IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2006-CP-01070-COA

CLARANCE MARIO KEITH — APPELLANT

VS.

STATE OF MISSISSIPPI — APPELLEE

Appeal From The Circuit Court of Hinds County, Mississippi
First Judicial District
Honorable L. Breland Hilburn, Circuit Judge presiding

BRIEF FOR APPELLANT

BY: Clarence Keith

Clarence Mario Keith, [redacted]
JCCF
279 Hwy. 33
Fayette, MS 39069

Appellant pro se

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CERTIFICATE OF INTERESTED PERSONS

The undersigned Appellant, Clarence Mario Keith, 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. Clarence Mario Keith, Appellant/Appellant;
2. Honorable Jim Hood, Atty. General, and his staff;
3. Honorable Mel Coxwell, Assistant District Attorney
4. Honorable **L. Breland Hilburn**, Circuit Court Judge;

Respectfully submitted,

BY: Clarence Keith

Clarence Mario Keith, [redacted]
JCCF
279 Hwy. 33
Fayette, MS 39069

CERTIFICATE OF INCARCERATION

Appellant, Clarence Mario Keith, was incarcerated in a Mississippi State Prison facility, in regards to the conviction and prison sentence now at issue in this action, at the time this actions was filed. Appellant remains in custody under strict supervision of the Mississippi department of Corrections, in regards to the conviction and prison sentence now at issue in this action, at this time and throughout the briefing of this case.

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BRIEF FOR Appellant

I. STATEMENT OF ISSUES ON APPEAL

A.

Whether trial court erroneously found that Appellant filed motion as a criminal matter where motion clearly contained appropriate lines and notation to allow clerk to apply civil action number and where there was not language indication to specifically state action was a criminal matter except the criminal cause number on the face of the motion for identification purposes.

B.

Whether trial court should have considered claims on the merits even in the absence of affidavits to support claims in view of the Keith's incarceration and inability to move about and secure affidavits from witnesses.

C.

Whether Appellant Keith was denied due process of law where he was convicted of the offense of manslaughter without having admitted a sufficient factual basis to demonstrate guilt of such manslaughter offense. The admissions made in upon court by Appellant Keith does not constitute sufficient basis for manslaughter.

D.

Whether Appellant Keith was denied due process of law where he was convicted of the offense of arm robbery without having admitted a sufficient factual basis to demonstrate guilt of such arm robbery offense. The admissions made in upon court by Appellant Keith does not constitute sufficient basis for arm robbery.

E.

Whether Appellant was denied due process of law where he was allowed and enticed to plead guilty to arm robbery and manslaughter under duress and coercion when defense counsel gave advice that if Appellant did not plead guilty he would get life without parole. Appellant was denied due process of law where he was charged with arm robbery and manslaughter where under the law the facts constituted a charge of car jacking.

F.

Whether Appellant was denied his right to effective assistance of counsel in violation of the six amendment to the United States constitution.

G.

Whether the Cumulative effect of the Ineffectiveness of counsel deprived Appellant Keith of his constitutional right to a fair trial and, if convicted at trial, an effective direct appeal to the Mississippi State appellate court, in violation of the 5th and 6th Amendments to the United States Constitution.

