Serial: 207623

IN THE SUPREME COURT OF MISSISSIPPI

No. 2013-CT-00547-SCT

MILTON TROTTER ***Appellant***

v.

STATE OF MISSISSIPPI ***Appellee***

EN BANC ORDER

Four of the justices of this Court are of the opinion that the judgment of the Court of Appeals should be affirmed, and four are of the opinion that it should be reversed; consequently, that judgment must be, and is, affirmed. This principle has been part of our jurisprudence in excess of seven decades. *See* ***Rockett Steel Works v. McIntyre***, 15 So. 2d 624 (Miss. 1943) ("Three of the judges of this Court are of the opinion that the judgment of the court below should be affirmed, and three of the opinion that it should be reversed; consequently, that judgment must be, and is affirmed."). This result was first dictated by Chief Justice Marshall for the United States Supreme Court, as follows:

> No attempt will be made to analyze [the parties' arguments and cited cases], or to decide on their application to the case before us, because the Judges are divided respecting it. Consequently, the principles of law which have been argued cannot be settled; but the judgment is affirmed, the court being divided in opinion upon it.

Etting v. Bank of United States, 24 U.S. 59, 78, 6 L. Ed. 419 (1826) (emphasis added).

Four decades later, Justice Field addressed the effect of affirmance by a divided court:

> There is nothing in the fact that the judges of this court were divided in opinion upon the question whether the decree should be reversed or not, and, therefore, ordered an affirmance of the decree of the court below. The judgment of affirmance was the judgment of the entire court. The division of opinion between the judges was the reason for the entry of that judgment; *but the reason is no part of the judgment itself.*

Durant v. Essex Co., 74 U.S. 107, 110, 19 L. Ed. 154 (1868)(emphasis added). *See also* ***Hertz v. Woodman***, 218 U.S. 205, 213-14, 30 S. Ct. 621, 622-23, 54 L. Ed. 1001 (1910) ("[A]n affirmance by an equally divided court is . . . a conclusive determination and adjudication of the matter adjudged; but the principles of law involved not having been agreed upon by a majority of the court sitting prevents the case from becoming an authority for the determination of other cases, either in this or in inferior courts.").

Now, 190 years after Chief Justice Marshall wrote, the U.S. Supreme Court continues to reaffirm this principle. *See* ***Dollar Gen. Corp. v. Miss. Band of Choctaw Indians***, 136 S. Ct. 2159, 195 L. Ed. 2d 637 (2016) ("The judgment is affirmed by an equally divided Court."); *accord* ***United States v. Texas***, 136 S. Ct. 2271, 195 L. Ed. 2d 638 (2016).

We followed this same principle in ***Beecham v. State***, 108 So. 3d 394 (Miss. 2012), holding that "as the judgment of the Court of Appeals has not been decided to be erroneous by a majority of the justices sitting in this case, we affirm, *without opinion*, the judgment of the Court of Appeals." ***Id.*** at 394 (emphasis added).

Accordingly, as the judgment of the Court of Appeals has not been decided to be erroneous by a majority of the justices sitting in this case, we affirm, without opinion, the judgment of the Court of Appeals.[1] The costs on appeal are assessed to Lauderdale County.

SO ORDERED, this the 13th day of September, 2016.

/s/ Michael K. Randolph

MICHAEL K. RANDOLPH, PRESIDING JUSTICE

TO AFFIRM: WALLER, C.J., RANDOLPH, P.J., LAMAR AND BEAM, JJ.

KITCHENS, J., OBJECTS TO THE ORDER WITH SEPARATE WRITTEN STATEMENT JOINED BY DICKINSON, P.J., KING AND COLEMAN, JJ.

NOT PARTICIPATING: MAXWELL, J.

[1] While this Court remains silent on the case *sub judice* and stands on the Order entered which affirms the Court of Appeals, today's objection erroneously posits today's Order "divine[s] that this case 'must be . . . affirmed' in the absence of any analysis of the important legal issues presented." It is the division of this Court that necessitates the entry of today's Order, for it is the division of this Court that mandates affirmance without opinion or analysis of the parties' arguments and cited cases.

