IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

COPY

NO. 2006-CP-02166-COA

PATRICK O'NEAL COOK — APPELLANT

VS.

FILED
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SUPREME COURT
COURT OF APPEALS

STATE OF MISSISSIPPI — APPELLEE

**Appeal From The Circuit Court of Pike County, Mississippi**
**Honorable Mike Smith, Circuit Judge presiding**

## BRIEF FOR APPELLANT

RECEIVED
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**Appellant pro se**

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## CERTIFICATE OF INTERESTED PERSONS

The undersigned Appellant, Patrick Cook, pro se, certifies that the following listed persons have an interest in the outcome of this case. The se representations are made in order that the Judges or Justices of this Court or the Court of Appeals may evaluate possible disqualification's or recusal:

1. Patrick Cook, Appellant/Appellant;
2. Honorable Jim Hood, Atty. General, and his staff;
3. Honorable Dewitt (Dee) Bates, Jr., District Attorney,
4. Honorable Mike Smith, Circuit Court Judge;

Respectfully submitted,

BY: Patrick Cook
Patrick Cook, Appellant

## CERTIFICATE OF INCARCERATION

Appellant, Patrick Cook , is incarcerated at the Central Mississippi Correctional Facility in the custody of the State of Mississippi in service of the sentence in this case and has been continuously incarcerated since the imposition of the punishment in this case.

**THE SUPREME COURT OF THE STATE OF MISSISSIPPI**

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**Appeal From The Circuit Court of Pike County, Mississippi**
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## BRIEF FOR APPELLANT

### A. STATEMENT OF ISSUES ON APPEAL

Appellant's plea of guilty was involuntary where it was entered upon ineffectiveness and ill-advice of counsel and where:

i.

Trial Court erred in failing to find that Appellant was denied effective assistance of counsel during the pretrial proceedings where counsel advised appellant to plead guilty to indictment without having first challenged legality of indictments since regarding the maximum sentence indictment was factually illegal in its attempt to mentally coerce Appellant to enter a plea of guilty. Defense counsel failed to object to the indictments recorded under Cause No. 04-005-KB and 04-006-KB.

ii.

Trial Court erred in failing to find that the sentence imposed upon Appellant constitutes a denial of due process of law and equal protection of the law as guaranteed him under the 4th, 5th and 14th Amendments of the United States Constitution.

iii.

Trial Court erred in failing to find that Appellant was subjected to a denial of due process of law where the trial court failed to advise Cook of the correct law in regards to appealing a sentence rendered upon a plea of guilty to the Supreme Court. Appellant Cook was never advised by the Court nor his attorney that, under applicable law, his sentence could be appealed to the Supreme Court for direct review independent to the plea of guilty to the charge.

## B. FACTS

On September 8, 2003 the defendant Patrick O'Neal Cook, was arrested and charged with he offense of unlawful possession and distribution of Marijuana .

On January 16, 2004, Three (3) Indictments recorded under Cause Numbers: 04-005-KB, 04-006-KB and 04-009-KB were returned by the Grand Jurors in the Circuit Court of Pike County, Mississippi, charging under 005, with possession and distribute of at least 250 grams but less than five grams of marihuana, 006, with possession and distribute at lease five kilograms but less than 6 kilograms of marihuana, 009 (Count 1), with sell more than one ounce of marihuana, and Count 2, with possession at less than 1 ounce of marihuana to distribute.

Appellant was represented by retained Attorney, the Honorable William E. Goodwin, who advised Appellant to plead guilty. Attorney Goodwin never sought to object to the three separate indictments and one charging Cook with two counts, all derived from the same incident on the same date and time.

Appellant Cook was not advised and admonished of his right to appeal the sentence directly to the Court of Appeals nor did the defense attorney investigate the legality of the indictment.

On March 5, 2004, the State recommended to the Court under Cause #04-009-KB that the State would Nol Pros the Indictment in Cause # 04-005-KB, which was filed with the Clerk on March 30, 2004.

On or about March 11, 2004, the Appellant changed his plea of not guilty to a charge of Unlawful Sale of More than One (1) ounce of Marihuana of Count One and Unlawful possession of Less than one (1) ounce of Marihuana with intent to distribute of Count Two in Cause No. 04-009-KB and beg leave of the Court to withdraw his plea of Not Guilty and to enter a plea of guilty to said charge. Appellant took this action at the urging of his attorney.

The Court conducted a hearing and found the plea of Guilty to be voluntarily and intelligently made and accepted said plea of guilty. In reaching such conclusion, the trial court never advised or admonished Cook of his right to appeal the sentence directly to the Court of Appeals.

Appellant presents these facts upon personal knowledge, information, records, and the belief of affiant and will be proven by the record in this case and testimony of witness.