II. FACTS

Keith was indicted by the Hinds County Grand Jury on June 12, 1997, for the offenses of armed robbery and capital murder. Edward DeLawrence McWilliams. Through his family, Appellant Keith retained Honorable Curtis Williams, of Jackson, Mississippi, to represent Appellant in this case at trial. Just prior to trial Keith's attorney instructed him that he should plead guilty because he, counsel, was medically unable to try a murder case and that he had recently underwent eye surgery and his physician had instructed him that he could not try an murder case. Mr. Williams came to Appellant several times with plea bargain deals which Appellant continuously refused until Mr. Williams told Appellant that if he did not take the last offer of 25 years that he would get life without parole and that he, Mr. Williams, could not do an appeal because Appellant still owed him several payments on the fee for the trial. This information was provided to Appellant before petitioner's mother and family and the pressure applied by Mr. Williams and the tactics of allowing the family to hear such information and the crying and tears of the family which was prompted by hearing such information from Mr. Williams coerced Appellant to plead guilty. The actions of Mr. Williams delivering such information was the driving force behind Appellant entering a pleas of guilty to crimes for which Appellant was not guilty of. Mr. Williams capitalized upon the tears and emotions of the family members in order to coerce and persuade Appellant to enter pleas of guilty to crimes in which Mr. Williams were fully aware that Appellant was not guilty of and that the charges would have been dismissed on speedy trial claims or would have been reversed and rendered by the Supreme Court on such claims in the direct appeal. Mr. Williams advised Appellant that if pleaded guilty he would serve about five years on the twenty five year sentence because the mandatory law would be changing in five years. Mr. Williams never filed amotion for a fast and speedy trial in the case and he was fully aware that the state had allowed over five years to pass between the

date of petitioner's arrest and the date of the trial. Appellant would assert that had he been aware of the fact that even if convicted of armed robbery and murder that no life sentence without parole would have been legal, Had Appellant been aware of this information set out herein, including the applicable law to this case, there would have been no pleas of guilty and Appellant would have insisted on going to trial.

III. SUMMARY OF ARGUMENT

When facts are clear from the record, re-filing an affidavit is unnecessary. Scott v. State, 878 So.2d 933, 948 (Miss. 2004).

Appellant Keith was subjected to a denial of effective assistance of counsel where defense counsel advised Appellant to enter a plea of guilty to the charge without having actually fully investigated such charges or the evidence which the state supported such charge. due process when the trial court discarded the previously mandated maximum sentence for manslaughter and replaced it with a greater sentence. The trial court exceeded its jurisdiction by changing the sentence after the Appellant advised his attorney to file an appeal.

The Motion to Reconsider filed in this case has merit where the trial court arbitrarily imposed an enhanced sentence of 10 years without a jury to determine the issues thus violating the 5th and 14th Amendments to the United States Constitution.

Appellant Keith was never apprised that under applicable law, his sentence could be appealed to the Supreme Court for direct appeal.

IV.

ARGUMENT

A.

The trial court concluded that Appellant filed his PCR as a criminal matter when it, in fact, should have been filed as a civil action. The trial court noted, and Appellant agrees, that Sykes v. State, 757 So.2d 757 (Miss. 1991) requires that the action be filed as a civil action. However, contrary to the Circuit Court's findings, Appellant did file the complaint as a civil matter which is contained in the same format as this Court has accepted in many other cases as being a civil action. The motion contained the information to identify it as a civil action. While the motion did contain the criminal cause number on the face, this was included as a means of identifying in which case it pertained to. The criminal cause number would be needed in order to know which action the claims would be in regard to. Otherwise it could be confused and mistaking to be regarding some other person. Including the criminal cause number would aid the clerk in finding the record in which the trial court must review in accord with the requirements of the PCR statutes.

This Court should find that the PCR motion filed in this matter was, in fact, filed as a civil action where it contained the appropriate information.

B.

When there would be witnesses to the events that are the basis for the claimed invalidity to the plea, and no affidavits from anyone are provided, the previous sworn assertions by the defendant in court or in a plea petition will stand as the controlling evidence. Gable v. State, 748

So.2d 703, 706 (Miss. 1999). On the other hand, where the claims contains procedural matters and are based upon matters already a part of the record, not affidavit s

C.

Appellant Keith was not indicted or sentenced as habitual offender under either Miss. Code Ann. §99-19-81 or Miss. Code Ann. §99-19-83. However, the sentence imposed upon Clarence Keith for armed robbery contained a mandatory portion which must be served without parole or eaned time. The law is clear that in order to be sentenced to a term without parole, defendant must be indicted and sentenced as a habitual offender. Ard v. State, 403 So. 2d. 875 (Miss. 1981). [1]

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., Brown 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 to 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.

