CASE NO. **2005-KP-00661-COA**

COURT OF APPEALS OF THE STATE OF MISSISSIPPI

JOHN JOHNSON
APPELLANT/Appellant

VS.

STATE OF MISSISSIPPI
APPELLEE/PLAINTIFF

APPEAL FROM THE CIRCUIT COURT OF
SUNFLOWER COUNTY, MISSISSIPPI

APPELLANT'S OPENING BRIEF

ORAL ARGUMENT NOT REQUESTED

BY: _____

John Johnson, [redacted]
Unit 29-J
Parchman, Ms 38738

Appellant, pro se

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ORAL ARGUMENT NOT REQUESTED

I.

STATEMENT REGARDING ORAL ARGUMENT

Appellant does not specifically request oral argument in this case as it is believed that the issues are capable of being adequately briefed by the parties. However, in the event the Court believes oral arguments would be helpful or beneficial to the Court then Appellant does not oppose oral argument and would in the court's discretion, as that counsel be appointed to deliver such oral argument for Appellant

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II.

CERTIFICATE OF INTERESTED PERSONS

The undersigned Appellant John Johnson, certifies that the following listed persons have interested in the outcome of this case. The representation are made in order that the Justices of this Court may evaluate possible disqualification or recusal.

1. Appellant John Johnson, Appellant pro se
2. Honorable Jim Hood, and staff, Attorney General
3. Honorable Ashley Hines, Circuit Court Judge
4. Honorable Joyce Chiles, District Attorney
5. Honorable George T. Kelly, Defense Attorney at trial

Respectfully submitted,

BY: John Johnson

John Johnson, [redacted]
Unit 29-J
Parchman, Ms 38738

Appellant, pro se

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III.

STATEMENT OF THE ISSUES

ISSUE ONE

Whether verdict of Jury was against overwhelming weight of evidence.

a) The witness who was identified as the victim in this cause, after being permitted full opportunity to view and inspect the face and body of the defendant in the Courtroom during the testimony of the witness, could not identify the defendant and did not identify the defendant John Johnson as being the person who robbed him.

b) The verdict was based solely upon the testimony of an indicted accomplice, and as such should not have been allowed to stand as not meeting the sufficiency of the evidence under the burden of proof of "beyond reasonable doubt."

c) The testimony at trial revealed that the gun in question was pointed at the victim and, thus, any offense allegedly committed by the defendant should not rise to the level of Armed Robbery.

ISSUE TWO:

The prosecution committed plain error in commenting upon and arguing to the jury not to impose a life sentence which argument was improper where it offered the jury a compromise which had not been offered and approved by the Court in jury instructions and where such improper argument by the prosecution constituted a nullification of the statute which required the jury to consider a life sentence.

ISSUE THREE:

Whether trial court erred and/or committed plain error in allowing jury to consider impermissible evidence and evidence which was contrary to the testimony at trial and which should have been excluded, to-wit:

a) The identification testimony from other witnesses at trial regarding the identification of Appellant made by Leroy Dandridge upon Dandridge's viewing of one picture, that being of the Appellant, where the basis of such exclusion should have been that Dandridge failed and was unable to identify Appellant in person and at trial.

ISSUE FOUR:

Whether trial court erred in allowing indictment to be amended and whether trial court erred in denying mistrial where the state was allowed to amend the indictment after the trial and after the defendant had defended the state's charges set forth in the indictment. The trial court erred in:

a) Allowing the state to amend the indictment to change the name of the person who actually owned the money which was allegedly taken during the robbery.

b) Failing to grant a mistrial where the state requested to amend, the indictment after the presentation of it's case and where state failed to move for an amendment of the indictment at the point in the trial where the evidence was presented to show that the ownership of the money was different from the name of the owner sent out in the indictment. The prosecution's request was untimely and should have been rejected by the trial court as untimely.

c) Allowing the prosecution to make a material amendment to the indictment and to ambush the defendant with such amendment at a time after the state had presented it's case and the defendant was unable to cross examine the witnesses regarding the actual ownership of the money.

ISSUE FIVE:

Whether appellant was denied a speedy trial.

ISSUE SIX:

Whether Appellant was subjected to Ineffective Assistance of Counsel At Trial, in violation of the Sixth Amendment to the United States Constitution.

ISSUE SEVEN

Whether Appellant was denied fair trial because of the cumulative effect of the claims stated herein.

IV.

STATEMENT OF INCARCERATION

The Appellant is presently incarcerated and is being housed in the Mississippi State Penitentiary at Parchman, Mississippi, in service of the term imposed in this case. Appellant has been continuously confined, in regards to such sentence, since date of conviction and imposition by the trial court.

V.

STATEMENT OF CASE

On September 4, 2003, an indictment was filed in the Sunflower County Circuit Court charging Appellant John Johnson, with armed robbery. The indictment also charged Curtis McIntosh as a co-defendant and with the same exact crime. (R7) Appellant was appointed Honorable George T. Kelly, Jr. to represent him at trial. (R. 8) Upon conviction of the charge set forth in the indictment Appellant was sentenced to a term of thirty (30) years in the custody of the Mississippi Department of Corrections. (R 31).

Being aggrieved by the verdict and sentence, Appellant Johnson perfected an appeal of the conviction and sentence of the Circuit Court of Sunflower County, Mississippi.

Appellant is now proceeding with the preparation and filing of his brief in the court pro se. which will contain a total of nine separate claims and subparts for reversal.

VI.

ARGUMENT

Issue No. 1

Whether verdict of Jury was against overwhelming weight of evidence.

a) The witness who was identified as the victim in this cause, after being permitted full opportunity to view and inspect the face and body of the defendant in the Courtroom during the testimony of the witness, could not identify the defendant and did not identify the defendant John Johnson as being the person who robbed him.

b) The verdict was based solely upon the testimony of an indicted accomplice, and as such should not have been allowed to stand as not meeting the sufficiency of the evidence under the burden of proof of "beyond reasonable doubt."

c) The testimony at trial revealed that the gun in question was pointed at the victim and, thus, any offense allegedly committed by the defendant should not rise to the level of Armed Robbery

The verdict of the jury was against the overwhelming weight of evidence and contrary to law, and the court should have granted Appellant Johnson's Motions for directed verdict, or alternative a new trial. Appellant Johnson's defense at trial was actual innocence. Appellant Johnson moved for a directed verdict at the end of State presentation of evidence and at the close of State case ((Tr. 132), due to the

fact that the State failed to make out a prima facie case of armed robbery. The state presented no rebuttal or objection to such motion. (Tr. 132-133) The trial court, sua sponte, denied the motion on the assertion that the testimony of the co-defendant, McIntosh, and the victim, Dandridge, "together" establish armed robbery. (Tr. 133)

The record is clear that the only testimony at trial which implicated Appellant in the crime was the testimony of co-defendant McIntosh. Dandridge's testimony exonerated Appellant by an in-court sworn declaration of testimony that he could not identify Appellant being the person who robbed him. Dandridge admitted that he had known Appellant as having seen Appellant on several occasions with his uncle. Dandridge also testified that Smith, the Chief of Police, had shown him one single photo of the Appellant and suggested that this was the person who committed the crime. Smith denied this at trial but the sworn testimony of Dandridge, the victim in this crime, states otherwise. If Dandridge is to be believed in other matters then it should also be believed in this instance as well. The testimony of Leroy Dandridge should not be disregarded in some instances and believed in others where it is most convenient to the prosecution. In those cases where the verdict is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice this Court can disturb the verdict on appeal. *Walker v. State*, 881 So. 2d 820, 831 (¶ 32) (Miss. 2004) (citing *Dudley*, 719 So. 2d at 182(¶ 8)); *Dilworth v. State*, 909 So. 2d 731, 737 (¶¶ 20-21) (Miss. 2005).