IN THE SUPREME COURT OF MISSISSIPPI

No. 2013-CT-00547-SCT

MILTON TROTTER

v.

STATE OF MISSISSIPPI

KITCHENS, JUSTICE, OBJECTING TO THE ORDER WITH SEPARATE WRITTEN STATEMENT:

¶1. Milton Trotter was sentenced to two life sentences involving one incident in 1981: first, by the United States District Court for the Southern District of Mississippi for kidnaping; second, by the Circuit Court of Lauderdale County for murder. In 1981, the Circuit Court of Lauderdale County had ordered, based on Trotter's plea agreement with the State, that his state sentence would run concurrently with the federal sentence and that Trotter would be "allowed to serve said sentence in the federal penitentiary." In 2011, when Trotter had served thirty years on the federal kidnaping sentence, he was paroled from federal custody. The Mississippi Parole Board denied his parole on the murder sentence, and Trotter was moved from federal prison to the Mississippi State Penitentiary at Parchman.

¶2. In this, the second of Trotter's requests for post-conviction relief, he claims that his guilty plea was not voluntary. The Circuit Court of Lauderdale County applied the successive-writ bar and summarily dismissed Trotter's petition for post-conviction relief. The

Mississippi Court of Appeals found that Trotter's petition was not successive and affirmed the trial court judgment because Trotter had presented no evidence that the State had promised him parole if ever he were granted parole on his federal sentence. ***Trotter v. State*** (***Trotter II***), 2014 WL 5584055, at *3 (Miss. Ct. App. Nov. 4, 2014).

¶3. We granted Trotter's petition for writ of *certiorari* because the plea agreement, ratified by the trial court, may have led him to believe that his concurrent federal and state life sentences were to be served in a federal penitentiary. Despite the Court's having divined that this case "must be . . . affirmed" in the absence of any analysis of the important legal issues presented,[2] I proceed to address, first, whether Trotter's claims are subject to a procedural bar and, second, whether Trotter is entitled to a hearing on the question of whether his guilty plea was entered voluntarily.

1. Whether Trotter's claims are subject to a procedural bar.

¶4. The Circuit Court of Lauderdale County and the Court of Appeals came to different conclusions regarding the application of the procedural bar. The circuit court found that Trotter's claims were time barred, but that "parole-eligibility claims have been recognized

[2] The Court affirms this case without opinion because the vote of the Court is divided equally. Apart from non-binding cases from the United States Supreme Court, it cites "seven decades" of this Court's jurisprudence to support its position. *See* ***Rockett Steel Works v. McIntyre***, 15 So. 2d 624 (Miss. 1943); ***Beecham v. State***, 108 So. 3d 394 (Miss. 2012). But this Court often has rejected such principle. *See* ***In re Miss. Medicaid Pharm. Average Wholesale Price Litig.,*** 190 So. 3d 829 (Miss. 2015) (Randolph, P.J., specially concurring); ***Cowart v. State***, 178 So. 3d 651 (Miss. 2015) (Randolph, P.J., specially concurring); ***Hentz v. State***, 152 So. 3d 1139 (Miss. 2014) (Randolph, P.J., specially concurring). Further, this Court has stated that "[w]e do not, by affirming without opinion in this particular case, establish a precedent that all cases in this procedural position will be affirmed without opinion." ***Meadowbrook Health and Rehab, LLC v. Queen City Nursing Ctr, Inc.***, 2013-CA-00171-SCT (Miss. Jul. 14, 2014).

as original actions that can be brought in circuit court outside the three-year time limit." (citing ***Ducksworth v. State***, 103 So. 3d 762, 764 (Miss. Ct. App. 2012)). The circuit court, however, ruled that Trotter's petition was barred as a successive writ: "The Petitioner's present motion for post-conviction relief is his second such motion, and the Petitioner has failed to demonstrate any applicable exception to Miss. Code Ann. § 99-39-23(6)."

