawn); Hayes v. Maggio, 699 F.2d 198 (5th Cir. 1983) (guilty plea withdrawn); United States v. Ammirato, 670 F.2d 552 (5th Cir. 1982) (relief denied) (the transcript showed clearly that there was no plea bargain); Chavez v. Wilson, 417 F.2d 584 (9th Cir. 1969) (guilty plea withdrawn).

7. Santobello v. New York, 404 U.S. 257 (1971).

8. Boykin v. Alabama, 395 U.S. 238 (1969), held that, because the defendant gives up important constitutional rights by pleading guilty, his plea must be voluntary.

9. *Marchibroda*, 368 U.S. at 493.

10. Hayes v. Maggio, 699 F.2d 198, 203 (5th Cir. 1983) (quoting Blackledge v. Allisson, 431 U.S. 63, 76 (1977)).

11. *See, e.g.*, Mabry v. Johnson, 104 S. Ct. 2543 (1984); Allen v. State, 465 So. 2d 1088 (Miss. 1985).

a variety of other contexts, some of which may render his plea involuntary. The Supreme Court articulated a standard to determine whether a plea was voluntary that "suggests that only a broken promise, a factual misrepresentation, a threat to do something illegal if the defendant refuses to plead guilty, or a promise to discontinue an illegal action if he does plead guilty can make a resulting guilty plea involuntary." [12] An unkept plea bargain clearly falls into the category of a broken promise. Increasingly, prisoners have called upon the courts to determine what other actions of their attorneys will render a guilty plea involuntary.

In light of the holding in *Boykin v. Alabama*,[13] that voluntariness is an essential element of a guilty plea, courts have become increasingly careful to observe strict procedures for accepting such pleas. The American Bar Association has drafted standards for accepting a guilty plea[14] that were designed so that "a defendant will be hard put to demonstrate, by the requisite clear and convincing evidence, that withdrawal is necessary to correct a manifest injustice if the court to which he pleaded scrupulously followed the standards governing the manner in which a plea should be examined prior to acceptance." [15] Nevertheless, many courts do not follow these standards, and even in the courts that do follow them, guilty pleas are often later attacked for a variety of reasons.

Among these reasons are: a temporary mental disturbance of the defendant; the inability of the defense attorney to render effective counsel; and a promise made by the defense attorney regarding sentencing. Courts have made short shrift of claims of temporary mental disturbances resulting from poor physical condition[16] or fear,[17] holding that post-conviction relief should not be granted in such cases. The other two areas (effectiveness of counsel and promises by counsel) have been more difficult to resolve.

In 1970, the Supreme Court decided a trio of cases that "shifted the central issue in guilty plea litigation from voluntariness to the effective assistance of counsel." [18] The cases, *Brady v. United States*,[19] *McMann v. Richardson*,[20] and *Parker v. North Carolina*[21]

12. Alschuler, *The Supreme Court, The Defense Attorney, and The Guilty Plea*, 47 COLO. L. REV. 1, 59 (quoting from Brady v. United States, 397 U.S. 742 (1970)).

13. 395 U.S. at 238.

14. STANDARDS RELATING TO PLEAS OF GUILTY (1968).

15. Uviller, *Pleading Guilty: A Critique of Four Models*, 41 LAW & CONTEMP. PROBS. 102, 128 (1977).

16. Moya v. Estelle, 696 F.2d 329 (5th Cir. 1983).

17. North Carolina v. Alford, 400 U.S. 25 (1970).

18. Alschuler, *supra* note 12, at 1180.

19. 397 U.S. 742 (1970).

20. 397 U.S. 759 (1970).