Leroy Dandridge testified that the Hacks Produce in Drew, Mississippi, was robbed on January 7, 2003, at 3:30 PM.[1] (Tr. 77). Dandridge testified that at the time of the robbery Terry Thurman and

[1] According to Dandridge, the Hacks Produce in Drew, Mississippi, was an illegal gambling establishment which conducted it's illegal gambling business with illegal gambling machines. (Tr. 81)

an elderly gentleman was present in the store along with himself.[2] (Tr. 77)

Dandridge, the only robbery victim who testified at thr trial and the state's key witness, testified that the gun shown to him at trial by the prosecution did not look familiar to him. (Tr. 85) Dandridge did not identify this weapon as he testified that it did not look in ay way like the gun that he saw on the date of the robbery. the robbery weapon. Dandridge testified a follows in regards to the gun.

Q. Mr. Dandridge, I've removed an item from this bag, from a property bag that bears the name of Chief B. Smith. Does this look familiar to you.?

A. No, ma'am.

Q. Does it look in any way like the gun that you saw that Day.

A. The gun that I seen the handle was on the end down there.

Q. Let me pull it back. Now does it look familiar?

A. No, it was a little bit bigger than that.

Q. It was bigger than that?

A. Yes, ma'am. About like that?

Q. Okay. Hold your hands up again. About like that?

A. About like that.

[2] The prosecution never bothered to call Terry Thurman nor the older gentleman as a witness at the trial. Obviously these were eye witnesses who could have testified and provided identification testimony since they were present during the robbery and, according to testimony, was instructed by the robbers to lay on the floor. These witnesses should have seen the robbers close up. The prosecution did indicate that it was going to check to see whether Thurman was there. The Court appeared to be concerned because the state had not called Robinson, Grant, or Smith. However, the state asserted this failure to the fact that these witnesses found drugs. The prosecution rested at this point which was a confirmation that Thurman never showed up to testify at he trial. There was no attempt to issue a bench warrant or subpoena for Thurman. (Tr. 131)

MS. BRIDGES: your Honor, I'd like this marked for identification.

THE COURT: Let it be marked for identification. (Tr. 85-86)

Clearly, Dandridge never identified the robbery weapon or the weapon which was retrieved by the police from the vehicle in which the Appellant was a passenger and which the state alleged o be the weapon used in the robbery. The state did not call Thurman, or never made any attempt to bring him to court after he failed to show up, who was another witness who could have identified he robbery weapon. The state never issued a subpoena for the elderly gentleman in which Dandridge testified was also present in the store during the robbery.[3] Dandridge testified that when he reported to the police that he told the police that the robbery was committed by a friend of his nephew that he had seen a couple of times. (Tr. 84) Dandridge testified that Appellant kind of looked like the shorter robber. (Tr. 85) Dandridge never positively identified Appellant as the robber. (Tr. 85)

It is clear here hat the prosecution failed to prove beyond a reasonable doubt that Appellant was the person who robbed the illegal gambling store. Appellant was convicted because he looked like the robber. The prosecution, in argument, advanced a speculation as to why Dandridge was reluctant in his identification but this presentation by the prosecution was not evidence but merely closing argument. The in-court testimony advanced and presented by Dandridge exonerates Appellant. The only other evidence which was advanced to incriminate Appellant was the testimony of McIntosh, the co-defendant who had much

[3] Dandridge testified that he did not call the police but called the boss man, Billy Hack, who lived in Arkansas, after the robbery and got into his car an drove back to Indianola. Dandridge testified that Billy Hack told him to go back up there and report it to the Police. (Tr. 83)

too loose in the case. The state, in order to paint a better picture of McIntosh, attempted to regard McIntosh as a bystander. The state was ready, willing, and did actually exonerate McIntosh in order to secure McIntosh's testimony. The state was not even willing to consider McIntosh as an accomplice when he had been actually indicted by the grand jury as a principle. The prosecution argued to the jury that Appellant did exactly what the grand jury charged him with. (Tr. 143) However, the state was not willing to agree with the grand jury on the charges against McIntosh when both defendants were charged in the same indictment. If the grand jury was correct, as the state argues, in the case of Appellant, then the grand jury should have been correct in the charges against McIntosh as well. (R. 144)

Appellant Johnson asserts that the verdict of the jury was against the overwhelming lack of evidence of guilt and contrary to law. In the case of Cherry v. State, 386 So2d. 203, The court reversed and rendered the conviction due to the fact that the verdict of the jury was contrary to the overwhelming weight of evidence. Quoting Burks v. United States, 437 U.S.1, 98 S.Ct. 2141, 57 L.Ed 2d 1 (1978).

The conviction and sentence for the offense against Appellant Johnson should be vacated and Appellant Johnson should be discharged to avoid a miscarriage of justice.

Issue No. II:

The prosecution committed plain error in commenting upon and arguing to the jury not to impose a life sentence which argument was improper where it offered the jury a compromise which had not been offered and approved by the Court in jury instructions and where such improper argument by the prosecution constituted a nullification of the statute which required the jury to consider a life sentence.

ARGUMENT

During closing argument, on at least two separate presentations, the prosecutor made reference to conflicting information to the jury in regards to the sentence. The prosecutor initially advised the jury that "whether or not you sentence him to life is up to you. (Tr. 144) The prosecutor next argued that:

> I'm not asking you to sentence him to life. I don't think this is one of those cases that really merits a life sentence, but it is serious. It is extremely serious. *His life does not depend on the outcome of this trial.* (Tr. 151)

While the jury did not impose a life sentence in this case, Appellant would argue that the comments by the prosecutor in regards to the sentence was improper since any instructions regarding the sentence and the jury's consideration of the sentence should be submitted by jury instructions by the court. The prosecutor's argument was designed to allow the jury to consider the case as being less drastic and return a GUILTY VERDICT on the assumption that the sentence would not be severe. The prosecutor failed to inform the jury that any sentence imposed for armed robbery, being a mandatory term by statute, would be tantamount to a life sentence. The prosecutor should not have been allowed to argue to the jury any facts or information regarding sentence in closing arguments. The remarks made by the prosecutor regarding the sentence was reversible error during closing arguments where the prosecutor argued facts regarding the sentence which was not in evidence and was designed to appeal to the bias and prejudices of the jury. The prosecutor argued that case was serious but made the jury appear that the sentence should not be a serious one while the

prosecutor knew that any sentence for armed robbery, under the law, would be a serious sentence. This Court should review comments made during closing arguments by determining "whether the natural and probable effect of the improper argument [creates] unjust prejudice against the accused so as to result in a decision influenced by the prejudice so created." *Sheppard v. State*, 777 So. 2d 659, 661 (¶ 7) (Miss. 2000). In this case such comments resulted in exactly this when the jury was nullified by rendering a guilty verdict without adequate evidence.