[1] Miss Code Ann. §97-3-79 provides that:

> *Every person who shall feloniously take or attempt to take from the person or from the presence the personal property of another and against his will by violence to his person or by putting such person in fear of immediate injury to his person by the exhibition of a deadly weapon shall be guilty of robbery and, upon conviction, shall be imprisoned for life in the state. penitentiary if the penalty is so fixed by the jury; and in cases where the jury fails to fix the penalty at imprisonment for life in the state penitentiary the court shall fix the penalty at imprisonment in the state penitentiary for any term not less than three (3) years.*

However, a sentence for armed robbery allows a non- habitual to accumulate earned time credits after serving the initial 10 years of such sentence. Williams. v. Puckett, 624 So.2d 496, 499-500 (Miss. 1993).

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.[2]

D.

Clarence Keith was represented in the Circuit Court by Honorable Curtis Williams who informed Appellant, in the presence of seven witnesses who has provided affidavits to effect, that if Appellant did not plead guilty to the charges he would get life without patrol. The law is clear that such a tactic is illegal. Myers v. State 583 So. 2d 174 (Miss. 1991) on the basis the pleas entered by Keith is coerced as well as involuntary. The judgments entered there under, as a matter of law, is subject to collateral attack.

Appellant would assert that the cumulative effect of each of the errors set forth in this motion, when combined, constitutes a denial of due process of law and amounts to reversible plain error as having denied Appellant his constitutional right to a fair trial..

V.

INEFFECTIVE ASSISTANCE OF COUNSEL

Appellant Clarence Keith was denied him Sixth Amendment right to effective assistance of counsel where his attorney, representing him during the plea and sentencing proceedings, advised Keith to plead guilty to armed robbery, and manslaughter or he would by sentenced to life without parole were he to proceed to trial. This information and advice constitutes ineffective assistance of counsel. More over, defense counsel's advice caused Keith life without parole if he continued of the course of asserting his rights to a trial. Lawfully, defense counsel was not in a position to advise Keith of a projected sentence he would receive when no such trial or

[2] While the Mississippi Supreme Court specified "Inmates at the Mississippi State Penitentiary", it is clear that this decision would apply to any inmate confined within or without the State of Mississippi who has been subjected to a Mississippi conviction and sentence and who is serving that sentence or must serve such sentence at some point in the future and which that person desire to attack collaterally.

sentencing hearing had yet been held. Sentencing, ever had Keith been found guilty, was a matter for the court.

In. Jackson v. State, 815 So.2d 1196 (Miss. 2002), the 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 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).*

Keith claims that the following instances demonstrate that he suffered ineffective assistance of counsel during the pre-plea proceedings. First, defense counsel never informed Keith of the fact that armed robbery, even upon a plea of guilty carried with it a mandatory sentence; Defense Counsel coerced Keith into pleas by informing Keith that a failure to plead guilty would result in a sentence of life without parole; Defense Counsel never informed Keith that the charges against him should have been car jacking as opposed to armed robbery and manslaughter. Had defense counsel correctly instructed Keith on these critical points Keith would not have entered a plea of guilty. Defense Counsel clearly was not informed on or fully aware of the law in regards to sentencing for that offense of armed robbery or murder.

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 know the law in regards to armed robbery or murder and as a result counsel failed to correctly advise Keith of the law regarding 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 Supreme Court of Mississippi 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); Appellant. 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 Appellant. 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. Appellant. 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. Appellant. 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 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 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. 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 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 idiosyncrasies 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 fact finder 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 sentence - 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 n this case, it is clear that Clarence Keith has suffered a violation of him constitutional rights to effective assistance of counsel, in violation of the 6th Amendment to the United States Constitution. Defense counsel should have made Keith aware of the law and should have gave Keith the right to make an intelligent decision as to where he would plead guilty. The decision cannot be intelligent where Keith was not provided

with all the relevant information regarding the penalty and the admissions he was entering. This fact, coupled with the fact that defense counsel's advice was the driving force b Keith's decision to plead guilty, constitutes gross ineffective assistance of counsel as will as coercion by counsel.

