

CASE NO. 2007-CA-00705-COA

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

CEARIC A. BARNES  
APPELLANT/DEFENDANT

VS.

STATE OF MISSISSIPPI  
APPELLEE/PLAINTIFF

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APPEAL FROM THE CIRCUIT COURT OF  
LINCOLN COUNTY, MISSISSIPPI

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APPELLANT'S OPENING BRIEF

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**ORAL ARGUMENT NOT REQUESTED**

**CEARIC A. BARNES, Appellant**

BY: 

Wanda Abioto  
Attorney At Law  
P. O. Box 1980  
Southaven, MS 38672

Attorney for Appellant  
MSB # 

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II.

**CERTIFICATE OF INTERESTED PERSONS**

The undersigned certifies that the following listed persons have an interest in the outcome of this case. The representation are made in order that the Justices of this Court may evaluate possible disqualification or recusal.

1. Cearic A. Barnes, Appellant
2. Honorable Jim Hood, and staff, Attorney General
3. Honorable Michael M. Taylor, Circuit Court Judge
4. Honorable Wanda Abioto, Appellant Attorney
5. Honorable Jennifer Musselwhite, Assistant District Attorney
6. Honorable William Barnett, Defense Attorney at trial

Respectfully submitted,

CEARIC A. BARNES

BY: \_\_\_\_\_  
Wanda Abioto

Attorney At Law  
P. O. Box 1980  
Southaven, MS 38672

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**STATEMENT OF THE ISSUES**

ISSUE ONE

Counsel for defense was ineffective in plain violation of the Sixth Amendment to the United States Constitution where counsel engaged in:

- a. Violations of the Fifth Amendment;
- b. Violations of Civil and Miranda Rights
- c. Waiving the Appellants right to a competency hearing and determination in violation of Rule 9.06 of Miss. Uniform Rules of Cty. And Circuit Court

#### ISSUE TWO:

Appellant's guilty plea was an unknowing involuntary and unintelligent waiver of fundamental rights, entered in violation of the Fourteenth Amendment due process of law clause;

#### ISSUE THREE:

The Court committed reversal error by amending the original indictment to the charge of murder in another judicial district after Barnes had entered a plea of guilty without giving notice of the elements of the charge and the judicial district where the crime was committed, making the conviction and sentence illegal. The sentence therefore constitutes a fundamental constitutional error cognizable at any time and not withstanding any procedural bar.

#### ISSUE FOUR:

Appellant was subjected to a denial of due process of law where the trial court failed to advise Barnes of the correct law in regards to appealing a sentence rendered upon a plea of guilty to the Supreme Court. Appellant Barnes was never told that, under applicable law, his sentence could be appealed to the Supreme Court for direct review.

## ISSUE FIVE:

Appellant would assert that the trial Court erred in failing to include the transcript of the plea proceedings and portions of the record, which the trial court referred to as being factual findings of the sentencing judge that justified Barnes, understood and waived his rights

## ISSUE SIX

The acceptance of the guilty plea entered in this case, wherein issues of competency have been raised pursuant to Rule 9.06, prior to the Court compliance with Rule 9.06 violates the provisions of Rule 9.06 of the Miss. Uniform Rules of Cty. And Circuit Court practice<sup>1</sup>

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### <sup>1</sup> **Rule 9.06 COMPETENCE TO STAND TRIAL**

If before or during trial the court, of its own motion or upon motion of an attorney, has reasonable ground to believe that the defendant is incompetent to stand trial, the court shall order the defendant to submit to a mental examination by some competent psychiatrist selected by the court in accordance with § 99-13-11 of the Mississippi Code Annotated of 1972.

After the examination the court shall conduct a hearing to determine if the defendant is competent to stand trial. After hearing all the evidence, the court shall weigh the evidence and make a determination of whether the defendant is competent to stand trial. If the court finds that the defendant is competent to stand trial, then the court shall make the finding a matter of record and the case will then proceed to trial. If the court finds that the defendant is incompetent to stand trial, then the court shall commit the defendant to the Mississippi State Hospital or other appropriate mental health facility. The order of commitment shall require that the defendant be examined and a written report be furnished to the court every four calendar months, stating:

A. Whether there is a substantial probability that the defendant will become mentally competent to stand trial within the foreseeable future; and

B. Whether progress toward that goal is being made.

**The defendant's attorney, as the defendant's representative, shall not waive any hearing authorized by this rule,** but is authorized to consent, on behalf of the defendant, to necessary surgical or medical treatment and procedures. If at any time during such commitment, the court decides, after a hearing, that the defendant is competent to stand trial, it shall enter its order so finding and declaring the defendant competent to stand trial, after which the court shall proceed to trial.