This Court should find that the state's argument was improper where there was no evidence presented regarding sentence and such argument was prejudicial to the Appellant where unjustly offered the jury a belief that the sentence would be mild and the impact of a guilty verdict would not be serious. This Court should reverse and remand for a new trial.

Issue No. III:

Whether trial court erred and/or committed plain error in allowing jury to consider impermissible evidence and evidence which was contrary to the testimony at trial and which should have been excluded, to-wit:

a) The identification testimony from other witnesses at trial regarding the identification of Appellant made by Leroy Dandridge upon Dandridge's viewing of one picture, that being of the Appellant, where the basis of such exclusion should have been that Dandridge failed and was unable to identify Appellant in person and at trial.

ARGUMENT

Appellant would assert to this Court that the identification testimony made by Burner Smith was improper since, at trial, Dandridge never identified Appellant and testified that Burner Smith, in fact, shown him one single photo and suggested that this was the person who committed the crime. This trial court should have excluded this testimony. Shelton v. State, 853 So.2d 1171 (Miss. 2003)

The problem with the testimony of Burner Smith, which is in conflict with the testimony of Dandridge, is that Smith did not make certain that Appellant was represented by counsel during the lineup. Smith merely obtained a photo of Johnson, flashed that photo on Dandridge, and impermissibly suggested that this was the one. The testimony of Burner Smith on the matter of identification of Johnson in the linup should be precluded based upon the fact that Dandridge testified that Smith use one photo and suggested to him that this was the person. Moreover, Dandridge testified at trial that Johnson was not the person and the gun which the state displayed was not the w**Issue No. IV:**

Whether trial court erred in allowing indictment to be amended and whether trial court erred in denying mistrial where the state was allowed to amend the indictment after the trial and after the defendant had defended the state's charges set forth in the indictment. The trial court erred in:

a) Allowing the state to amend the indictment to change the name of the person who actually owned the money which was allegedly taken during the robbery.

b) Failing to grant a mistrial where the state requested to amend the indictment after the presentation of it's case and where state failed to move for an amendment of the indictment at the point in the trial where the evidence was presented to show that the ownership of the money was different from the name of the owner sent out in the indictment. The prosecution's request was untimely and should have been rejected by the trial court as untimely.

c) Allowing the prosecution to make a material amendment to the indictment and to ambush the defendant with such amendment at a time after the state had presented it's case and the defendant was unable to cross examine the witnesses regarding the actual ownership of the money.

ARGUMENT

The prosecution was permitted to amend the indictment after it had presented it's case. The state alleged, in support of such request, that this was a routine amendment where the proof shows one thing and the indictment has alleged – the gist of the crime is the robbery itself, not the ownership of the money, and I believe the state has proven that. (Tr. 132)

The problem with this argument by the state is that: 1. It confirms that the state had already introduced proof before it requested to amend and the argument itself substantiates that. Appellant had a right to know the charge and what the state was attempting to prove before any actual proof was presented. The amendment was untimely. 2. The state's argument is contrary to the evidence where it

speaks to the ownership of the money. The state introduced testimony that Appellant made a statement that that was a gambling house. Additionally, Burner Smith and Dandridge both testified that illegal gambling machines were in the place of business. Burner Smith testified that he did not arrest anyone for the illegal activity but told them to get them out. The owner was not prosecuted. This is why the state's argument is contrary to the evidence when the state argues that ownership of the money is not an issue. Dandridge testified that the money was taken out of the machines in the back of the business. Yet the prosecution argues that amendment of the indictment to show the name of the person who owned the money, which was fruits of an illegal activity, do not matter. This argument makes as much sense as the prosecution's argument that McIntosh was a bystander when McIntoish admitted that he was the driver of the car both too and from the robbery scene, that he snatched the phone line from the wall, that he told the alleged robber to "let's go" after the robbery, and that he was caught driving the same car days later. The prosecution is a genius creating self-serving arguments.

The defense made an objection to this motion to amend the indictment by the state. (Tr. 131) This claim is therefore genuine and meritorious. Contrary to the trial court's findings on this matter, proving ownership in this instance goes to the gist of the defense and prosecution since the state alleged that the Appellant stated that the money belonged to a gambling house or was gambling money. The state made this an element of the crime when it injected this evidence into the case. It should not now be said that this was not an Issue and was unimportant when the state has made much of it as long as it fitted the state's need at the time. The amendment here was untimely.

This Court has previously held that the question of whether an indictment is fatally defective is an issue of law and deserves a relatively broad standard of review by this Court. *Nguyen v. State*, 761 So.2d 873, 874 (Miss. 2000) (citing *Peterson v. State*, 671 So.2d 64 (Miss. 1996)). "'It is fundamental that courts may amend indictments only to correct defects of form, however, defects of substance must be corrected by the grand jury.'" *Evans v. State*, 813 So.2d 724, 728 (Miss. 2002) (quoting *Mitchell v. State*, 739 So.2d 402, 404 (Miss.Ct.App. 1999)); *see* URCCC 7.09.

We have stated:

> "It is well settled in this [S]tate [. . .] that a change in the indictment is permissible if it does not materially alter facts which are the essence of the offense on the face of the indictment as it originally stood or materially alter a defense to the indictment as it originally stood so as to prejudice the defendant's case."

An indictment may only be amended at trial if the amendment is not material to the merits of the case and the defense will not be prejudiced by such amendment. *Griffin v. State*, 584 So.2d 1274, 1276 (Miss. 1991); *see Mitchell*, 739 So.2d at 404. The test for whether an amendment to the indictment will prejudice the defense is whether the defense as it originally stood would be equally available after the amendment is made. *Griffin*, 584 So.2d at 1276. Since this Court has held that an indictment may be amended after the State has rested. *See Burt v. State*, 493 So.2d 1325, 1328 (Miss. 1986). *See generally Burks v. State*, 770 So.2d 960, 962-63 (Miss. 2000), that point is not an issue. However, in this case the issue is and remains that such amendment prejudiced the Appellant and totally changed the substance of the case around to allege ownership of the money by another person other then the person named in the indictment. The amendment here was substance and should have been done only by the grand jury.

Issue No. V:

Whether Appellant was denied a speedy trial.