¶5. The Court of Appeals found that Trotter was "not challenging the denial of parole eligibility," but rather that he was arguing that he was being held unlawfully because his 1981 guilty plea allegedly had been entered with the understanding that he would be paroled on his state charges at the time he received federal parole. ***Trotter II***, 2014 WL 5584055, at *2. The Court of Appeals held that "section 99-39-5(1)(h) does except untimely PCR challenges when the petitioner is 'unlawfully held in custody'" and that "[b]ecause this is essentially what Trotter argues, we find his challenge—that based on his plea agreement, he is being wrongly held in custody—is not untimely or successive." ***Id.*** at *2.

¶6. Section 99-39-5(1)(h) of the Mississippi Uniform Post-Conviction Collateral Relief Act (UPCCRA) provides, in pertinent part, that:

> (1) Any person sentenced by a court of record of the State of Mississippi, including a person currently incarcerated . . . may file a motion to vacate, set aside or correct the judgment or sentence . . . or a motion for an out-of-time appeal if the person claims:
>
> . . .
>
> (h) That his sentence has expired; his probation, parole or conditional release unlawfully revoked; or he is otherwise unlawfully held in custody;
>
> . . .

Miss. Code Ann. § 99-39-5(1)(h) (Rev. 2015). Section 99-39-5(2) provides, in pertinent part, that "[a] motion for relief *under this article* shall be made . . . in case of a guilty plea, within three (3) years after entry of the judgment of conviction." Miss. Code Ann. § 99-39-5(2) (Rev. 2015). Thus, the Court of Appeals erroneously found that Section 99-39-5(1)(h) applied, because that section remains subject to the three-year time bar of Section 99-39-5(2), and Trotter never filed a "motion for an out-of-time appeal." Furthermore, Section 99-39-5(1)(h) is not applicable to the successive-writ bar of Mississippi Code Section 99-39-23(6), upon which the circuit court dismissed Trotter's second petition for post-conviction relief.

¶7. The legislature excepts from the three-year statute of limitations "those cases in which the petitioner can demonstrate either":

> (a)(i) That there has been an intervening decision of the Supreme Court of either the State of Mississippi or the United States which would have actually adversely affected the outcome of his conviction or sentence or that he has evidence, not reasonably discoverable at the time of trial, which is of such nature that it would be practically conclusive that had such been introduced at trial it would have caused a different result in the conviction or sentence; or
>
> (a)(ii) That, even if the petitioner pled guilty or nolo contendere, or confessed or admitted to a crime, there exists biological evidence not tested, or, if previously tested, that can be subjected to additional DNA testing that would provide a reasonable likelihood of more probative results, and that testing would demonstrate by reasonable probability that the petitioner would not have been convicted or would have received a lesser sentence if favorable results had been obtained through such forensic DNA testing at the time of the original prosecution.
>
> (b) Likewise excepted are those cases in which the petitioner claims that his sentence has expired or his probation, parole or conditional release has been unlawfully revoked. Likewise excepted are filings for post-conviction relief in capital cases which shall be made within one (1) year after conviction.

Miss. Code Ann. § 99-39-5(2) (Rev. 2015).

¶8. Because Trotter's claim does not involve an intervening decision from any court, the discovery of evidence that would have been introduced at trial, or a claim that his sentence had expired, the statutory exceptions do not contemplate Trotter's sought relief. When Trotter was removed from federal prison and transferred to Parchman, the "clear factual agreement that all time on the Mississippi life sentence would be served in federal prisons" and the promise that Trotter "would only serve one sentence and that would be in the federal prison" proved untrue. Trotter claims that "he traded an opportunity to defend against the murder charge, to require a grand jury to indict him in exchange for the promise by the State of Mississippi that when he served his life sentence in the federal prison system he would be paroled" and that "the State of Mississippi did not perform its part of the bargained for exchange." In 1981, had Trotter known that he would be paroled on his federal kidnaping charge and transferred to state custody, such knowledge, he claims, would have affected his guilty plea, which he now wishes to challenge.