#### ISSUE SEVEN:

The appellant was denied due process of law and the denial of rights under Mississippi Code Annotated 99-39-11 in the cursory review of the post conviction petition.

#### ISSUE EIGHT:

Appellant suffered cumulative error, which caused him to be deprived of his constitutional right to a fair trial in violation of the 5th and 14th Amendment to the United States Constitution.

### **STATEMENT OF INCARCERATION**

Appellant Cearic A. Barnes is presently incarcerated and housed in the Mississippi Department of Corrections at the Jefferson County Correctional Facility in Fayette, Mississippi, in service of the terms imposed by the court in this case. Appellant has been continuously confined, in

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If at any time during such commitment, the proper official at the Mississippi State Hospital or other appropriate mental health facility shall consider that the defendant is competent to stand trial, such official shall promptly notify the court of that effect in writing, and place the defendant in the custody of the sheriff. The court shall then proceed to conduct a hearing on the competency of the defendant to stand trial. If the court finds the defendant is not competent to stand trial, it shall order the defendant committed as provided above. If the court finds the defendant is competent to stand trial, then the case shall proceed to trial.

If within a reasonable period of time after commitment under the provisions of this rule, there is neither a determination that there is substantial probability that the defendant will become mentally competent to stand trial nor progress toward that goal, the judge shall order that civil proceedings as provided in § 41-21-61 to 41-21-107 of the Mississippi Code of 1972 be instituted.

Said proceedings shall proceed notwithstanding that the defendant has criminal charges pending against him/her. The defendant shall remain in custody until determination of the civil proceedings.



regards to such sentences, since the date of conviction and imposition of said sentences by the trial court.

### **STATEMENT OF CASE**

This Court has exclusive jurisdiction over the person(s) and the subject matter pursuant to Miss. Code Ann. Section 99-39-1 et seq. and Mississippi Code Ann. Section 99-39-5 et seq. Appellant was convicted in this Court on or about the 10th day of June 2003, in the Circuit Court of the Lincoln County, Mississippi, the 14th Judicial District, pursuant to a plea of guilty to the offense of Murder. Appellant was sentenced to a term life imprisonment. Said sentence was imposed to be served in the custody of the Mississippi Department of Correction in Cause No. 02-250-MS.

Appellant timely filed a post conviction motion in the trial court on October 31, 2006. Said motion was not accorded the review pursuant to statute and was not heard within the requisite period of time because of the record being misplaced. (C. P. 46-47) (R.E. 6-7) . On April 25, 2005, without conducting an evidentiary hearing and without reviewing the record as required by Miss. Code Ann. §99-39-11(1)<sup>2</sup> , the trial court entered an order dismissing the motion for post conviction relief. (C. P. 31) (R.E. 2) .On May 1, 2007, within the time required by law, Appellant filed

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<sup>2</sup> (1) The original motion, together with all the files, records, transcripts and correspondence relating to the judgment under attack, shall be examined promptly by the judge to whom it is assigned.

his Notice of Appeal. (C.P. 33) (R.E. 10) accompanied by his designation of record on appeal. (C.P. 34) (R.E. 11).

### **SUMMARY OF ARGUMENTS**

Appellant Barnes was charged by an indictment with Capital Murder pursuant to Section 97-3-19(2)(e)<sup>3</sup> of the Miss. Code Ann. 1972, in criminal cause No. 02-250MS. Jerrard T. Cook was also charged with the same offense as a co-defendant. Appellant filed his Amended Post-Conviction Relief for withdrawal of guilty plea within 3 years of the date of conviction and sentence as required.