ARGUMENT

Appellant Johnson was arrested on January 8, 2003 for possession of controlled substance, with intent, and armed robbery. Appellant Johnson was indicted by Sunflower County grand jury for armed robbery on September 4, 2003. The case was subsequently set for trial and went to trial on November 9, 2004, one year and ten months after Appellant was arrested and over one year after the indictment. Miss. Code Ann. §99-17-1 provides: Unless good cause be shown, and a continuance duly granted by the court, all offenses for which indictments are presented to the court shall be tried no later than (270) days after accused has been arraigned." Appellant Johnson was arraigned September 15, 2003 (R. 14) and trial began 409 days later on November 9, 2004. Obviously there is a violation of §99-17-1. Johnson never waived or relinquished his right to a speedy trial. . In Perry v. State, 419 So2d 194 (Miss. 1992), the court stated the constitutional right to a speedy trial, unlike the statutory right under §99-17-1, attaches at the time of a formal indictment or information, or when a person has been arrested. In short, the constitutional right to a speedy trial attaches when a person has been accused. Beavers v. State, 498 So2d 788,789-90 (Miss. 1986); Bailey v. State, 463 So2d 1059, 1062 (Miss. 1985). Appellant Johnson's constitutional right to a speedy trial attached when defendant's rights to a speedy trial attached, the balancing test set out in Barker v. Wingo, 407 U.S. 514, 92 S.Ct. 2182, 33L.Ed2d 101 (1972) must

be applied to determine whether that right has been denied. The Barker court identified for factors which are to be considered in making such a determination:

(1) the length of delay;

2) the reason for delay;

3) whether Appellant has asserted his right to a speedy trial; and

(4) whether Appellant has been prejudiced by the delay.

No one of these factors is in itself dispositive. Rather, they must be considered together, in light of all the circumstances. Barker, 407 U.S. at 533, 92 S.Ct. at 2193.

LENGTH OF DELAY

This factor, according to the Barker Court, "is to some extent a triggering mechanism. Appellant Johnson was arrested January 8, 2003 and his trial began November 9, 2004, a total of one year and ten months after Appellant was arrested. This delay of over a year after the 270 day period expired is itself prejudicial and establishes that Appellant Johnson's right to a speedy trial was violated. This is enough to warrant close examination of the other Barker factors. In Bailey v. State, supra, 463 So2d at 1062, this court found delay of 298 days to be a substantial enough period of time to require a balancing of all Barker factors. In Beavers v. State, supra, 498 So2d at 790, this court found a delay of 423 days was sufficient to require reversal" in the absence of the other Barker factors pointing in favor of the prosecution (or in the absence of the Appellant position on the other Barker factors being weak)." See U.S. v. Greer, 655 F2d 5153 (1981), this court found delay of 357 days is long enough to trigger the requirement of inquiry into the other Barker factors.

REASON FOR DELAY

The record contains nothing top demonstrate that Appellant was the cause of the delay in this case. Appellant never waived his right to a speedy trial. In Perry v. State, supra, this court stated: In the case at bar, the prosecution provided no excuse for the delay. Where the Appellant has not caused the delay and where prosecution has declined to show good cause for the delay, we must weigh this factor against the prosecution. The burden of the state to see that a Appellant receives a speedy trial. 419 So2d at 199. Accord Vickery v. State, 535 So2d 1371, 1375 (Miss. 1988); Beavers v. State, supra 498 Sp2d at 791; Bailey v. State, supra, 463, So2d at 1062. See also Burgess v. State, 473 So2d 432 (Miss. 1985).

DEFENDANT'S ASSERTION OF HIS RIGHT TO SPEEDY TRIAL

Appellant Johnson failed to assert his right to a speedy trial. Appellant Johnson did not waive his right to a speedy trial.

PREJUDICE TO DEFENDANT

Had Appellant Johnson been tried to prior to November 9, 2004 (which was one year and ten months after Appellant was arrested), Appellant would have been able to call witnesses which were no longer willing to testify. This violation of Johnson's rights of U.S.C.A.6 and is reversible error and Appellant Johnson should be discharged. See Perry v. State, supra 419 So2d at 197)citing Strunk v. U.S., 412 U.S. 434, 93 S.Ct. 2260,37 L.Ed.2d 56 (1973), this court held sole remedy for denial of a defendant's right to a speedy trial is dismissal of the charges against him.

Issue No. VI:

Ineffective Assistance of Counsel At Trial, in violation of the Sixth Amendment to the United States Constitution.

To prevail on an ineffective assistance of counsel claim the complaining party must satisfy the well-established two prong test. First the party must show that counsel's performance was objectively deficient. The party must then show that, but for counsel's deficient performance, there is a reasonable probability that the result of the trial would have been different. Gilliard v. State, 462 So.2d 710, 714 (Miss. 1985). In the case at bar, Appellant's counsel absolutely failed to assert Appellant's right to a speedy trial at no stage of the proceedings. Had counsel asserted this right, through the filing of a timely and proper motion in the trial court, then this case would not have went to trial and would have been dismissed with prejudice since the state clearly failed to provide Appellant with a speedy trial. As presented earlier, the main focus of the state's delay was so that Leroy Dandridge and Terry Thurmond could be subpoenaed. The state needed to rehabilitate the testimony of Dandridge. It was clear from Dandridge's testimony that Appellant was suggested to him, as being the person who committed this crime, by law enforcement. Dandridge testified that Chief Smith did this suggestion. Of course Chief Smith denied this but there was evidence to show that Dandridge was shown only one photo and this is what the state was attempting to rehabilitate before the trial. In doing so, the state denied Appellant his constitutional right to a speedy trial and defense counsel did absolutely nothing in regards to this. The state was not prepared for trial since, without having Dandridge having change his testimony the case was in jeopardy. Counsel was ineffective in failing to bring this issue out in the trial court so that, if

denied, it would have been a claim which could have been confronted directly in this Court on appeal rather then being challenged secondary. Additionally, counsel failed to bring out the fact that the indictment was defective in it's attempt to charge Appellant and that at least one of the witnesses, Curtis McIntosh, was a participant in the crime and which the state was looking for a way to disassociate McIntosh from the crime. Defense counsel should have timely objected to the delays and should have moved the Court for a speedy trial. John Johnson was subjected to ineffective assistance of counsel. Leatherwood v. State, 473 So.2d 964, 969 (Miss. 1985) (explaining that the basic duties of criminal defense attorneys include the duty to advocate the defendant's case" remanding for reconsideration of claim of ineffectiveness where the Appellant alleged that his attorney did not know the relevant law.

It is clear that Appellant Johnson was prejudiced by his attorney's failure to raise the speedy trial issue during the pre-trial proceedings or to move the Court for a dismissal on that ground during the actual trial.

This Court should conclude that here counsel rendered ineffective assistance of counsel and that such ineffectiveness prejudices Appellant's conviction in such a way as to mandate a reversal of conviction as well as the sentence imposed. Defense counsel was charged with knowing the law and being familiar with the record and evidence. In Jackson v. State, 815 So. 2d 1196 (Miss. 2002), the Supreme Court held the following in regards to ineffective assistance of counsel:

> Our standard of review for a claim of ineffective assistance of counsel is a two-part test: the Appellant must prove, under the totality of the circumstances, that (1) his attorney's performance was deficient and (2) the deficiency deprived the Appellant of a fair trial. Hiter v. State, 660 So.2d 961, 965 (Miss.1995). This review is highly deferential to the attorney, with a strong presumption that

> the attorney's conduct fell within the wide range of reasonable professional assistance. Id. at 965. With respect to the overall performance of the attorney, "counsel's choice of whether or not to file certain motions, call witnesses, ask certain questions, or make certain objections fall within the ambit of trial strategy" and cannot give rise to an ineffective assistance of counsel claim. Cole v. State, 666 So.2d 767, 777 (Miss.1995).
>
> [7] [8] [9] ¶ 9. Anyone claiming ineffective assistance of counsel has the burden of proving, not only that counsel's performance was deficient but also that he was prejudiced thereby. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Additionally, the Appellant must show that there is a reasonable probability that, but for his attorney's errors, he would have received a different result in the trial court. Nicolaou v. State, 612 So.2d 1080, 1086 (Miss.1992). Finally, the court must then determine whether counsel's performance was both deficient and prejudicial based upon the totality of the circumstances. Carney v. State, 525 So.2d 776, 780 (Miss.1988).