¶9. In ***Holland v. Florida***, the United States Supreme Court wrote that a *habeas corpus* petitioner can receive the benefit of equitable tolling "if he shows '(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way' and prevented timely filing." ***Holland v. Fla.***, 560 U.S. 631, 649, 130 S. Ct. 2549, 177 L. Ed. 2d 130 (2010) (quoting ***Pace v. DiGuglielmo***, 544 U.S. 408, 418, 125 S. Ct. 1807, 161 L. Ed. 2d 669 (2005)). This Court, likewise, has applied the doctrine of equitable tolling in the context of an application for post conviction relief in a death penalty case: "when a party is prohibited from exercising his right to proceed by circumstances which are clearly beyond

his control and rise to such a dimension as to implicate due process and fundamental fairness, the Court may and should toll the limitations for the period of the impairment." ***Puckett v. State***, 834 So. 2d 676, 678 (Miss. 2002).

¶10. In ***Puckett***, an Oklahoma lawyer appointed to represent the prisoner in post-conviction proceedings obtained files and documents crucial to the filing and removed them to his offices in Oklahoma. ***Id.*** at 679-80. Funds to pay counsel, however, "were determined to be unavailable" and the Office of Capital Post Conviction Counsel was substituted to represent the prisoner. ***Id.*** at 680. The Oklahoma lawyer "ignored requests to turn over the files," and the Office of Capital Post Conviction Counsel "was ultimately forced to file a complaint with the Oklahoma Bar Association seeking their return." ***Id.*** But during that time, the limitations period expired. ***Id.*** at 678, 680.

¶11. This Court examined a Tennessee case in which a case similar to ***Puckett*** was remanded for the trial court for a hearing:

> "The sole inquiry here, however, is whether this limitation period is tolled because of due process concerns surrounding possible attorney misrepresentation. . . . [The statute of limitations] gives defendants one year to file their petitions, and we are simply remanding the case to the trial court for an evidentiary hearing to determine (1) whether due process tolled the statute of limitations so as to give the appellee a reasonable opportunity after the expiration of the limitations period to present his claim in a meaningful time and manner; and (2) if so, whether the appellee's filing of the post-conviction petition [after the statutory period had run] was within the reasonable opportunity afforded by the due process tolling. To summarily terminate his claim without further inquiry would be an 'abridgement of both direct and post-conviction avenues of appeal-without ever reaching the merits of the appell[ee's] case-[and] would be patently unfair.' ***Crittenden v. State***[,] 978 S.W. 2d 929 (Tenn. 1998)."

Puckett, 834 So. 2d at 679 (quoting ***Williams v. State***, 44 S.W.3d 464 (Tenn. 2001)).

¶12. We opined in ***Puckett*** that "it cannot be said that Puckett has slept on his rights or that he seeks relief because of mere excusable neglect. Due to circumstances completely beyond his control, Puckett has been unable to timely file an application for leave to seek post conviction relief within the one-year time frame." ***Id.*** at 680. We held that "[t]o punish Puckett for these circumstances would deprive him of minimal due process and a fair opportunity to be heard;" thus "[t]he statute was tolled by these events, and the Court is bound to grant Puckett relief." ***Id.***

¶13. Nevertheless, we declined to extend the doctrine of equitable tolling to non-capital cases and noted that "the fact that Puckett is under a sentence of death and subject to a shortened one year statute of limitations weighs heavily in this decision." ***Id.*** at 681. But here, when Trotter was removed from federal prison and transferred to Parchman, it appears he could not raise his voluntariness claim—that the plea was not voluntary because he had been promised that the entirety of his sentence would be served in federal prison—because the limitations period had expired. The plea agreement, memorialized in the sentencing order, promised Trotter that "defendant be allowed to serve said sentence in the Federal Penitentiary." But such a claim does not appear to have materialized until the time Trotter was transferred from federal prison to Parchman. Under the unique circumstance of this case, I would remand the case to the circuit court to determine whether the doctrine of equitable tolling applies to preserve Trotter's claims. While the deprivation of liberty faced by Trotter certainly amounts to less than a death sentence, the importance of the right to access to courts remains.