During the guilty plea proceedings, the Appellant was denied effective assistance of counsel in violation of his Sixth Amendment Right under the Constitution of the United States and the Constitution of the State of Mississippi. Appellant asserts that it was counsel's responsibility to adequately investigate the facts surrounding the indictment; to raise procedural and factual issues which are set forth herein, as well as to file the appropriate motion under Rule 9.06 prior to trial. Appellant contends that counsel failed to present such assistance and subsequently allowed

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<sup>3</sup>***§97-3-19. Homicide; murder defined; capital murder; lesser-included offenses.***

*(2) The killing of a human being without the authority of law by any means or in any manner shall be capital murder in the following cases:*

*(e) When done with or without any design to effect death, by any person engaged in the commission of the crime of rape, burglary, kidnapping, arson, robbery, sexual battery, unnatural intercourse with any child under the age of twelve (12), or nonconsensual unnatural intercourse with mankind, or in any attempt to commit such felonies;*

Appellant to enter an involuntary plea of guilty to the offense, which he was charged by the amended indictment.

The Trial Court entered an order on April 25, 2007 dismissing the Motion for Post Conviction Relief. Yet the Judge Michael Taylor on April 9, 2008 (approximately one year later) wrote a letter to the Supreme Court in which stating that that the court file which contained the post conviction petition and its attachments had been misplaced and that his office was not in possession of the file and had never had the file. ( R.E. 16). The clerk of court made numerous motions after the order was entered requesting additional time to submit the record. ( R.E. 4-7). Finally this Court on August 1, 2008 made a finding that the case file had been lost and that it was necessary to remand the case to the Circuit Court for 30 days so that the file could be reconstructed. (R.E. 8). It should be noted that September 18, 2007, the trial court entered the self-same order entered on August 25, 2007.(R.E. 2). The Circuit Court Clerk submitted the record , on October 2, 2008.

In light of the trial court's admission that at no time had they been in possession of the file, the appellant contends that the trial court failed to comport with Mississippi Code Annotated.99-39-11. Further appellant contends that the second order was untimely which was entered after the Notice of Appeal had been filed and jurisdiction to determine the post conviction motion had been removed. (C. P. 33)(R.E.2).

The appellant contends that due to the loss of the record and the inordinate amount of time which had transpired that due process considerations mandated that the trial court review the petition pursuant to one of the enumerated sections (§99-39-13 through §99-39-23). In actions by the trial court to correct its error by the September 18, 2007 order should be considered as being without a jurisdictional basis in that the Notice of Appeal had been filed at the time the order was entered. Moreover both the April 25, 2007 and the September 18, 2007 orders both suffer defectively from the denial of due process mandated by Mississippi Code Annotated \_\_\_\_\_. At the time the Court remanded the motion to the trial court for proceedings to reconstruct the record. (C. P. 51)(R.E. 8).

### **ARGUMENT**

Appellant Barnes was charged by an indictment with Capital Murder pursuant to Section 97-3-19(2)(e)<sup>4</sup> of the Miss. Code Ann. 1972, in criminal cause No. 02-250MS. Jerrard T. Cook was also charged with the same offense as a co-defendant. Appellant has filed his Amended Post-Conviction Relief for withdrawal of guilty plea. Appellant brought his

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<sup>4</sup>***§97-3-19. Homicide; murder defined; capital murder; lesser-included offenses.***

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*(e) When done with or without any design to effect death, by any person engaged in the commission of the crime of rape, burglary, kidnapping, arson, robbery, sexual battery, unnatural intercourse with any child under the age of twelve (12), or nonconsensual unnatural intercourse with mankind, or in any attempt to commit such felonies;*

collateral attack within 3 years of date of conviction and sentence as required.

Appellant Cearic Barnes has suffered a violation of his 5th And 14th Amendment rights under the United States Constitution as well as the Constitution of the State of Mississippi where he has been sentence to a term of life without parole by the trial court where the law, at the time of offense was alleged to have been committed, did not permit life without parole as an option available to a trial court, setting without a jury fixing the said sentence.