21. 397 U.S. 790 (1970).

have become known as the "*Brady* trilogy."[22] These cases all involved prisoners who alleged that their attorneys made a mistake of law in advising them to plead guilty. In *Brady*,[23] the prisoner alleged that his plea was made to avoid the death sentence then imposed on kidnappers who did not release their victims unharmed. Since a later case invalidated the death penalty for such offenses, the prisoner claimed that his attorney erred in not anticipating the change in law. In *McMann*[24] and *Parker*,[25] the prisoners alleged that their attorneys erred in misjudging the admissibility of coerced confessions. In all three cases, the court refused to grant relief, holding that effectiveness of counsel was not an issue upon which a guilty plea may be withdrawn.

The general rule of the *Brady* trilogy has been modified in recent cases in state courts where the attorney's mistake of law has gone to the conditions of the defendant's sentence. In *State v. Galliano*,[26] the defendant was allowed to withdraw his guilty plea after his attorney, the trial judge, and the prosecutor told him he would be ordered to undergo a psychiatric exam and given a suspended sentence. In fact, a three-year sentence was mandatory. In *People v. Owsley*,[27] the defense attorney misrepresented parole conditions to the defendant. And, finally, in *Hill v. State*,[28] the Mississippi Supreme Court allowed an evidentiary hearing to determine whether a guilty plea should be vacated after the trial court erred in informing the defendant of the number of years he would have to serve. Thus, where the prisoner maintains that his attorney's ineffectiveness induced his guilty plea, he must show a material misrepresentation regarding sentencing in order to get post-conviction relief. In contrast, where the claim is based solely on inexperience or lack of knowledge of the attorney, the plea will stand.[29]

Cases involving a guilty plea given in reliance on a promise from the defense attorney are, in terms of precedent, the most confusing. These cases typically concern a statement by the attorney to the effect that, by pleading guilty, the defendant will reduce his possible sentence. Where this statement merely reflects an erroneous estimate on the part of the attorney or a mistaken im-

22. Alschuler, *supra* note 12, at 1180.

23. 397 U.S. 742 (1970).

24. 397 U.S. 759 (1970).

25. 397 U.S. 790 (1970).

26. 396 So. 2d 1288 (La. 1981).

27. 66 Ill. App. 3d 234, 383 N.E.2d 271 (1978).

28. 388 So. 2d 143 (Miss. 1980).

29. In United States v. Cariola, 323 F.2d 180 (3d Cir. 1963), the defendant pleaded guilty to a "technical violation" of the Mann Act on the advice of his lawyer, and was not allowed to later withdraw it.

pression that the judge has promised a lighter sentence, the plea will not be set aside as involuntary.[30] However, where the attorney promises a specific sentence and leads the defendant to believe that he is assured of receiving it, he opens the guilty plea up to an attack based on voluntariness.

After the *Boykin* decision, the standard for voluntariness was that the transcript clearly reflect it.[31] However, in many instances there is not an adequate record of the pre-sentencing hearings. Furthermore, even when there are extensive records, a prisoner may allege that he lied to the trial judge regarding the voluntariness of his plea, so that the record is not adequate. These two situations present significant problems in ruling on a previously given plea of guilty, and will be dealt with separately.

The Mississippi Supreme Court, in *Sanders*, relied heavily on the case of *Blackledge v. Allison*,[32] to support its proposition that collateral attacks on guilty pleas should be allowed.[33] The prisoner in *Blackledge* had petitioned for a writ of habeas corpus on the grounds that his attorney told him, presumably after consulting with the trial judge and the prosecutor, that he would get a ten-year sentence for attempted bank robbery. His attorney also allegedly told him to lie to the court when he was asked whether any promises were made, in order that the court would accept his plea. At the hearing where the prisoner entered his plea, the judge read thirteen questions from a printed form,[34] which the prisoner then signed. The form indicated that no promise had induced him to plead guilty. The record did not show whether any other questioning of the prisoner or his attorneys took place, nor was there a record of the arraignment proceeding or the sentencing hearing. The trial judge sentenced the prisoner to seventeen

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30. Mosher v. Lavallee, 491 F.2d 1346 (2nd Cir. 1974), *cert. denied*, 416 U.S. 906 (1974).