¶14. In the instant case, Trotter filed his petition within the three-year limitations period *if* the limitations period were to be tolled until the point at which he learned that he would no longer "be allowed to serve said sentence in the Federal Penitentiary" and would be transferred to Parchman. The facts alleged by Trotter contrast with those in, *e.g.*, ***Fisher v. Johnson***, 174 F.3d 710 (5th Cir. 1999), in which the Fifth Circuit declined to apply equitable tolling to preserve the federal habeas corpus claims of a defendant made pursuant to 28 United States Code Section 2254. In ***Fisher***, the petitioner, Thomas James Fisher, contended that the applicable one-year statute of limitations should be tolled because for seventeen days of the one-year period he had been confined to a psychiatric ward without his glasses—thereby rendering him legally blind, confined, and medicated. ***Fisher***, 174 F.3d at 715. In refusing to apply the doctrine of equitable tolling, the Fifth Circuit noted that the seventeen-day period in question was an insignificant amount of time and that Fisher had more than six months to complete his petition after being released. ***Id.*** at 715. By contrast, if Trotter's allegations and factual averments are true, he did not know of the factual basis for his current petition until, decades after his conviction, he was required to serve his state sentence in state prison.

¶15. Trotter was discharged from federal prison and transferred to state custody on May 16, 2011. Trotter filed the present petition for post-conviction relief in the Circuit Court of Lauderdale County on April 10, 2012. I would hold that the doctrine of equitable tolling may have operated to toll the running of the statute of limitations until the date of Trotter's discharge—the point at which his voluntariness claim became viable—and would remand

the case to the trial court for a threshold consideration of the application of the doctrine of equitable tolling.

2. Whether Trotter is entitled to a hearing on the question of the voluntariness of his guilty plea.

¶16. When this Court reviews a summary dismissal by the circuit court, "[o]ur procedural posture is analogous to that when a defendant in a civil action moves to dismiss for failure to state a claim." ***Horton v. State***, 584 So. 2d 764, 767 (Miss. 1991) (citing Miss. R. Civ. P. 12(b)(6); ***Billiot v. State***, 515 So. 2d 1234, 1236 (Miss. 1987)). A trial judge cannot grant a motion to dismiss for failure to state a claim "unless, taking the factual allegations of the complaint as true, 'it appears beyond any reasonable doubt that the non movant can prove no set of facts in support of the claim which would entitle them to relief.'" ***Bowden v. Young***, 120 So. 3d 971, 975 (Miss. 2013) (quoting ***Rein v. Benchmark Constr. Co.***, 865 So. 2d 1134, 1142 (Miss. 2004)).

¶17. In the circuit court, Trotter claimed that his decision to plead guilty in state court was predicated on his understanding that he would have to serve only his federal sentence and would be incarcerated only in a federal penitentiary. With his petition, Trotter provided an affidavit, swearing that "[t]here was a clear factual agreement that all time on the Mississippi life sentence would be served in the federal prisons" and that "[a]s to the phrase in the Order 'and defendant be allowed to serve said sentence in the Federal Penitentiary', I and my codefendants were all told and it was agreed to that we would only serve one sentence and that would be in the federal prison."