Appellant's grounds this petition on the following state and federal constitutional laws, to which he asserts that his sentence is illegal, and that he is entitled to relief from:

1. Counsel for defense was ineffective in plain violation of the Sixth Amendment to the United States Constitution where counsel engaged in:
  - a. Violations of the Fifth Amendment;
  - b. Violations of Civil and Miranda Rights
  - c. Waiving the Appellants right to a competency hearing and determination in violation of Rule 9.06 of Miss. Uniform Rules of Cty. And Circuit Court.

2 Appellant's guilty plea was an unknowing involuntary and unintelligent waiver of fundamental rights, entered in violation of the Fourteenth Amendment due process of law clause;

3. The Court committed reversal error by amending the original indictment to the charge of murder in another judicial district after Barnes had entered a plea of guilty without giving notice of the elements of the charge and the judicial district where the crime was committed, making the conviction and sentence illegal. The sentence therefore constitutes a fundamental constitutional error cognizable at any time and not withstanding any procedural bar.

4. Appellant was subjected to a denial of due process of law where the trial court failed to advise Barnes of the correct law in regards to appealing a sentence rendered upon a plea of guilty to the Supreme Court. Appellant Barnes was never told that, under applicable law, his sentence could be appealed to the Supreme Court for direct review.

5. The acceptance of the guilty plea entered in this case, wherein issues of competency have been raised pursuant to Rule 9.06, prior to the Court compliance with Rule 9.06 violates the provisions of Rule 9.06 of the Miss. Uniform Rules of Cty. And Circuit Court practice<sup>5</sup>

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**<sup>5</sup> Rule 9.06 COMPETENCE TO STAND TRIAL**

If before or during trial the court, of its own motion or upon motion of an attorney, has reasonable ground to believe that the defendant is incompetent to stand trial, the court shall order the defendant to submit to a mental examination by some competent

## ISSUE ONE

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psychiatrist selected by the court in accordance with § 99-13-11 of the Mississippi Code Annotated of 1972.

After the examination the court shall conduct a hearing to determine if the defendant is competent to stand trial. After hearing all the evidence, the court shall weigh the evidence and make a determination of whether the defendant is competent to stand trial. If the court finds that the defendant is competent to stand trial, then the court shall make the finding a matter of record and the case will then proceed to trial. If the court finds that the defendant is incompetent to stand trial, then the court shall commit the defendant to the Mississippi State Hospital or other appropriate mental health facility. The order of commitment shall require that the defendant be examined and a written report be furnished to the court every four calendar months, stating:

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**The defendant's attorney, as the defendant's representative, shall not waive any hearing authorized by this rule,** but is authorized to consent, on behalf of the defendant, to necessary surgical or medical treatment and procedures. If at any time during such commitment, the court decides, after a hearing, that the defendant is competent to stand trial, it shall enter its order so finding and declaring the defendant competent to stand trial, after which the court shall proceed to trial.

If at any time during such commitment, the proper official at the Mississippi State Hospital or other appropriate mental health facility shall consider that the defendant is competent to stand trial, such official shall promptly notify the court of that effect in writing, and place the defendant in the custody of the sheriff. The court shall then proceed to conduct a hearing on the competency of the defendant to stand trial. If the court finds the defendant is not competent to stand trial, it shall order the defendant committed as provided above. If the court finds the defendant is competent to stand trial, then the case shall proceed to trial.

If within a reasonable period of time after commitment under the provisions of this rule, there is neither a determination that there is substantial probability that the defendant will become mentally competent to stand trial nor progress toward that goal, the judge shall order that civil proceedings as provided in § § 41-21-61 to 41-21-107 of the Mississippi Code of 1972 be instituted.

Said proceedings shall proceed notwithstanding that the defendant has criminal charges pending against him/her. The defendant shall remain in custody until determination of the civil proceedings.

COUNSEL FOR DEFENSE WAS INEFFECTIVE IN PLAIN VIOLATION OF THE SIXTH AMENDMENT, THAT IS, (A) VIOLATION OF THE FIFTH AMENDMENT AND (B) VIOLATION OF CIVIL RIGHTS AND MIRANDA RIGHTS

Appellant contends that his attorney, Mr. Barnett, convinced his family that he needed to plea or he would die. The appellant contends that the love of his family was used against him by his attorney to get him to plead guilty based on emotions. (See Exhibits C-1, C-2 & C-3). He contends that he was only 18 years of age and extremely scared for his life, and all he could think about was the death penalty because his attorney kept planting the thoughts of death sentence in his mind and lead him to believe that the only way to keep from being sentenced to death was to plead guilty. Yet despite the reality of this approach, the decision to plead must be based on rationale thought in which strategy and law are balanced against duty to family and other. Any consultation, which is limited to emotionalism, is a denial of the 6<sup>th</sup> Amendment to the United States Constitution.