## C. SUMMARY OF ARGUMENT

Appellant Cook was deprived of effective assistance of counsel where the defense counsel, representing Cook during the plea and sentencing proceedings, advised Cook to plead guilty to the charge without first having objected to or challenged the indictment which indictment was factually illegal in its attempt to change the offense. Appellant's attorney persuaded Appellant to enter a plea of guilty by coercing Appellant to enter a plea of guilty.

## D. ARGUMENT

### I.

### VOLUNTARINESS OF PLEA

Under URCCC 8.04(A)(3), "before the trial court may accept a plea of guilty, the court must determine that the plea is voluntarily and intelligently made and that there is factual basis for the plea." In Corley v. State, 585 So.2d 765, 767 (Miss. 1991), the Supreme Court of Mississippi discussed Rule 3.03(2), Miss. Unif. Crim. R. Cir. Ct. Pract. (1979, as amended), requiring that the trial court have before it "... substantial evidence that the accused did commit the legally defined offense to which he is offering the plea." See, e.g., Sappington v. State, 533 So.2d 1118, 1124 (Miss. 1988); Reynolds v. State, 521 So.2d 914, 917 (Miss. 1988).

The Mississippi Supreme Court has long recognized that the courts of the State of Mississippi are open to those incarcerated at Mississippi Correctional facilities and Institutions raising questions regarding the voluntariness of their pleas of guilty to criminal offenses or the duration of confinement. Hill v. State, 388 So.2d 143, 146 (Miss.1980); Watts v. Lucas, 394 So.2d 903 (Miss. 1981); Ball v. State, 437 So.2d 423, 425 (Miss. 1983); Tiller v. State, 440 So.2d 1001, 1004-05 (Miss. 1983). This case represents one such instance.

The Mississippi Supreme Court has continuously recognized that a plea of guilty may be challenged for voluntariness by way of the Mississippi Uniform Post Conviction Collateral Relief Act.

The petition filed by Cook clearly states that the Agents of the Mississippi Bureau of Narcotics (MBN) advised petitioner that they would cut his time if he confessed that the drugs belonged to him (R. 25). This was clearly improper conduct by the MBN. The Court should have conducted an evidentiary hearing in regards to this matter.

While Appellant did designate the record of the guilty plea colloquy and related documents to be made a part of the record on appeal, no such records are contained in the records filed by the Circuit Clerk in this case. Moreover, Appellant has filed a motion with this Court which again sought to have such records filed. At the time of the writing of this brief, which must be filed by the delinquent date, has not been filed. Appellant would urge that the plea entered here was not a voluntary plea where it was rendered under the pre represented conditions that the MBN would intervene in regards to sentencing. The Order of the trial court dismissing the PCR and denying relief do not address this claim. Additionally, the trial court never required the state to file an answer to the petition or that an evidentiary hearing be conducted.

II.

**INEFFECTIVE ASSISTANCE OF COUNSEL**

Appellant Patrick O'Neal Cook was denied his Sixth Amendment right to effective assistance of counsel where his attorney, representing him during the plea and sentencing proceedings, advised Cook to plead guilty to the charge without first having objected to or challenged the indictment which indictment was factually illegal in its attempt to change Appellant. Defense counsel secured such plea of guilty by mentally coercing Appellant to enter a plea of guilty. Defense counsel never objected to the indictments recorded under Cause Nos. 04-005 KB and 04-006 KB.

In. Jackson v. State, 815 So. 2d 1196 (Miss. 2002), the Supreme Court of Mississippi 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 defendant must prove, under the totality of the circumstances, that (1) him attorney's performance was deficient and (2) the deficiency deprived the defendant of a fair trial. *Hiter v. State, 660 So. 2d 961, 965 (Miss. 1995).*

*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 defendant must show that there is a reasonable probability that, but for him 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 Ward v. State, 708 So.2d 11 (Miss. 1998), the Supreme Court held the following:

Effective assistance of counsel contemplates counsel's familiarity with the law that controls him client's case. *See* **Strickland v. Washington**, *466 U.S. 668, 689 (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 defendant's case; remanding for consideration of claim of ineffectiveness where the defendant alleged that him attorney did not know the relevant law).*

In the instant case, defense counsel failed to properly represent Appellant Cook effectively by failing to investigate the indictment or object to the fact that the indictment was an illegal instrument. Additionally, defense counsel never conferred with Cook as to the contents of the promises made to him by the MBN in regards to a plea of guilty and admission of the charges. This should have been investigated by defense counsel since such information could have been crucial to any leniency which Cook may have been entitled to. Counsel could have brought such matter to the attention to the trial court at the appropriate time and in mitigation of the sentence.