31. 395 U.S. at 238.

32. 431 U.S. 63 (1977).

33. 440 So. 2d at 285.

34. The pertinent questions were:

8. Do you understand that upon your plea of guilty you could be imprisoned for as much as a minimum of 10 years to life?

Answer: Yes.

10. Have you had time to talk and confer with and have you conferred with your lawyer about this case, and are you satisfied with his services?

Answer: Yes.

11. Has the Solicitor, or your lawyer, or any policeman, law officer, or anyone else made any threat to you to influence you to plead guilty in this case?

Answer: No.

12. Do you now freely, understandingly, and voluntarily authorize and instruct your lawyer to enter on your behalf a plea of guilty?

Answer: Yes.

Blackledge, 431 U.S. at 66, n.1.

to twenty-one years. In affirming the court of appeals' order for an evidentiary hearing, the Supreme Court stated that:

> [T]he federal courts cannot fairly adopt a per se rule excluding all possibility that a defendant's representations at the time his guilty plea was accepted were so much the product of such factors as misunderstanding, duress, or misrepresentation by others as to make the guilty plea a constitutionally inadequate basis for imprisonment.[35]

The Court in *Blackledge* considered two factors in determining whether the prisoner had raised "contentions that in the face of the record are wholly incredible."[36] First, the prisoner submitted a petition which "indicated exactly what the terms of the promise were; when, where, and by whom the promise had been made; and the identity of one witness to its communication."[37] Second, in the absence of adequate records of the proceedings, the prisoner could reasonably have believed that the plea bargain was a part of the process which must remain concealed. Therefore, this case held that where the prisoner makes a plausible claim in his petition that is not refuted by the record, an evidentiary hearing must be held to determine whether the guilty plea was entered voluntarily.

Similarly, in the case of *Williams v. Estelle*,[38] the Fifth Circuit held that a prisoner's claim of a promise of a light sentence and early parole was not without merit. The prisoner alleged that the court did not warn him that his sentence could be greater. "In view of the absence of a transcript of the hearing at which Williams' guilty plea was accepted, and the confused nature of the subsequent state habeas corpus proceedings, we conclude that Williams' claims . . . should not have been dismissed by the district court."[39]

In order to determine that guilty pleas are given voluntarily, trial courts have developed exhaustive questioning of defendants who plead guilty. However, even a complete and accurate trial record that indicates understanding and voluntariness may be attacked. Where the prisoner claims that he made false statements to the trial judge regarding his voluntariness, he bears the burden of coming forward with evidence to support his claim. In one case, where the prisoner's attorney testified that no promise had been made, and the prisoner produced a witness who testified that there had been a promise, relief was denied.[40] The court held that "[w]here, from the transcript, the plea-taking proceedings are clear

35. *Id.* at 75.
36. *Id.* at 74.
37. *Id.* at 76.
38. 681 F.2d 946 (5th Cir. 1982).
39. *Id.* at 948.
40. Barnes v. United States, 579 F.2d 364 (5th Cir. 1978).

and regular on their face, a petitioner asserting the existence of a bargain outside the record and contrary to his own statements under oath bears a heavy burden."[41] In another case, where the defense attorney and several witnesses testified that a promise had been made, the courts granted relief.[42] The court there held that "[i]f the defendant's belief that he will receive leniency is induced by an erroneous sentence estimate made by defense counsel, his plea is not involuntary and will not be set aside."[43]

The Mississippi Supreme Court, in *Sanders*, also relied on the Missouri case of *Burgin v. State*[44] to support its granting of the evidentiary hearing.[45] However, Missouri courts provide an example which is contrary to the holding of *Sanders*, showing how the process for accepting a guilty plea may evolve as the result of post-conviction attacks on voluntariness. In *Burgin*, the court granted an evidentiary hearing on a motion to vacate a sentence imposed after a guilty plea. The prisoner alleged that his attorney had promised him a shorter sentence than the one actually imposed and told him to lie to the trial judge when asked if any promises had been made. The court held that the lie destroyed the purpose of the judge's inquiry, in that:

> The question by the trial judge relating to a 'promise' is intended to determine that the plea is not 'involuntary' in the sense that a 'promise' by anyone other than the judge is not binding on the court and that the defendant is not misled by a 'promise' of a certain sentence not within the power of the promissor to perform.[46]

This case supports the opinion of *Sanders* that a collateral attack on a guilty plea can be made by any prisoner who alleges that he was promised a light sentence and lied to the trial judge. The crux of the decision is that a guilty plea made upon the promise of a defense attorney is not voluntary, in that the promise itself is illusory. At the time he enters his guilty plea, the defendant generally has no way of knowing that his attorney's promise cannot be enforced, and it is this lack of understanding which makes his plea involuntary.

However, the holding of *Burgin* was limited in the subsequent Missouri case of *Mainord v. State*.[47] There, the judge specifically told the defendant that any deals previously made were no longer

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41. *Id.* at 366.

42. Mosher v. Lavallee, 351 F. Supp. 1101 (S.D.N.Y. 1971), *aff'd*, 491 F.2d 1346 (2nd Cir.1974), *cert. denied*, 416 U.S. 906 (1974).

43. 351 F. Supp. at 1108.

44. 522 S.W.2d 159 (Mo. App. 1975).

45. 440 So. 2d at 286.

46. *Burgin v. State*, 522 S.W.2d at 160.

47. 541 S.W.2d 779 (Mo. Ct. App. 1976).

effective. After receiving concurrent sentences of eight and five years, the prisoner moved to vacate the sentence on the grounds that his attorney told him he would receive a five-year sentence. The court distinguished *Burgin* on the grounds that this language "suggests that the trial judge did not clearly inform the defendant that any promises made were not binding on the trial court."[48]

In successive cases, the Missouri courts further refined the procedure for examining post-conviction attacks on guilty pleas. In *Beaver v. State*,[49] the prisoner alleged that his attorney promised him concurrent sentences when, in fact, he received consecutive sentences. The court denied relief, pointing to the fact that his allegation was refuted by the showing in the record that the court made it clear that the choice of sentences rested with the court. Likewise, in *Dickerson v. State*,[50] the prisoner alleged that his attorney told him that he would receive the recommended sentence, which was significantly lower than the sentence imposed. However, the court made it clear to the prisoner that the recommended sentence was not binding, so relief was denied. Finally, in *Roebuck v. State*,[51] the prisoner moved to vacate his sentence on the ground that he lied when asked if he had been promised probation. The court denied the motion, holding that the allegations "were clearly refuted by the record."[52] Examining the record of the guilty plea, the court held:

> The question of promises of any kind, particularly of probation were exhaustively covered by the trial court. It confronted movant with the question of whether he had been advised to lie to the court. It made a painstaking effort to insure movant's plea was voluntarily and knowingly entered. It gave movant an opportunity to change his mind about his indicated desire to plead guilty.[53]

Given the precedent set by the aforementioned cases, the state of the law regarding post-conviction attacks on guilty pleas may be summarized as follows:

1) *Boykin* requires that a guilty plea be given voluntarily and that voluntariness must be indicated by the transcript.[54]
2) An actual plea bargain that is not kept will render a guilty plea involuntary.[55]

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48. *Id.* at 781.
49. 522 S.W.2d 36 (Mo. Ct. App. 1977).
50. 594 S.W.2d 293 (Mo. Ct. App. 1979).
51. 607 S.W.2d 872 (Mo. Ct. App. 1980).
52. *Id.* at 873.
53. *Id.*
54. *Boykin*, 395 U.S. at 238-44.
55. *Santobello*, 404 U.S. at 257.