Appellant further states the following:

"I did not voluntarily and intelligently enter a plea of guilty. I was acting out of fear for my life. I would not have plead guilty had my counsel not scared me and my family with the treats of the death penalty and said I could get parole in 10 years when I cannot.

In effect, my counsel told me to lie to the judge about me understanding the court proceedings; and to lie when the court asked me, if I had been forced or coerced into pleading guilty. I did lie to the court when asked about this. My counsel threatened me and coerced me into pleading guilty by scaring me with the death penalty. He stated that if I accepted the plea, I would have



parole in 10 years, also that he could almost guarantee I'll make parole if I kept my nose clean See Exhibit C-1, C-2 & C-3.

I lied when I said I was satisfied with the service of my counsel. I filed with the bar on my counsel and he asked to be removed from my case; but the Judge denied his request. I was told to lie about this when asked by the court or the court would not accept my plea and I would face the death penalty. See Exhibit B.

The fear of the death penalty; for not pleading guilty, destroyed Barnes's ability to think and balance the risk and benefits of going to trial. When the issue of voluntariness is raised, the burden of proof remains upon the State to prove voluntariness of guilty plea by clear and convincing evidence. See *Courtney v. State*, 704 So.2d 1352 1352 (Miss.App. 1997).

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., Sykes v. State, 533 So.2d 1118, 1124 (Miss. 1988); Reynolds v. State, 521 So.2d 914, 917 (Miss. 1988).

<sup>6</sup>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 <sup>7</sup> 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.

#### **INEFFECTIVE ASSISTANCE OF COUNSEL**

Appellant Barnes was denied him Sixth Amendment right to effective assistance of counsel where his attorney, representing him during the plea and sentencing proceedings, advised Barnes to plead guilty openly to murder before the original indictment of capital murder was legally amended, and when, at most, the crime of murder is what he should have been indicted for at first because it was not premeditated murder. Mr. Barnett, the defense counsel, appeared to be disorientated during the trial. He allowed his client to enter a plea of guilty to a lesser charge before the amendment of the indictment, and indictment count that did not show the element of the crime. The state and the court, on their own

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<sup>7</sup> 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, which they desire to attack collaterally.

initiative, corrected the indictment afterward in another judicial district. This is a matter which the defense should have been fully aware of and should have informed the court prior to any plea being made. Mr. Barnett was not functioning as a counsel, which the Sixth Amendment requires. Mr. Barnett's assistance was less than adequate since had he been functioning properly as an attorney, Barnes plea and sentence would have been legally executed.

In Jackson v. State, \_\_\_ So.2d \_\_\_ (Miss. 2002) (No. 2000-KA-01195-SCT), 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) his 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 his attorney's errors, he would have received a different result in the trial court. Nicolaou v. State, 612 So.2d 1080, 1086 (Miss. 1992). Finally, the court must then*

determine whether counsel's performance was both deficient and prejudicial based upon the totality of the circumstances. Carney v. State, 525 So.2d 776, 780 (Miss. 1988).

In Ward v. State, \_\_\_ So.2d \_\_\_ (Miss. 1998) (96-CA-00067), 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 capital murder and the lesser charge of murder as well as failed to advise Barnes of the law to the penalty phase of what kind of sentence to expect if the jury fails to fix the sentence to life imprisonment without parole. Either way, it is ineffective assistance of counsel. 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).

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, it is clear that Cearic Barnes has suffered a violation of his constitutional rights to effective assistance of counsel, in violation of the

6th Amendment to the United States Constitution. Defense counsel should have made Barnes aware of the law and should have gave Barnes the right to make an intelligent decision as to where he would plead guilty. The decision cannot be intelligent where Barnes was not provided with all the relevant information regarding the penalty and the admissions he was entering. This fact, coupled with the fact that counsel failed to investigate and interview the witnesses, who could and would have supported mitigating circumstances that Barnes was not fully involved in the crime or armed during the process, would have been reasonable doubt for a jury. This Court should recognize such violation and grant post conviction relief to Cearic Barnes who is entitled to a new trial and to have effective assistance of counsel during such trial.