To successfully claim ineffective assistance of counsel, the defendant 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 defendant. 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; Gilliard v. State, 462 So.2d 710, 714 (Miss. 1985). The defendant must show that there is a reasonable probability that for him attorney's errors, defendant 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. 668, 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 defendant 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 him 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 him favor, and to have the Assistance of Counsel for him 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 defendant be first defense witness); Ferguson v. Georgia, 365 U.S. 570, 593 -596 (1961) (bar on direct examination of defendant). Counsel, however, can also deprive a defendant 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 defendant's claim that counsel's assistance

was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

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 defendant [466 U.S. 668, 688] complains of the ineffectiveness of counsel's assistance, the defendant 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 Michael 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 defendant entails certain basic duties. Counsel's function is to assist the defendant, 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 defendant derive the overarching duty to advocate the defendant's cause and the more particular duties to consult with the defendant on important decisions and to keep the defendant 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 defendant. 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 defendant'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 defendant 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 defendant 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 defendant 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 defendant 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 defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. 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 defendant has said, the need for further investigation may be considerably diminished or eliminated altogether. And when a defendant 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 defendant 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 defendant 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 defendant demonstrates that counsel "actively represented conflicting interests" and that "an actual conflict of interest adversely affected him 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 defendant 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 defendant shows that particular errors of counsel were unreasonable, therefore, the defendant must show that they actually had an adverse effect on the defense. It is not enough for the defendant 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. States v United. 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 defendant 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 defendant 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 defendant must exclude the possibility of arbitrariness, whimsy, caprice, "nullification," and the like. A defendant has no entitlement to the luck of a lawless decision maker, even if a lawless decision cannot be reviewed. The assessment of prejudice should proceed on the assumption that the decision maker is reasonably, conscientiously, and impartially applying the standards that govern the decision. It should not depend on the idiosyncracies of the particular decision maker, 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 defendant 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 defendant 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 defendant 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 defendant 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 defendant 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 presented here, it is clear that Appellant Patrick Cook suffered violations of his constitutional right to effective assistance of counsel, in violation of the 6th Amendment to the United States Constitution. Defense counsel should have adequately investigated the indictment, the pre-indictment provided to Cook by the MBN, and made appropriate objections to the multiple counts in which the indictment set forth. Moreover, had defense counsel been abreast of the information provided by the MBN to Cook then the defense would have been able to approach the prosecutor with a request that the MBN's representations to Cook be respected. The indictment should not have specified any increased amount of drugs

that was not in the possession of Cook at the time of arrest. Cook told the officers that he did not live at the address where the officers allegedly found 13 pounds of marijuana, and that he lived with his mom. Cook had been detained in a room for at least 10 hours. Cook stated that he previously stayed at that address, but not anymore, and the marijuana found there was not his. The officers told him that if it was not his, then "it's your girlfriend's." So, Cook told them that the drugs were his because of his girlfriend's sake. Cook's attorney failed to object to the indictment or the amount of drugs that were used to coerce Cook into entering a plea of guilty. Cook's attorney was clearly ineffective, and Cook's conviction and sentence should have been reversed by the trial court and, since it was not, this Court should reverse and remand this case to the trial court for an evidentiary hearing.

**A.**

**COUNSEL WAS INEFFECTIVE FOR FAILURE TO OBJECT TO INDICTMENTS 005 AND 006 WHICH WAS USED TO MENTAL COERCE APPELLANT TO ENTER A PLEA OF GUILTY KNOWING THAT SAID INDICTMENT WAS ILLEGAL DUE TO VIOLATION OF THE 4TH, 5TH AND 14TH AMENDMENT.**

In Miller v. State, 243 So.2d 558 (Miss. 1971), a confession was obtained after the Sheriff mentioned to Miller that "he would be better off" if he would tell the truth. The conviction was reversed and the case remanded for a new trial, the confession being held inadmissible.

> The trial court found the appellant's statement to have been freely and voluntarily made. It did not, however, rule upon the statement of the sheriff with regard to whether it was an inducement or offer of leniency to the appellant if he would confess. In Robinson v. State, , 613, , 51 (1963), we stated: "* * * a mere exhortation or adjuration to speak the truth will not exclude a confession, but where such adjuration is accompanied by an expression that it would be better for the accused to tell the truth, some courts have refused to admit such confession. * * *", citing Mathews v. State, 102 Miss. 549, 59 So. 842 (1912) and Frazier v. State, (Fla. 1958). We held in Robinson that the statement or confession made subsequent to an exhortation to "square with the State, or the City, whoever the crime was against" and with the "'man upstairs' and that if he didn't, he wasn't