¶18. This affidavit was supported by Trotter's state-court sentencing order which stated that Trotter was "sentenced to a term of life in the Mississippi State Penitentiary at Parchman, Mississippi, and said sentence to run concurrent with the life sentence of the United States Federal Court, Southern District of the State of Mississippi and *defendant be allowed to serve said sentence in the Federal Penitentiary*." Also, the "Memorandum of Understanding," which recorded "all promises, agreements and conditions made by and between the United States Attorney for the Southern District of Mississippi and Trotter," stated that:

> during the course of discussions resulting in this memorandum of understanding, both defense counsel and the Assistant United States Attorney conferred with Charles Wright, District Attorney for Lauderdale County, Mississippi, as to possible disposition of a pending warrant for murder charges in that county, and that during such conference Wright agreed that, should Trotter appear before the Circuit Court of Lauderdale County and waive his right to grand jury indictment and consent to the filing of an information/indictment by the District Attorney charging murder of Bail Allen, and enter a plea of guilty thereto, then in that event Wright will recommend to the Circuit Court that Trotter be sentenced to life imprisonment to run concurrent with the sentence imposed herein in E81-00003(N), *and that Trotter shall serve his federal sentence*.

(Emphasis added.)

¶19. The circuit judge mischaracterized Trotter's claim as one for him to order parole. Trotter requested no such relief, specifically stating that "the Prisoner moves the Court to vacate his conviction and sentence." Instead, Trotter's challenge rests on the fact that he avers his willingness to plead guilty was based on his agreement with the prosecution. "A guilty plea must be made voluntarily in order to satisfy the defendant's constitutional rights. A plea is voluntary if the defendant knows . . . what effect the plea will have, and what the

possible sentence might be because of his plea." ***Wilson v. State***, 577 So. 2d 394, 396–97 (Miss. 1991) (citing ***Schmitt v. State***, 560 So. 2d 148, 153 (Miss. 1990)).

¶20. While the circuit judge made a factual finding that Trotter got the concurrent sentences for which he bargained, the judge failed to accept as true—which he was required to do at the summary dismissal stage—Trotter's affidavit that the prosecution had agreed Trotter would serve only his federal sentence and would be held only in a federal penitentiary. The circuit judge's factual finding to the contrary constitutes a failure to apply the correct legal standard and requires reversal.

¶21. Even in the absence of the trial court's error in summarily dismissing the claims, Trotter pled sufficient facts to entitle him to a post-conviction hearing. "Pursuant to the Mississippi Uniform Post-Conviction Collateral Relief Act . . . a petitioner is entitled to an in-court opportunity to prove his claims if the claims are 'procedurally alive "substantiall[y] showing denial of a state or federal right."'" ***Washington v. State***, 620 So. 2d 966, 967-68 (Miss. 1993) (quoting ***Horton***, 584 So. 2d at 767 (quoting ***Neal v. State***, 525 So. 2d 1279, 1281 (Miss. 1987))).

¶22. The law is well settled that "a knowing and voluntary guilty plea waives certain constitutional rights, among them the privilege against self-incrimination, the right to confront and cross-examine the State's witnesses, the right to a jury trial, and the right to have the State prove each element of the offense beyond a reasonable doubt." ***Joiner v. State***, 61 So. 3d 156, 158 (Miss. 2011) (citing ***Jefferson v. State***, 556 So. 2d 1016, 1019 (Miss. 1989)). "'Waivers of constitutional rights *not only must be voluntary but must be knowing*,

intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences.'" ***Wilson v. State***, 81 So. 3d 1067, 1087 (Miss. 2012) (quoting ***Brady v. United States***, 397 U.S. 742, 748 S. Ct. 1463, 25 L. Ed. 1461 (1938)) (emphasis in original). Further, "[c]ourts should indulge every reasonable presumption against waiver of constitutional rights and should not presume acquiescence in the loss of fundamental rights." ***Wilson***, 81 So. 3d at 1087 (citing ***Johnson v. Zerbst***, 304 U.S. 458, 464, 58 S. Ct. 1019, 1023, 82 L. Ed. 1461 (1938)).