This court 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, if 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 him

attorney of the applicable maximum and minimum sentences a question of fact arises concerning whether the attorney's conduct was deficient].

Further counsel contravened the law by submitting the guilty petition of the movant without moving for a competency hearing. The defendant further asserts that he was denied effective assistance of counsel in that Mr. Brewer, as the defendant's representative could not directly or indirectly waive any hearing authorized by this rule. The action of defendant's counsel to submit a petition to enter a guilty plea prior to the competency hearing was prohibited and directly in contravention of the 6<sup>th</sup> amendment to the United States Constitution. It is therefore the position of the defendant that at the time the plea was taken he was without effective assistance of counsel and could not understand the ramification of said plea.

During the course of the guilty plea, the record is devoid of the Court having discussed the competency of the movant prior to the acceptance of the guilty plea. It was incumbent upon counsel to mandate a finding and he failed to so act.

This Court should conclude that here counsel rendered ineffective assistance of counsel and that such ineffectiveness prejudices Appellant's guilty plea in such a way as to mandate a reversal of the plea as well as the sentence imposed. This Court should reverse that case to the trial

Court and direct that an evidentiary hearing be conducted in regards to this case.

## ISSUE TWO

APPELLANT'S GUILTY PLEA WAS AN UNKNOWING INVOLUNTARY AND UNINTELLIGENT WAIVER OF FUNDAMENTAL RIGHTS, ENTERED IN VIOLATION OF THE FOURTEENTH AMENDMENT DUE PROCESS OF LAW CLAUSE.

Appellant averred that he entered a guilty plea because of fear of the death sentence is in direct violation of Rule 8.04(A)(3) of the Uniform Rules of circuit Court Practice. See Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709 (1969). Appellant states that he was 18 years of age when he was charged with murder, and he was 18 years of age at the time of sentencing, and he had no understanding of the court system. See Sanders v. State. He contends that the plea properly was rejected when defendant asserted innocence in response to direct questioning by the court; at jury selecting, when attempted to enter plea (See record)

In Boykin v. Alabama, the Court stated:

"Against this background, the Court holds that the Due Process Clause of the Fourteenth Amendment requires the outright reversal of Appellant's conviction. This result is wholly unprecedented. There are past holdings of this Court to the effect that a federal habeas corpus Appellant who makes sufficiently credible allegations that his state guilty plea was involuntary is entitled to a hearing as to the truth of those allegations. See, e. g., Waley v. Johnston, 316 U.S. 101 (1942); cf. Machibroda v. United States, 368 U.S. 487 (1962). These holdings suggest that if equally convincing allegations were made in a petition for certiorari on direct review, the Appellant might in some circumstances be Page 247 entitled to have a judgment of affirmance vacated and the case remanded for a state hearing on voluntariness. Cf. Jackson v. Denno, 378 U.S. 368, 293-394 (1964). However, as has been noted, this Appellant makes no allegations of actual involuntariness."



If the plea of guilty entered in this case by Barnes was involuntary as defined by existing law, then not only the Appellant's sentence, but also his guilty plea, must be vacated. This is true even though Barnes only sought to vacate his sentences and did not specifically seek to vacate his guilty plea. See Courtney v. State, 704 So.2d 1352 (Miss. App. 1997), citing Stevenson v. State, 506 (Miss. 1996); Patterson v. State, 969 (Miss. 1995).

### ISSUE THREE

THE COURT COMMITTED PLAIN AND REVERSAL ERROR BY AMENDING THE INDICTMENT TO THE CHARGE OF MURDER IN ANOTHER JUDICIAL DISTRICT AFTER BARNES HAD ENTERED A PLEA OF GUILTY WITHOUT GIVING NOTICE OF THE ELEMENT OF THE CHARGE AND THE JUDICIAL DISTRICT WHERE THE CRIME WAS COMMITTED, MAKING THE CONVICTION AND SENTENCE ILLEGAL. THE SENTENCE THEREFORE CONSTITUTES A FUNDAMENTAL CONSTITUTIONAL ERROR COGNIZABLE AT ANY TIME AND NOT WITHSTANDING ANY PROCEDURAL BAR.

