IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

NO. 2006-CP-2164

GENARRO D. SHUMPERT — APPELLANT

VS.

STATE OF MISSISSIPPI — APPELLEE

REPLY BRIEF FOR APPELLANT

BY: Genarro Shumpert

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The State of Mississippi has filed its brief in this case and has failed to refute Appellant's claims that:

a) Contrary to the Argument advanced by the state, Shumpert has demonstrated that he received ineffective assistance of counsel by the standards set forth in Strickland v. Washington, 466 U.S. 668, 687-96, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

REPLY ARGUMENT

Shumpert suffered
Ineffective Assistance of Counsel

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. Then the party must 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 fair trial where counsel failed to raise or mention the involvement and interest of the trial judge. Counsel failed to put forth the issue of recusal before simply advising Appellant to plead guilty and waive what constitutional rights Appellant would have been entitled to enjoy absent such a plea. 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 trial judge enjoyed a certain interest which caused such court to be biased. The trial court judge was a regular patron of the restaurant which was allegedly robbed and which was the subject of the prosecution in this case. Counsel was ineffective in failing to bring this issue out in the record and before the trial court so that, even if denied, it would have been a claim which could have been confronted directly in this Court on appeal rather then being challenged secondary on PCR. The state argues that the record belies Appellant's claims. This is simply not correct. The record supports Shumpert's claims since there is no showing in the record that the trial judge was not a regular patron of the restaurant and should not have recused himself on the court's own motion. The Court was not required to wait until a motion was made knowing that the Court

was biased and too involved to render a fair and just proceeding. Shumpert 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 Shumpert was prejudiced by his attorney's failure to raise the recusal issue or to pursue the that issue diligently before advising Shumpert to plead guilty or recommending such a plea. Counsel has a duty to create reversible error as long as counsel's conduct is within the law.

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).
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> [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).

Appellant Shumpert respectfully ask this court to review the facts of this case with the decisions rendered in Naylor, Jones, Powell, Berry, and Nathanson, and reverse the convictions and remand to the trial court for a trial on the merits.

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).

Appellant would again stress to the Court that 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 decision after decision. A clearly distinguishable decision on such issue would be 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.
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> II
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> 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 Shumpert has suffered in violation of his constitutional rights to effective assistance of counsel, in violation of the 6th Amendment to the United States Constitution. The state never refuted such claim in it's brief and this Court should take that into account and reverse and remand with directions that the pleas of guilty be vacated and set aside and a new trial granted in this matter.

REPLY ARGUMENT

Shumpert never intentionally and
knowingly waived his right to recusal

The state argue that Shumpert waived his constitutional rights regarding the recusal of the trial judge where he pleaded guilty without having raised the issue. On the surface that would appear to be a valid argument. However, in the instant case it would seem a bit more complicated since Shumpert was never told of this right by the trial court nor by his defense attorney before he was allowed to plead guilty. Not being abreast of the law, Shumpert would have had no other way of actually knowing of his rights. Shumpert's defense attorney was in on the scheme and played a role in keeping Shumpert unaware of his rights. Appellant Shumpert was subjected to Fundamental Constitutional Error where the plea of guilty, under these circumstances, do not meet the constitutional requirement of establishing a factual basis for the plea. While the state argues otherwise, there has been no actual showing by the state that a factual basis for the plea was established. The state simply asserts that the record demonstrates such factual basis and that Shumpert waived his right to have an unbiased Court accept the plea and rendered a sentence. Nothing can be further from the truth. If the trial Court judge was a regular patron of the establishment which was allegedly robbed by Shumpert, that Court was not qualified to participate in the proceedings. The judge should have, without any motion being made, recused himself. The record fail to demonstrate

that the Court was not a patron of the club or a member of the club. The trial court summarily dismissed the PCR petition without allowing the state to file an answer to that question. The Court was fully aware of what the answer would have been and did not want such answer being a part of the record. The state's brief makes no reference to any specific page number of the record which would refute Appellant's assertions in the brief. The state's brief, on this issue, should be rejected. Such brief sets out not one single judicial decision in support of the argument presented by the state that the trial court was not required to recuse itself after having the knowledge that the Court not unbiased.

In Taylor v. Kennedy, 914 So.2d 1260 (Miss. App. 2005), this Court rendered the following findings regarding failure to cite authority in support of a claim.