3) A reasonable belief that an actual plea bargain was made will render a guilty plea involuntary.[56]
4) Mental disturbances of the defendant[57] or the defense attorney's mistake of law[58] will not render a guilty plea involuntary, although a material error regarding sentencing will.[59]
5) Where the record is silent as to the possibility of a plea bargain, one may be imputed by the courts.[60]
6) Where the record clearly shows an exhaustive examination of the defendant which disclaims any previous bargains, at least one state court has held that the guilty plea is voluntary.[61]

INSTANT CASE

The Mississippi Supreme Court relied primarily on *Blackledge v. Allison* in holding that Sanders' allegations entitled him to an evidentiary hearing. As the court interpreted *Blackledge* and its progeny,[62] Sanders' allegations mandated an evidentiary hearing to determine the voluntariness of his plea, if those allegations did not contradict the record. Since Sanders alleged that he lied to the trial court, his affidavit was not contrary to the record. Thus, the court held that when a prisoner maintains that his attorney convinced him to plead guilty on the unkept promise of a lesser sentence, and the prisoner lies during the plea hearing, then he may later attack the guilty plea on the grounds of involuntariness.

The allegations of *Sanders* presented a case of first impression for the Mississippi Supreme Court. However, in deciding the issue of whether an evidentiary hearing was required in this case, the court reviewed several prior Mississippi decisions. Notable among these decisions were *Thornhill v. State*,[63] *Kennard v. State*,[64] *Dunn v. Reed*,[65] *Baker v. State*,[66] and *Phillips v. State*.[67]

In *Thornhill*,[68] the court granted a writ of error coram nobis

56. *Marchibroda*, 368 U.S. at 487.
57. *Alford*, 400 U.S. at 25.
58. *Brady*, 397 U.S. at 742.
59. *Hill*, 388 So. 2d at 143.
60. *Blackledge*, 431 U.S. at 63.
61. *Roebuck*, 607 S.W.2d at 872.
62. The court cited Blackledge v. Allison, 431 U.S. 63 (1977), for the proposition that a per se rule disallowing collateral attack on a guilty plea was improper. The line of cases used to support this reasoning included: Moser v. Lavallee, 491 F.2d 1346 (2d Cir. 1974), *cert. denied*, 416 U.S. 906 (1974); Chavez v. Wilson, 417 F.2d 584 (9th Cir. 1974); People v. Owsley, 66 Ill. App. 3d 234, 383 N.E.2d 271 (1978); State v. Galliano, 396 So. 2d 1288 (La. 1981); Baker v. State, 358 So. 2d 401 (Miss. 1978); Burgin v. State, 522 S.W.2d 159 (Mo. Ct. App. 1975).
63. 246 Miss. 312, 149 So. 2d 27 (1963).
64. 246 Miss. 209, 148 So. 2d 660 (1963).
65. 309 So. 2d 516 (Miss. 1975).
66. 358 So. 2d 401 (Miss. 1978).
67. 421 So. 2d 476 (Miss. 1982).
68. 246 Miss. at 312, 149 So. 2d at 27.

to review a plea of guilty to homicide. The trial record in that case clearly showed evidence of inadequate counsel, in that the trial judge made a promise of leniency. *Kennard* also involved the granting of a writ of error coram nobis where the averred facts were not in the record.[69] The case gave a standard for a petition for a writ of error coram nobis, holding that it should be sustained only where "the newly discovered evidence is of such a nature that it would be practically conclusive that it would cause a different result . . . . [I]t will not be sustained if the newly discovered evidence merely tends to impeach other testimony offered at the trial . . . ."[70] In *Dunn,* the prisoner alleged that he pleaded guilty to manslaughter and arson because he was told he would receive the death penalty, he was suffering from a mental disorder, and he misunderstood the parole procedure. Although the writ was denied on jurisdictional grounds, the court held that the allegations, if true, would require issuance.[71] These three cases may be analogized to cases cited earlier in this article regarding unkept plea bargains and material errors regarding sentencing.[72]