¶23. Where the plea "was induced by promises, the essence of those promises must in some way be made known." ***Santobello v. New York***, 404 U.S. 257, 261-62, 92 S. Ct. 495, 30 L. Ed. 2d 427 (1971). While circumstances surrounding the guilty plea may vary, "a constant factor is that when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." ***Id.*** at 262. "That the breach of the agreement was inadvertent does not lessen its impact." ***Id.***

¶24. In that case, the petitioner had "'bargained' and negotiated for a particular plea to secure dismissal of more serious charges . . . on condition that no sentence recommendation would be made by the prosecutor." ***Id.*** But at sentencing, a second prosecutor, "apparently ignorant of his colleague's commitment, argued that there was nothing in the record to support petitioner's claim of a promise . . . ." and recommended a sentence. ***Id.*** at 259. The United States Supreme Court vacated the petitioner's sentence and remanded the case to state court, stating that:

> [T]he ultimate relief to which petitioner is entitled we leave to the discretion of the state court, which is in a better position to decide whether the circumstances of this case require only that there be specific performance of the agreement on the plea, in which case petitioner should be resentenced by a different judge, or whether, in the view of the state court, the circumstances require granting the relief sought by petitioner, i.e., the opportunity to withdraw his plea of guilty.

Id. at 263.

¶25. The plea agreements of Trotter's codefendants appear in the record, though Trotter's plea agreement does not. In its prosecution of Trotter's codefendant, Edward Davidson, the State recommended a "life sentence to run concurrent with the life sentence of the U.S. District Court, So[uthern] District of M[ississippi], imposed on a charge of kidnapping, said sentence imposed on or about 9-28-1981; with *all time to be served in federal custody*." (Emphasis added.) Denise Daquigan's guilty plea bore the following recommendation from the State: "life imprisonment to run concurrent to that previously imposed life sentence for guilty plea entered in U.S. District Court 9-28-81. *Time will be served in federal prison*." (Emphasis added.) Both codefendants were sentenced consistent with the State's recommendation: "sentenced to a term of life in the Mississippi State Penitentiary at Parchman, Mississippi, and said sentence to run concurrent with the life sentence of the United States Federal Court, Southern District of the State of Mississippi and *defendant be allowed to serve said sentence in the Federal Penitentiary*." (Emphasis added.)

¶26. Trotter was sentenced as his codefendants were sentenced: "to a term of life in the Mississippi State Penitentiary at Parchman, Mississippi, and said sentence to run concurrent with the life sentence of the United States Federal Court, Southern District of the State of

Mississippi and *defendant be allowed to serve said sentence in the Federal Penitentiary*." (Emphasis added.) The "Memorandum of Understanding," which recorded "all promises, agreements and conditions made by and between the United States Attorney for the Southern District of Mississippi and Trotter" stated that:

> [S]hould Trotter appear before the Circuit Court of Lauderdale County and waive his right to grand jury indictment and consent to the filing of an information/indictment by the District Attorney . . . and enter a plea of guilty thereto, then in that event [the District Attorney] will recommend to the Circuit Court that Trotter be sentenced to life imprisonment to run concurrent with the sentence imposed herein, and *that Trotter shall serve his federal sentence*.

(Emphasis added.) Trotter's affidavit, submitted with his second petition for post-conviction relief, avers that "[t]here was a clear factual agreement that all time on the Mississippi life sentence would be served in the federal prisons" and that "I and my co-defendants were all told and it was agreed to that we would only serve one sentence and that would be in the federal prison."

¶27. The record reflects that Trotter may have been promised that he would be allowed to serve the entirety of his concurrent state and federal life sentences in the federal penitentiary. The trial court's order accepting Trotter's plea and sentencing him to life imprisonment explicitly states that "defendant be allowed to serve said sentence in the Federal Penitentiary" and that caveat is consistent with what the State had promised to Trotter's codefendants. A life sentence served in a medium security federal prison likely is very different from a life sentence served in a state institution on a murder charge.

¶28. Assuming equitable tolling applies, Trotter's voluntariness claim should not fall on deaf ears. Accordingly, he should be afforded "an in-court opportunity to prove his claims."

Washington, 620 So. 2d at 968 (quoting ***Horton***, 584 So. 2d at 767 (quoting ***Neal***, 525 So. 2d at 1281)).

DICKINSON, P.J., KING AND COLEMAN, JJ., JOIN THIS SEPARATE WRITTEN STATEMENT.