> "The absence of authority in Taylor's brief has additional consequences. It is the appellant's duty "to provide authority in support of an assignment of error." United Plumbing & Heating Co., Inc. v. Mosley, 835 So.2d 88, 92 (Miss.Ct.App. 2002) (quoting McNeil v. Hester, 753 So.2d 1057, 1075 (¶ 65) (Miss. 2000)). It is well established that this Court is not required to address any issue that is not supported by reasons and authority. Varvaris, 813 So.2d at 753(¶ 6) (citing Hoops v. State, 681 So.2d 521, 535 (Miss. 1996)). Failure to cite any authority is a procedural bar, and this Court is under no obligation to consider the assignment. Mosley, 835 So.2d at 92(¶ 8) (citing Powell v. Cohen Realty, Inc., 803 So.2d 1186, 1190(¶ 5) (Miss.Ct.App. 1999)). Pursuant to the Mississippi Rules of Appellate Procedure 28(a)(1)(6) the argument in an appellant brief must contain "the contentions of appellant with respect to the issues presented, and the reasons for those contentions, with citations to the authorities, statutes, and parts of the record relied upon." Therefore, due to Taylor's complete failure to cite authority in her brief, we decline to address her assignments of error."

While the failure to cite legal authority in this instance is on behalf of the state, as opposed to the Appellant, this Court should not proceed any differently

then it would had Appellant not cited legal authority in support of his claims or argument. The Court should decline to address the state's arguments.

While a valid guilty plea waive all non-jurisdictional issues, it cannot waive plain error or an issue of fundamental constitutional nature. Sneed v. State, 722 So.2d 1255, 1257 (Miss. 1998).

In Sneed, the Court held as follows:

> Despite the untimely assertion of this issue, we find that a purported judgment of conviction for a felony not charged in the indictment affects fundamental rights of the defendant that may not be waived or subjected to a procedural bar. Sneed v. State, 722 So.2d 1255, 1257 (¶ 11) (Miss.1998).

The issues which Appellant raise in his brief reaches fundamental constitutional magnitude and should be considered by this Court, as well as should have been considered by the trial court. This court has previously held that a claim of fundamental plain error, being an illegal sentence in this instance, waives all bars and constitutes an exception

The sentence imposed upon Shumpert was severe and could have been interpreted in several ways. . A criminal defendant has a right to a definite sentence. Payne v. State, 462 So.2d. 902 (Miss. 1984) Appellant did not receive such a sentence in this case. The trial court imposed numerous sentences which will guarantee that Shumpert will spend the rest of his life in prison. That sentence, if it was to be imposed, should have been imposed by an unbiased judge

that do not participate as a patron of the same establishment which Shumpert allegedly robbed. The trial court's actions constitute a manifest abuse of discretion. Shumpert was not representing himself during the criminal proceedings. Shumpert was represented by an office of the Court. Shumpert had no personal obligations to object to the participation of the trial judge. That was matter for counsel. Had Shumpert been representing himself then the state could have argued that Shumpert waived his rights where he failed to timely object to the trial judge's participation. Tubwell v. Grant, 760 So.2d 687, 689 (Miss. 2000). It should also be considered here that Shumpert's sentence was not imposed by a plea agreement but the trial court judge, who was not an unbiased individual, imposed the sentence on an open plea. Given the trial judge's familiarity with the victim as being a patron of the same restaurant which was allegedly robbed, the trial judge should not have been the person who decided the sentence. Shumpert was denied due process of law. On this claim alone, without considering any other issue of this appeal, reversal of the convictions and sentences should be appropriate. At the least, this Court should reverse the sentence against Shumpert. The trial court's status in the case taints the sentence and all the proceedings which the trial judge was involved without a jury.

CONCLUSION

Shumpert would respectfully ask this Court to reject the state's argument and find that Appellant suffered a violation of his constitutional rights under the 5th and 14th Amendments. Further, the state has failed to refute the Appellant's arguments and claims with legal authority or a valid argument. This Court must reverse the convictions and sentences in order to prevent a manifest injustice from being being carried out by the actions of the trial court in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that I, Genarro Shumpert, Appellant pro se, have this date delivered a true and correct copy of the above and foregoing Appellant's Reply Brief, to:

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This, the 30 **th day of** ~~November~~ October**, 2007.**

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