The Supreme Court of Mississippi has repeatedly held that an allegation that counsel for a defendant failed to advise him of the range of punishment to which he was subject to gives rise to a question of fact about the attorney's constitutional proficiency that is to be determined in the trial Court. See: Nelson v. State, 626 So.2d 121, 127 (Miss. 1993) [The failure to accurately advise Nelson of the possible consequences of a finding of guilt in the absence of a plea bargain ... may, of proven, be sufficient to meet the test in Strickland v. Washington] See also: Alexander v. State, 605 So.2d 1170 (Miss. 1992) [Emphasizing that where a criminal defendant alleges that he pleaded guilty to a crime without having been advised by his attorney of the applicable maximum and minimum sentences a question of fact arises concerning whether the attorney's conduct was deficient].

This Court should conclude that here counsel rendered ineffective assistance of counsel and that such ineffectiveness prejudiced Petitioner's guilty pleas in such a way as to mandate vacation of such pleas as well as the sentence imposed. This Court should conduct an evidentiary hearing in regards to such claims and, if such claims are proven the Court should direct a new trial be held.

VI.

CUMULATIVE ERROR

Appellant asserts that even in the event this Honorable Court hold that each of the aforesaid claims raised, standing alone, does not constitute cause to grant relief, the cumulative effect of each acted to deprive Clarence Mario Keith of him constitutional rights to a fair trial, as

guaranteed to him under the Sixth and Fourteenth Amendments to the United States Constitution, and Article 3, Sections 14 and 26 of our Mississippi Constitution. Rainer v. State, 473 So.2d 172, 174 (Miss. 1985); Williams v. State, 445 So.2d 798, 814 (Miss. 1984)

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

> *"It is one of the crowning glories of our law that, no matter how guilty one may be, no matter how atrocious him crime, nor how certain him doom when brought to trial anywhere, he shall, nevertheless, have the same fair and impartial trial accorded to the most innocent defendant. Those safeguards crystallized into the constitution and laws of the land as the result of centuries of experience, must be, by the courts, sacredly upheld as well as in the case of the guiltiest as of the most innocent defendant answering at the bar of him country. And it ought to be a reflection always potent in the public mind, that where the crime is atrocious, condemnations is sure, when all these safeguards are accorded the defendant, and therefore the more atrocious the crime, the less need is there for any infringement of these safeguards." Tennison v. State, 79 Miss. 708, 713, 31 So. 421, 422 (1902), cited and quoted with approval in Johnson v. State, supra.*

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

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

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

> *"This is not one of those case for the application of the rule that a conviction will be affirmed unless it appears that another jury could reasonably reach a different verdict upon a proper trial then that returned on the former one,*

but rather it is a case where the constitutional right of an accused to a fair and impartial trial has been violated. When that is done, the defendant is entitled to another trial regardless to the fact that the evidence on the first trial may have shown him to be guilty beyond every reasonable doubt. The law guarantees this to one accused of crime, and until he has had a fair an impartial trial within the meaning of the Constitution and the laws of the State, he is not to be deprived of him liberty by a sentence in the state penitentiary." Id. *At 750.*

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

Appellant Keith did not receive a fair trial in this case and, for that reason, as outlined above Keith was unable to prove he was innocence to the crimes because prosecuting authorities, aided by Keith's attorney, used unfair and illegal tactics to lure Keith into incriminating himself by pleading guilty. Appellant's trial attorney was grossly ineffective during the trial court proceedings. This Court should grant the appeal in this case and reverse and remand to the trial court for additional proceedings..

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 allow Appellant to

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above and foregoing Brief for Appellant, have been mailed to: Honorable E. Faye Peterson, District Attorney, P. O. Box 22747, Jackson; Honorable Jim Hood, P. O. Box 220, Jackson, MS 39205; Honorable Bobby Delaughter, Circuit Court Judge, P. O. Box 327, Jackson, MS 39205.

This, the 27 day of September, 2007.

Respectfully submitted,

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