trying to help himself" was the equivalent of an inducement, rendering the statement inadmissible in evidence as being involuntarily made. In Mitchell v. State, 24 So. 312 (Miss. 1898), we held that a confession given by the defendant was not voluntarily made subsequent to the defendant's being advised by the sheriff that it would be better for him to tell all about it. Recently, in Agee v. State, , 674 (Miss. 1966), we held: A confession made after the accused has been offered some hope of reward if he will confess or tell the truth cannot be said to be voluntary. This Court has long adhered to the rule that when the offer of reward or hope of leniency is made by a private individual the same rule applies. In Clash v. State, , (1927) a confession was held inadmissible when it was signed by the accused after a private individual had told him that, "* * * `If he would tell us about the money, and return it, we would let him out of jail on bond.'" In Johnson v. State, 89 Miss. 773, 42 So. 606 (1906) private citizens told the accused that, "* * * it would be better for him to confess, as it would go lighter with him if he told the truth." The confession that followed these statements by private citizens was held inadmissible. Although the statement made by the sheriff that the appellant would be better off by telling the truth was probably not intended as an inducement, yet, when it is considered under the circumstances in which it was made, we conclude it very probable that the statement caused the appellant to confess. Some of these circumstances were that the appellant was a twenty-year-old Negro youth of previous good reputation, having never been incarcerated before, who was desirous of being released from jail. These factors, when considered with the additional fact that the sheriff is the highest officer of the county, a representative of the State, speaking in his official capacity to a youth accused of a crime, cast such doubt upon the confession as to render it inadmissible in evidence. We are of the opinion the confession was not voluntarily made and that its admission constitutes reversible error. Page 560

Thus, another case, Miller v. State, 250 So.2d 624, a confession was held inadmissible where an officer told the defendant that if she would cooperate with the State "it would probably go a lot easier on her."

In the recent case of Miller v. State, , 559 (Miss. 1971), we held: The trial court found the appellant's statement to have been freely and voluntarily made. It did not, however, rule upon the statement of the sheriff with regard to whether it was an inducement or offer of leniency to the Robinson v. State, , 613, , 51 (1963), Page 627 we stated: "* * * a mere exhortation or abjuration to speak the appellant if he would confess. In truth will not exclude a confession, but where such abjuration is accompanied by an expression that it would be better for the accused to tell the truth, some courts have refused to admit such confession. * * *", citing Mathews v. State, 102 Miss. 549, 59 So. 842 (1912) and Frazier v. State, (Fla. 1958). We held in Robinson that the statement or confession made subsequent to an exhortation to "square with the State, or the City, whoever the crime was against" and with the "`man upstairs' and that if he didn't, he wasn't trying to help himself" was the equivalent of an inducement, rendering the statement inadmissible in evidence as being involuntarily made. In Mitchell v.

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This Court should conclude that in the instant appeal counsel rendered ineffective assistance of counsel and that such ineffectiveness consisted of Counsel's failure to challenge or object to the indictment where that was valid claims for objection. Appellant's conviction upon his guilty plea and sentence must be reversed. In the alternative, this Court should direct that this matter be remanded to the trial court for and evidentiary hearing.

**B.**

## Where trial Court failed to advise Cook that under the ruling rendered by the Supreme Court in Trotter v. State, the sentence of the Court could be appealed directly to the Supreme Court independent of the plea of guilty.

The guilty plea colloquy, which have not been filed in this case, should show that the trial court advised Cook that he had no right to appeal the actions of the Court. This was not a correct statement of the law. The trial court judge made fundamental error where it advised Appellant Cook that he had no right to directly appeal the actions of the trial court in regards to his sentence. The law is clear that a defendant who pleads guilty has a right to directly appeal the sentence to the Supreme Court. Trotter v. State, 554 So. 2d 313, 86 A.L.R.4th 327 (Miss. 1989). Cook should have been provided with this information.

The Order of the trial court which denied the PCR in this case never address nor referenced this claim. The record filed with this Court on appeal fail to include the plea colloquy transcript. This Court should find that the record on appeal is not complete where Appellant has applied all attempts required to secure and make the record appropriate, complete, and correct for review by this court. This Court should reverse and remand this case to the trial court to allow the court to correct the record on appeal.

## CONCLUSION

Based upon the facts contained in the record and the presentation contained in this brief, Appellant would urge this Honorable Court to reverse and remand this case to the trial court to allow Appellant to withdraw the plea and to proceed to trial. Appellant should at least be allowed an evidentiary hearing in this matter under the law and facts which has been set out herein and above.

Respectfully submitted,

BY: /atrick Cook

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## CERTIFICATE OF SERVICE

This is to certify that I, Patrick Cook, Jr., have this date served a true and correct copy of the above and foregoing Brief for Appellant, by United State Postal Service, first class postage prepaid, upon:

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Honorable Mike Smith
Circuit Court Judge
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This, the 29 day of October, 2007.

BY: Patrick Cook

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