In *Baker,* the prisoners asked the court to vacate their guilty pleas on the grounds that duress and the threat of facing capital punishment made their pleas involuntary.[73] The trial judge had questioned the prisoners as to whether their pleas were voluntary, and they had answered in the affirmative. The supreme court recognized that *Blackledge* held that a collateral attack on a plea of guilty could not be denied just because the transcript "reflects recitation of voluntariness and awareness of the consequence."[74] However, the court also recognized the heavy burden that the prisoner has of proving the reasonable probability of his allegations. Where the court must choose between sworn statements made in court and a petition, "the petition fails to rise to the level of a reasonable probability ...."[75] *Baker* is also important because it sets out the requirements for a petition for a writ of error coram nobis, which are:

1) Specifically and separately enumerate those facts within the personal knowledge of the petitioner.
2) Those facts must be sworn to on personal knowledge by the petitioner.

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69. 246 Miss. at 209, 148 So. 2d at 660.
70. *Id.* at 212, 148 So. 2d at 661.
71. 309 So. 2d at 516.
72. *Santobello,* 404 U.S. at 257.
73. 358 So. 2d at 401.
74. *Id.* at 403.
75. *Id.*

3) For any facts alleged not within the personal knowledge of the petitioner, the petition must state how or by whom these facts will be proven and include the affidavit of the witness who will so testify.
4) Finally, the above (affidavits of other persons) may be excused upon good cause shown, however, the petition must set out in detail for consideration by the court the alleged 'good cause.'[76]

These requirements indicate that any allegations of the petition that contradict the record may require corroborating testimony.

The prisoner requesting review of his guilty plea in *Phillips* has been sentenced under the habitual offender statute due to a guilty plea previously made in Kentucky.[77] He challenged the sentence on the ground that his previous plea was involuntary. The court denied his petition, saying:

> Although no longer may it be presumed from a silent record that a determination of the voluntariness of the guilty plea was made, from an affirmative showing of such on the face of the conviction, it must be presumed for the purpose of sentencing under the habitual offender statute that such guilty plea was constitutionally sufficient.[78]

Thus, the state of the law in Mississippi regarding the withdrawal of a guilty plea before *Sanders* can be summarized as follows:

1) A plea was considered involuntary if induced by an unkept plea bargain[79] or a material mistake regarding sentencing.[80]
2) A petition for a writ of error coram nobis should include corroborating testimony to overcome the presumption of accuracy of the record.[81]
3) Where the record of the conviction makes an affirmative showing of voluntariness, the court will presume that the plea was constitutionally sufficient.[82]

Sanders represents a complete break in Mississippi law regarding the withdrawal of guilty pleas through the use of a writ of error coram nobis. Furthermore, the court in *Sanders* chose to apply a Missouri precedent which has been explicitly distinguished in a factual situation similar to *Sanders*. At issue is whether the court intended to change the law regarding the withdrawal of guilty pleas in Mississippi, or whether the case indicates a return to the days when guilty pleas were generally distrusted by the courts.

76. *Id.* at 404.
77. 421 So. 2d 476 (Miss. 1982).
78. *Id.* at 483.
79. Thornhill v. State, 246 Miss. 312, 149 So. 2d 27 (1963).
80. Dunn v. Reed, 309 So. 2d 516 (Miss. 1975).
81. Baker v. State, 358 So. 2d 401 (Miss. 1978).
82. Phillips v. State, 421 So. 2d 476 (Miss. 1982).

RATIONALE OF COURT

The record in *Sanders* shows that the trial judge made a lengthy and exhaustive examination of the defendant. He repeatedly asked the defendant whether anyone had promised him any particular sentence, that the court was not bound by any other agreements, and gave the defendant an opportunity to change his plea. Sanders affirmed that his plea was entered voluntarily and without any promise from his attorneys. There is no evidence from the record to indicate that Sanders believed that a plea bargain existed that required him to maintain his silence. Furthermore, there is no indication that Sanders offered testimony from any third parties that he was promised a lighter sentence. Allowing Sanders the opportunity to offer evidence at a hearing which would contradict the record is contrary to the holding of *Baker* that a petition for a writ of error coram nobis must contain affidavits from third parties that they will offer such evidence or must show good cause why such evidence cannot be presented.[83] Sanders did not overcome, in his petition, the presumption of accuracy of the record.