In the present case defense counsel failed to make an objection to the prejudicial testimony and fail to move for time to prepare defense to confront this testimony. Counsel failed to make objection to prosecutors misconduct by the prosecutor having coached Chief Smith as to what to testify to and such testimony was in direct conflict with the testimony of Dandridge.

2. Counsel fail to preserve defendant's rights to a speedy trial by allowing fourteen (14) to elapse between indictment and trial beginning, due the fact indictment was filed September 3, 2003, and trial began until November 9, 2004, causing Appellant to suffer severe where, due to the passage of this time, the state was allowed to amend the indictment to allege the owenship of the money to change from Hack Produce to Billy Hack. This violated Appellant U.S.C.A. 6th Amendment of the U.S. provides: "In all criminal prosecution,] the accused shall enjoy the right to have the Assistance of Counsel for his defense." By the 14th Amendment this right is made obligatory upon the [states. Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9.L.Ed.2ed 799]

Counsel performance was so defective it caused fundamentally unfair outcome of trial. This is reversible error. This is violation of Appellant U.S.C.A. 6

& Miss. Const. Art. 3§26. Conviction and sentence shall be vacated and Appellant shall be discharged. See Strickland v. Washington, 466 U.S. 668, 687.

Appellant Johnson respectfully ask this court to review the facts of this case along with the decisions rendered in Naylor, Jones, Powell, Berry, and Nathanson, and reverse the conviction and discharge the Appellant

In Ward v. State, 708 So.2d 11 (Miss. 1998) (96-CA-00067), the Supreme Court held the following:

> Effective assistance of counsel contemplates counsel's familiarity with the law that controls his client's case. See **Strickland v. Washington**, 466 U.S. 668, 689, 104 S.Ct. 2052, 2065, 80 L.Ed.2d 674 (1984) (noting that counsel has a duty to bring to bear such skill and knowledge as will render the trial reliable); see also **Herring v. Estelle**, 491 F.2d 125, 128 (5th Cir.1974) (stating that a lawyer who is not familiar with the facts and law relevant to the client's case cannot meet the constitutionally required level of effective assistance of counsel in the course of entering a guilty plea as analyzed under a test identical to the first prong of the **Strickland** analysis); **Leatherwood v. State**, 473 So.2d 964, 969 (Miss.1985) (explaining that the basic duties of criminal defense attorneys include the duty to advocate the Appellant's case; remanding for consideration of claim of ineffectiveness where the Appellant alleged that his attorney did not know the relevant law).

In the instant case, John Johnson's defense counsel failed in his duties to adequately represent Johnson during the trial and prior to the trial when counsel allowed over fourteen months to elapse without making any motion to assert Appellant's right to a speedy trial.

To successfully claim ineffective assistance of counsel, the Appellant must meet the two-prong test set forth in Strickland v. Washington, 466 U.S. 668,687 (1984). This test has also been recognized and adopted by the Mississippi Supreme Court. Alexander v. State, 605 So.2d 1170, 1173 (Miss. 1992); Knight v. State, 577 So.2d 840, 841 (Miss. 1991); Barnes v. State, 577 So.2d 840,841 (Miss. 1991); McQuarter v. State, 574 So.2d 685, 687 (Miss. 1990); Waldrop v. State, 506 So.2d

273, 275 (Miss.1987), aff'd after remand, 544 So.2d 834 (Miss. 1989); Stringer v. State, 454 So.2d 468, 476 (Miss. 1984), cert. denied, 469 U.S. 1230 (1985).

The Mississippi Supreme Court visited this issue in the decision of Smith v. State, 631 So.2d 778, 782 (Miss. 1984). The Strickland test requires a showing of (1) deficiency of counsel's performance which is, (2) sufficient to constitute prejudice to the defense. McQuarter 506 So.2d at 687. The burden to demonstrate the two prongs is on the Appellant. Id. Leatherwood v. State, 473 So.2d 964, 968 (Miss. 1994), reversed in part, affirmed in part, 539 So.2d 1378 (Miss. 1989), and he faces a strong rebuttable presumption that counsel's performance falls within the broad spectrum of reasonable professional assistance. McQuarter, 574 So.2d at 687; Waldrop, 506 So.2d at 275; Gillard v. State, 462 So.2d 710, 714 (Miss. 1985). The Appellant must show that there is a reasonable probability that for his attorney's errors, Appellant would have received a different result. Nicolaou v. State, 612 So.2d 1080, 1086 (Miss. 1992); Ahmad v. State, 603 So.2d 843, 848 (Miss. 1992).

In Strickland v. Washington, 466 U.S. 688, 687 (1984), the United States Supreme Court held as follows:

> In assessing attorney performance, all the Federal Courts of Appeals and all but a few state courts have now adopted the "reasonably effective assistance" standard in one formulation or another. See Trapnell v. United States, 725 F.2d 149, 151-152 (CA2 1983); App. B to Brief for United States in United States v. Cronic, O. T. 1983, No. 82-660, pp. 3a-6a; Sarno, [466 U.S. 668, 684] Modern Status of Rules and Standards in State Courts as to Adequacy of Defense Counsel's Representation of Criminal Client, 2 A. L. R. 4th 99-157, 7-10 (1980). Yet this Court has not had occasion squarely to decide whether that is the proper standard. With respect to the prejudice that a Appellant must show from deficient attorney performance, the lower courts have adopted tests that purport to differ in more than formulation. See App. C to Brief for United States in United States v. Cronic, supra, at 7a-10a; Sarno, supra, at 83-99, 6. In particular, the Court of Appeals in this case expressly rejected the prejudice standard

articulated by Judge Leventhal in his plurality opinion in United States v. Decoster, 199 U.S. App. D.C. 359, 371, 374-375, 624 F.2d 196, 208, 211-212 (en banc), cert. denied, 444 U.S. 944 (1979), and adopted by the State of Florida in Knight v. State, 394 So.2d, at 1001, a standard that requires a showing that specified deficient conduct of counsel was likely to have affected the outcome of the proceeding. 693 F.2d, at 1261-1262. For these reasons, we granted certiorari to consider the standards by which to judge a contention that the Constitution requires that a criminal judgment be overturned because of the actual ineffective assistance of counsel. 462 U.S. 1105 (1983). We agree with the Court of Appeals that the exhaustion rule requiring dismissal of mixed petitions, though to be strictly enforced, is not jurisdictional. See Rose v. Lundy, 455 U.S., at 515 -520. We therefore address the merits of the constitutional issue.