The record indicates that the original indictment was executed on August 30, 2002, showing the crime of murder was committed in the County of Lincoln in the Fourteenth Judicial District. The court sentenced Barnes to a term of Life imprisonment in the custody of the Mississippi Department of Corrections on June 10, 2003. Also, on June 10, 2003, the Court issued an "Order Amending Indictment" to change the charge of Capital Murder to Murder, because of defendant's plea of guilty to Murder (indicating that the plea to murder had already been done). See Exhibit #3 Notwithstanding the Amended Indictment clearing shows that it was executed in the County of Adams, Mississippi. The Judicial District of

Adams County is the Sixth Judicial District. The Amended Indictment also failed to show the elements of the Crime, which was shown in the original indictment, committed in Lincoln County, Mississippi, the Fourteenth Judicial District. Such an error is fatal and clear error.

A trial court's denial of post-conviction relief will not be reversed absent a finding that the trial court's decision was clearly erroneous. Smith v. State, 806 So.2d 1148, 1150 (Miss. Ct. App. 2002). However, when issues of law are raised the proper standard of review is de novo. Brown v. State, 731 So.2d 595, 598 (Miss. 1999). Whether or not an indictment is defective is a question of law. Peterson v. State, 671 so.2d 647, 652 (Miss. 1996).

In Brown v. State, 2005-CP-004COA (Miss. App. 5-30-2006, the Court stated:

"A guilty plea is not binding upon the accused unless made knowingly and voluntarily. Alexander v. State, (Miss. 1992) (citing , (Miss. 1991)). If the accused is made aware of the nature of the charges against him and the consequences of the plea, then the plea is deemed "knowing and voluntary." Alexander, (citing Wilson v. State, (Miss. 1991)). The trial judge must "inquire and determine' that the accused understands the maximum and minimum penalties to which he may be sentenced." Alexander, . To require reversal on the grounds of an involuntary guilty plea, Brown must prove by a preponderance of the evidence that his plea was involuntary. Dearman v. State, (¶ 8) (Miss.Ct.App. 2005) (citing Brown v. State, , (¶ 4) (Miss.Ct.App. 2004); McLendon v. State, (Miss. 1989)). Brown must provide record support for his allegations of fact." Dearman, (¶ 8) (citations omitted).

In a recent case, Fuqua v. State, 2004-KA-00491-COA (Miss.App. 9-13-2005),

the Court ruled:

"[I]t is a well-established principle of law that in order for an indictment to be sufficient, it must contain the essential elements of the crime charged." Peterson v. State, (Miss. 1996). More specifically, it is

fundamental . . . that an indictment, to be effective as such, must set forth the constituent elements of a criminal offense; if the facts alleged do not constitute such an offense within the terms and meaning of the law or laws on which the accusation is based or if the facts alleged may all be true and yet constitute no offense, the indictment is insufficient. . . . Every material fact and essential ingredient of the offense — must be alleged with precision and certainty, or, as has been stated, every fact which is an element in a prima facie case of guilt must be stated in the indictment. *Id.* at 653 (quoting *Love v. State*, , , , (1951)). "The ultimate test, when considering the validity of an indictment on appeal, is whether the defendant was prejudiced in the preparation of his defense." *Medina v. State*, , (Miss. 1996).

Barnes states that he was prejudiced by the amended indictment because it took place after he had entered a plea of guilty, notwithstanding he was also prejudiced by the amended indictment for failure to state the correct judicial district where the crime was allegedly committed. Barnes alleges that if his counsel had shown him the amended indictment before he entered a plea of guilty, he would not have entered that plea because he had not committed a crime in Adams County. He would have proceeded with a trial by jury and been acquitted of the murder charge. Even if the elements of the crime of murder would have been the same of the original indictment, Barnes would have objected to the amended indictment for failure of the court to make known the correct judicial district by which the crime was committed. The Court must vacate his plea and sentence and have a hearing to determine whether such an error was plain, clear and harmful error that was prejudicial to the defendant.