Assuming, then, that the record is accurate, it reflects a full understanding and awareness of the consequences of the guilty plea. The court held that Sanders' allegations lie outside the record, and, therefore, do not contradict it. In reaching that conclusion, the court applied both *Blackledge* and *Burgin.* However, both of those cases dealt with records which were inadequate. In *Blackledge,* no transcript of the hearing was available,[84] and in *Burgin,* the record indicated that the judge had given the defendant inadequate information.[85] By comparison, the transcript of the sentencing hearing of Sanders showed clearly that he was made fully aware of all of the ramifications of his guilty plea. Furthermore, and unlike Burgin, Sanders was told that the choice of sentences rested with the court and that no promises outside the court were enforceable. In light of the record in this case, the defendant did not overcome the presumption that his guilty plea, as reflected by the record, was made knowingly, understandingly, and voluntarily.

Furthermore, in its instructions to the circuit court on the subject of the evidentiary hearing, the supreme court admonished the court to consider "all evidence tending to reveal the state of mind of Sylvester Sanders *at the time each plea was actually tendered."*[86]

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83. Baker v. State, 358 So. 2d 401 (Miss. 1978).
84. Blackledege v. Allison, 431 U.S. 63 (1977).
85. Burgin v. State, 522 S.W.2d 159 (Mo. Ct. App. 1975).
86. *Sanders,* 440 So. 2d at 288.

This evidence was to include Sanders' general level of sophistication and ability to understand the consequences of his plea, the counsel he received from his attorneys, and the interrogation of the court.[87] The opinion went further to state that "[t]he thoroughness with which Sanders was interrogated by the circuit court at the time the plea was tendered may well be the most important evidence of all."[88] Recognizing that the determination of the voluntariness of the plea necessarily involved a determination of the state of mind of the defendant, the court left to the discretion of the circuit court judge the evaluation and balancing of the relevant factors.[89] Thus, the circuit court judge will have discretion at the evidentiary hearing to consider the same evidence that was available to him at the sentencing hearing; *i.e.*, the responses to the interrogation to determine voluntariness of the guilty plea.

This case seems to indicate a reluctance on the part of the Mississippi Supreme Court to accept assertions made by the defendant at the sentencing hearing, although those same assertions may be determinative at the evidentiary hearing. The reluctance may stem from a distaste of the plea bargaining system, as it exists today in an atmosphere of secrecy and silence, rather than an open forum in which bargains are struck between the defendant and the judge who will ultimately sentence him. Justice Robertson indicated as much in his opinion when he observed that "[a]ny 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 . . . . Yet it is the defendant, not the lawyer, who enters the plea . . . [and] . . . who is going to serve the time."[90] In a perfect system, where the defendant and the judge bargained for the sentence to be imposed in open court, the specter of unkept promises would be laid to rest.

CONCLUSION

This case represents an important trend in criminal law in that it is a liberal interpretation of the principles, articulated in *Blackledge*, for withdrawing a guilty plea. The holding in *Sanders* allows any prisoner who has pleaded guilty to later claim that he was promised a lighter sentence and was told to lie to the trial judge. No procedure for interrogation can prevent this type of

87. *Id.*
88. *Id.*
89. *Id.*
90. *Id.* at 286.

attack on a guilty plea, since the defendant's state of mind cannot be made part of the record. *Sanders* allows the subsequent allegations of the prisoner to refute the record as to voluntariness of his guilty plea. The effect of this case will be to make state judges even more reluctant to accept a plea of guilty.

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