II

In a long line of cases that includes Powell v. Alabama, 287 U.S. 45 (1932), Johnson v. Zerbst, 304 U.S. 458 (1938), and Gideon v. Wainwright, 372 U.S. 335 (1963), this Court has recognized that the Sixth Amendment right to counsel exists, and is needed, in order to protect the fundamental right to a fair trial. The Constitution guarantees a fair trial through [466 U.S. 668, 685] the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment, including the Counsel Clause: "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 defence." Thus, a fair trial is one in which evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding. The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel's skill and knowledge is necessary to accord defendants the "ample opportunity to meet the case of the prosecution" to which they are entitled. Adams v. United States ex rel. McCann, 317 U.S. 269, 275 , 276 (1942); see Powell v. Alabama, supra, at 68-69.

Because of the vital importance of counsel's assistance, this Court has held that, with certain exceptions, a person accused of a federal or state crime has the right to have counsel appointed if retained counsel cannot be obtained. See Argersinger v. Hamlin, 407 U.S. 25 (1972); Gideon v. Wainwright, supra; Johnson v. Zerbst, supra. 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. [466 U.S. 668, 686] For that reason, the Court has recognized that "the right to counsel is the right to the effective assistance of counsel." McMann v. Richardson, 397 U.S. 759, 771 , n. 14 (1970). Government violates the right to effective assistance when it interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense. See, e. g., Geders v. United States, 425 U.S. 80 (1976) (bar on attorney-client consultation during overnight recess); Herring v. New York, 422 U.S. 853 (1975) (bar on summation at bench trial); Brooks v. Tennessee, 406 U.S. 605, 612 -613 (1972) (requirement that Appellant be first defense witness); Ferguson v. Georgia, 365 U.S. 570, 593 -596 (1961) (bar on direct examination of Appellant). Counsel, however, can also deprive a Appellant of the right to effective assistance, simply by failing to render "adequate legal assistance," Cuyler v. Sullivan, 446 U.S., at 344 . Id. at 345-350 (actual conflict of interest adversely affecting lawyer's performance renders assistance ineffective). The Court has not elaborated on the meaning of the constitutional requirement of effective assistance in the latter class of cases - that is, those presenting claims of "actual ineffectiveness." In giving meaning to the requirement, however, we must take its purpose - to ensure a fair trial - as the guide. The 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. The same principle applies to a capital sentencing proceeding such as that provided by Florida law. We need not consider the role of counsel in an ordinary sentencing, which may involve informal proceedings and standardless discretion in the sentencer, and hence may require a different approach to the definition of constitutionally effective assistance. A capital sentencing proceeding like the one involved in this case, however, is sufficiently like a trial in its adversarial format and in the existence of standards for decision, see Barclay [466 U.S. 668, 687] v. Florida, 463 U.S. 939, 952 -954 (1983); Bullington v. Missouri, 451 U.S. 430 (1981), that counsel's role in the proceeding is comparable to counsel's role at trial - to ensure that the adversarial testing process works to produce a just result under the standards governing decision. For purposes of describing counsel's duties, therefore, Florida's capital sentencing proceeding need not be distinguished from an ordinary trial.

III

A convicted Appellant's claim that counsel's assistance

was so defective as to require reversal of a conviction or death sentence has two components. First, the Appellant 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 Appellant by the Sixth Amendment. Second, the Appellant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the Appellant of a fair trial, a trial whose result is reliable. Unless a Appellant 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.

A

As all the Federal Courts of Appeals have now held, the proper standard for attorney performance is that of reasonably effective assistance. See Trapnell v. United States, 725 F.2d, at 151-152. The Court indirectly recognized as much when it stated in McMann v. Richardson, supra, at 770, 771, that a guilty plea cannot be attacked as based on inadequate legal advice unless counsel was not "a reasonably competent attorney" and the advice was not "within the range of competence demanded of attorneys in criminal cases." See also Cuyler v. Sullivan, supra, at 344. When a convicted Appellant [466 U.S. 668, 688] complains of the ineffectiveness of counsel's assistance, the Appellant must show that counsel's representation fell below an objective standard of reasonableness. More specific guidelines are not appropriate. The Sixth Amendment refers simply to "counsel," not specifying particular requirements of effective assistance. It relies instead on the legal profession's maintenance of standards sufficient to justify the law's presumption that counsel will fulfill the role in the adversary process that the Amendment envisions. See Michel v. Louisiana, 350 U.S. 91, 100 -101 (1955). The proper measure of attorney performance remains simply reasonableness under prevailing professional norms. Representation of a criminal Appellant entails certain basic duties. Counsel's function is to assist the Appellant, and hence counsel owes the client a duty of loyalty, a duty to avoid conflicts of interest. See Cuyler v. Sullivan, supra, at 346. From counsel's function as assistant to the Appellant derive the overarching duty to advocate the Appellant's cause and the more particular duties to consult with the Appellant on important decisions and to keep the Appellant informed of important developments in the course of the prosecution. Counsel also has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process. See Powell v. Alabama, 287 U.S., at 68 -69. These basic duties neither exhaustively define the obligations of counsel nor form a checklist for judicial evaluation of attorney performance.

In any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances. Prevailing norms of practice as reflected in American Bar Association standards and the like, e. g., ABA Standards for Criminal Justice 4-1.1 to 4-8.6 (2d ed. 1980) ("The Defense Function"), are guides to determining what is reasonable, but they are only guides. No particular set of detailed rules for counsel's conduct can satisfactorily take [466 U.S. 668, 689] account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal Appellant. Any such set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions. See United States v. Decoster, 199 U.S. App. D.C., at 371, 624 F.2d, at 208. Indeed, the existence of detailed guidelines for representation could distract counsel from the overriding mission of vigorous advocacy of the Appellant's cause. Moreover, the purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation, although that is a goal of considerable importance to the legal system. The purpose is simply to ensure that criminal defendants receive a fair trial. Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a Appellant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. Cf. Engle v. Isaac, 456 U.S. 107, 133 -134 (1982). A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the Appellant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy." See Michel v. Louisiana, supra, at 101. There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way. See Goodpaster, [466 U.S. 668, 690] The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases, 58 N. Y. U. L. Rev. 299, 343 (1983). The availability of intrusive post-trial inquiry into attorney performance or of detailed guidelines for its evaluation would encourage the proliferation of ineffectiveness challenges. Criminal trials resolved unfavorably to the Appellant would increasingly come to be followed by a second trial, this one of counsel's unsuccessful defense. Counsel's performance and even willingness to serve could be adversely affected. Intensive scrutiny of counsel and

rigid requirements for acceptable assistance could dampen the ardor and impair the independence of defense counsel, discourage the acceptance of assigned cases, and undermine the trust between attorney and client. Thus, a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. A convicted Appellant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. In making that determination, the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case. At the same time, the court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. These standards require no special amplification in order to define counsel's duty to investigate, the duty at issue in this case. As the Court of Appeals concluded, strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic [466 U.S. 668, 691] choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments. The reasonableness of counsel's actions may be determined or substantially influenced by the Appellant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the Appellant and on information supplied by the Appellant. In particular, what investigation decisions are reasonable depends critically on such information. For example, when the facts that support a certain potential line of defense are generally known to counsel because of what the Appellant has said, the need for further investigation may be considerably diminished or eliminated altogether. And when a Appellant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable. In short, inquiry into counsel's conversations with the Appellant may be critical to a proper assessment of counsel's investigation decisions, just as it may be critical to a proper assessment of counsel's other litigation decisions. See

United States v. Decoster, supra, at 372-373, 624 F.2d, at 209-210.

B

An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment. Cf. United States v. Morrison, 449 U.S. 361, 364 -365 (1981). The purpose of the Sixth Amendment guarantee of counsel is to ensure [466 U.S. 668, 692] that a Appellant has the assistance necessary to justify reliance on the outcome of the proceeding. Accordingly, any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution. 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. Cronic, ante, at 659, and n. 25. Prejudice in these circumstances is so likely that case-by-case inquiry into prejudice is not worth the cost. Ante, at 658. Moreover, such circumstances involve impairments of the Sixth Amendment right that are easy to identify and, for that reason and because the prosecution is directly responsible, easy for the government to prevent. 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, 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. Moreover, it is difficult to measure the precise effect on the defense of representation corrupted by conflicting interests. Given the obligation of counsel to avoid conflicts of interest and the ability of trial courts to make early inquiry in certain situations likely to give rise to conflicts, see, e. g., Fed. Rule Crim. Proc. 44(c), it is reasonable for the criminal justice system to maintain a fairly rigid rule of presumed prejudice for conflicts of interest. Even so, the rule is not quite the per se rule of prejudice that exists for the Sixth Amendment claims mentioned above. Prejudice is presumed only if the Appellant demonstrates that counsel "actively represented conflicting interests" and that "an actual conflict of interest adversely affected his lawyer's performance." Cuyler v. Sullivan, supra, at 350, 348 (footnote omitted). [466 U.S. 668, 693] Conflict of interest claims aside, actual ineffectiveness claims alleging a deficiency in attorney performance are subject to a general requirement that the Appellant affirmatively prove prejudice. The government is not responsible for, and hence not able to prevent, attorney errors that will result in reversal of a conviction or sentence. Attorney errors come in an infinite variety and are as likely to be utterly harmless in a particular case as they are to be

prejudicial. They cannot be classified according to likelihood of causing prejudice. Nor can they be defined with sufficient precision to inform defense attorneys correctly just what conduct to avoid. Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another. Even if a Appellant shows that particular errors of counsel were unreasonable, therefore, the Appellant must show that they actually had an adverse effect on the defense. It is not enough for the Appellant to show that the errors had some conceivable effect on the outcome of the proceeding. Virtually every act or omission of counsel would meet that test, cf. United States v. Valenzuela-Bernal, 458 U.S. 858, 866 -867 (1982), and not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding. Respondent suggests requiring a showing that the errors "impaired the presentation of the defense." Brief for Respondent 58. That standard, however, provides no workable principle. Since any error, if it is indeed an error, "impairs" the presentation of the defense, the proposed standard is inadequate because it provides no way of deciding what impairments are sufficiently serious to warrant setting aside the outcome of the proceeding. On the other hand, we believe that a Appellant need not show that counsel's deficient conduct more likely than not altered the outcome in the case. This outcome-determinative standard has several strengths. It defines the relevant inquiry in a way familiar to courts, though the inquiry, as is inevitable, is anything but precise. The standard also reflects the profound importance of finality in criminal proceedings. [466 U.S. 668, 694] Moreover, it comports with the widely used standard for assessing motions for new trial based on newly discovered evidence. See Brief for United States as Amicus Curiae 19-20, and nn. 10, 11. Nevertheless, the standard is not quite appropriate. Even when the specified attorney error results in the omission of certain evidence, the newly discovered evidence standard is not an apt source from which to draw a prejudice standard for ineffectiveness claims. The high standard for newly discovered evidence claims presupposes that all the essential elements of a presumptively accurate and fair proceeding were present in the proceeding whose result is challenged. Cf. United States v. Johnson, 327 U.S. 106, 112 (1946). An ineffective assistance claim asserts the absence of one of the crucial assurances that the result of the proceeding is reliable, so finality concerns are somewhat weaker and the appropriate standard of prejudice should be somewhat lower. The result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome. Accordingly, the appropriate test for prejudice finds its roots in the test for materiality of exculpatory information not disclosed to the defense by the prosecution, United States v. Agurs, 427 U.S., at 104 , 112-113, and in the test for materiality of testimony made unavailable to the defense by Government

deportation of a witness, United States v. Valenzuela-Bernal, supra, at 872-874. The Appellant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. In making the determination whether the specified errors resulted in the required prejudice, a court should presume, absent challenge to the judgment on grounds of evidentiary insufficiency, that the judge or jury acted according to law. [466 U.S. 668, 695] An assessment of the likelihood of a result more favorable to the Appellant must exclude the possibility of arbitrariness, whimsy, caprice, "nullification," and the like. A Appellant has no entitlement to the luck of a lawless decisionmaker, even if a lawless decision cannot be reviewed. The assessment of prejudice should proceed on the assumption that the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision. It should not depend on the idiosyncrasies of the particular decisionmaker, such as unusual propensities toward harshness or leniency. Although these factors may actually have entered into counsel's selection of strategies and, to that limited extent, may thus affect the performance inquiry, they are irrelevant to the prejudice inquiry. Thus, evidence about the actual process of decision, if not part of the record of the proceeding under review, and evidence about, for example, a particular judge's sentencing practices, should not be considered in the prejudice determination. The governing legal standard plays a critical role in defining the question to be asked in assessing the prejudice from counsel's errors. When a Appellant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt. When a Appellant challenges a death sentence such as the one at issue in this case, the question is whether there is a reasonable probability that, absent the errors, the sentencer - including an appellate court, to the extent it independently reweighs the evidence - would have concluded that the balance of aggravating and mitigating circumstances did not warrant death. In making this determination, a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury. Some of the factual findings will have been unaffected by the errors, and factual findings that were affected will have been affected in different ways. Some errors will have had a pervasive effect on the inferences to [466 U.S. 668, 696] be drawn from the evidence, altering the entire evidentiary picture, and some will have had an isolated, trivial effect. Moreover, a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support. Taking the unaffected findings as a given, and taking due account of the effect of the errors on the remaining findings, a court making the prejudice inquiry must ask if the Appellant has met the

burden of showing that the decision reached would reasonably likely have been different absent the errors.

IV

A number of practical considerations are important for the application of the standards we have outlined. Most important, in adjudicating a claim of actual ineffectiveness of counsel, a court should keep in mind that the principles we have stated do not establish mechanical rules. Although those principles should guide the process of decision, the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. In every case the court should be concerned with whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results. To the extent that this has already been the guiding inquiry in the lower courts, the standards articulated today do not require reconsideration of ineffectiveness claims rejected under different standards. Cf. Trapnell v. United States, 725 F.2d, at 153 (in several years of applying "farce and mockery" standard along with "reasonable competence" standard, court "never found that the result of a case hinged on the choice of a particular standard"). In particular, the minor differences in the lower courts' precise formulations of the performance standard are insignificant: the different [466 U.S. 668, 697] formulations are mere variations of the overarching reasonableness standard. With regard to the prejudice inquiry, only the strict outcome-determinative test, among the standards articulated in the lower courts, imposes a heavier burden on defendants than the tests laid down today. The difference, however, should alter the merit of an ineffectiveness claim only in the rarest case. Although we have discussed the performance component of an ineffectiveness claim prior to the prejudice component, there is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the Appellant makes an insufficient showing on one. In particular, a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the Appellant as a result of the alleged deficiencies. The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed. Courts should strive to ensure that ineffectiveness claims not become so burdensome to defense counsel that the entire criminal justice system suffers as a result.

Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984).

Under the standards set forth above in Strickland, and by a demonstration of the record and the facts set forth in support of the claims in this case, it is clear that John Johnson has suffered in violation of his constitutional rights to effective assistance of counsel, in violation of the 6th Amendment to the United States Constitution. This Court should reverse and remand for a new trial on this claim.

Issue No. VII:

> Appellant suffered cumulative error which caused mim to be deprived of his constitutional right to a a fair trial violation of the 5th and 14th Amendments to the United States Constitution.

Appellant asserts that even in the event this Honorable Court hold that each of the aforesaid claims raised, standing alone, does not constitute cause to grant relief, the cumulative effect of each acted to deprive Appellant Johnson of his constitutional right to a fair trial, as guaranteed to him under the Sixth and Fourteenth Amendments to the United States Constitution, and Article 3, Sections 14 and 26 of our Mississippi Constitution. Rainer v. State, 473 So.2d 172, 174 (Miss. 1985); Williams v. State, 445 So.2d 798, 814 (Miss. 1984).

In cases similar as the one presented here, the Supreme Court has not hesitated in reversing other defendants convictions and ordering a new trial, for "(a) fair trial is, after all, the reasons we have our system of justice; it is a paramount distinction between free and totalitarian societies." Johnson v. State, 476 So.2d 1195 (Miss. 1985), cited with approval in Fisher v. State, 481 So.2d 283 (Miss. 1985).

> *"It is one of the crowning glories of our law that, no matter how guilty one may be, no matter how atrocious his crime, nor how certain his doom when brought to trial anywhere, he shall, nevertheless, have the same fair and impartial trial accorded to the most innocent Appellant. Those safeguards crystallized into the constitution and laws of the land as the result of centuries of experience, must be, by the courts, sacredly upheld as well as in the case of the guiltiest as of the most innocent Appellant answering at the bar of his*

> *country. And it ought to be a reflection always potent in the public mind, that where the crime is atrocious, condemnations is sure, when all these safeguards are accorded the Appellant, and therefore the more atrocious the crime, the less need is there for any infringement of these safeguards." Tennison v. State, 79 Miss. 708, 713, 31 So. 421, 422 (1902), cited and quoted with approval in Johnson v. State, supra.*

The importance to which the Honorable Mississippi Supreme Court has jealously guarded and accused right to a fair trial and fair judicial process is further reflected in Cruthirds v. State, 2 So.2d 154 (Miss. 1941)

> *"The storm of opposition, brute force and hate which is sweeping across a large part of the universe has levered to the ground the temple of justice in many countries, and even in our own it has been shaken and broken in places, yet we may fervently hope that when the storm shall have spent its fury there will remain undisputed, as one of the foundational pillars of that temple, the right of all men, whether rich or poor, strong or weak, guilty or innocent, to a fair trial, orderly and impartial trial in the courts of the land. Id. at 146.,*

The case sub judice falls within the perimeters of that described in Scarbrough v. State, 37 So.2d 748 (Miss. 1948):

> *"This is not one of those case for the application of the rule that a conviction will be affirmed unless it appears that another jury could reasonably reach a different verdict upon a proper trial then that returned on the former one, but rather it is a case where the constitutional right of an accused to a fair and impartial trial has been violated. When that is done, the Appellant is entitled to another trial regardless to the fact that the evidence on the first trial may have shown him to be guilty beyond every reasonable doubt. The law guarantees this to one accused of crime, and until he has had a fair an impartial trial within the meaning of the Constitution and the laws of the State, he is not to be deprived of his liberty by a sentence in the state penitentiary." Id. At 750.*

Since the right to a fair trial is a fundamental and essential right, under the form of our government, Johnson v. State, supra, there shall be no procedural bar to these assignments of error, which collectively denied Appellant Johnson his constitutional fundamental right to a fair trial, being raised for the first time in a post-conviction setting. Gallion, 469 So.2d 1247 (Miss. 1985).

Appellant Johnson did not receive a fair trial in this case when the trial judge permitted the prosecution to focus the jury's consideration of the involvement of McIntosh away from the jury by asserting to the jury that McIntosh was not a

participant in the crime when the evidence demonstrated that McIntosh was involved and had been indicted as a co-defendant. There was evidence that McIntosh had acted as a co-defendant in the crime and it was the denial of a fair trial for the prosecution to assert before the jury that McIntosh was not involved. The prosecution has a constitutional duty to prosecute all who are involved in crime through credible evidence. This Court should find that Appellant was denied a fair trial where the prosecution changed the status of McIntosh after the trial had commenced and as an effort to convict Appellant. The prosecution tainted the evidence of the guilt of McIntosh. If the prosecution was not to prosecute McIntosh, after the grand jury had found McIntosh to be a co-defendant, then Appellant should not have been prosecuted either. Additionally, the trial court allowed the trial to be unfair by allowing the prosecution to make a material amendment to the indictment and to ambush the defendant with such amendment at a time after the state had presented it's case and the defendant was unable to cross examine the witnesses regarding the actual ownership of the money. The failed to grant a mistrial where the state requested to amend the indictment after the presentation of it's case and where state failed to move for an amendment of the indictment at the point in the trial where the evidence was presented to show that the ownership of the money was different from the name of the owner sent out in the indictment. The prosecution's request was untimely and should have been rejected by the trial court as untimely and in order to protect and secure the defendant's right to a fair trial. This Court should find that the trial court's actions were fundamentally unfair and deprived Appellant of his constitutional right to a fair trial.

permitting the state to taint the evidence in an effort to convict Appellant by presenting false evidence regarding the involvement of McIntosh.

CONCLUSION

For the reasons and authority cited herein, Appellant Johnson submits that his conviction and sentence should be reversed rendered on the basis of the denial of the constitutional right to a speedy trial. In the alternative, Appellant Johnson's Conviction and sentence should be reversed to the trial court with instructions that a new trial be granted consistent with the laws of the State of Mississippi. .

Respectfully submitted,

By: _____
John Johnson, Appellant

CERTIFICATE OF SERVICE

This is to certify that I, John Johnson, have this date served a true and correct copy of the above and foregoing Opening Brief for Appellant, by United States Postal Service, first class postage prepaid, upon:

Honorable Jim Hood Attorney General P. O. Box 220 Jackson, MS 39205	Honorable Hallie Gail Bridges Assistant District Attorney P. O. Box 1046 Indianola, MS 39751	Hon. Ashley Hines Circuit Court Judge P. O. Box 1315 Starkville, MS 39759

Respectfully submitted,

This, the 7th day of August, 2007.

By: _____
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