The court, the prosecutors and the defense counsel know or should have known that the Amendment Indictment take the place of the

original Indictment and abandon the elements, including the judicial district, and cannot be a clear notice of the charge with the an Amended indictment gives the elements of the charge and the where-about the charge was committed and the victim who the crime was committed upon. Such an error is plain and clear error and the defendant's conviction by entering a plea of guilty to a defected amended indictment make the plea and sentence illegal. The case must be vacated and the sentence must be reversed to a lesser sentence.

#### ISSUE FOUR

APPELLANT WAS DEPRIVED OF DUE PROCESS OF LAW WHERE TRIAL COURT FAILED TO ADVISE BARNES OF HIS RIGHT TO APPEAL THE SENTENCE.

The trial court failed to advise Cearic Barnes that he had no right to appeal the actions of the Court in the sentence it arrived at in regards to the plea. Even upon a plea of guilty the law would allow Barnes a direct appeal of the sentence imposed. The trial court judge made fundamental error where the Court failed to advise Barnes of this avenue of review of the sentence in regards to the plea of guilty. 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).

The law supports the assertion here that the trial court was incorrect in the advised furnished to Barnes regarding the appeal. A defendant is

not barred from appealing by having pleaded guilty. Neblett v. State, 75 Miss. 105, 21 So. 799 (1897); Jenkins v. State, 96 Miss. 461, 50 So. 495 (1909).

Thus, the trial court was clearly incorrect, as a matter of law, in advising Barnes that there was no right to appeal from the sentence.

#### ISSUE FIVE

APPELLANT WOULD ASSERT THAT THE TRIAL COURT ERRED IN FAILING TO INCLUDE THE TRANSCRIPT OF THE PLEA PROCEEDINGS AND PORTIONS OF THE RECORD WHICH THE TRIAL COURT REFERRED TO AS BEING THE FACTUAL FINDINGS OF THE SENTENCING JUDGE WHICH JUSTIFIED BARNES UNDERSTOOD AND WAIVED HIS RIGHTS.

Appellant would assert to this Court that it is the responsibility of the Appellant to make the record contain those documents, which supports the claims raised. Puckett v. Stuckey, 633 So.2d 978, 982 (Miss. 1993).

**In Puckett, the Supreme Court held that:**

Inexplicably, the MDOC visitation policy was not made a part of the record in the circuit court. A purported copy is included in appellee's brief but may not be considered in the present posture of the case. We have stated on many occasions that each case must be decided by the facts shown in the record, not assertions in the brief. Facts asserted to exist must and ought to be definitely proved and placed before us by a record certified by law, otherwise, we cannot know them. Britt v. State, 520 So.2d 1377, 1379 (Miss. 1988).

In the instant case, as the record demonstrates, Appellant designated all transcripts of the record and all clerks papers. While Appellant did not include a particular cause number in his designation, the designation all transcripts filed in this case. (C.P. 34). The post conviction relief motion filed by Appellant contained Cause No. 02-250MS (C. P. 4), which was part of this case in which the designation referred to.

Moreover, this Court has previously stated in Doss v. State, 956 So.2d 1100 (Miss.App. 2007) (fn 1) that:

None of the transcripts from the proceedings on the underlying robbery conviction was included in the record, which is before this Court. Doss's "Designation of Records" designated "[a]ll clerks papers, trial transcripts and exhibits filed, taken or offered in this case" as being necessary to be included on appeal. Technically, this designation does not include papers, transcripts, or exhibits which are part of the underlying criminal conviction, as a motion for post-conviction collateral relief is a separate civil action. Nevertheless, were we not affirming on grounds which are in no way dependent on these absent documents, we would order a supplemental record to include such documents.

The decision in Doss represented a similar designation of records which this Court indicated it would reversed and supplement the record on appeal were there not other claims which caused dismissal and which claims were not inclusive in the portions of the record missing. In the instant case, the crucial portions of the record are missing. The trial court referred to a finding by the sentencing court, which is not included in the record. Moreover, this Court previously sent this case to the trial court to reconstruct the record. The trial court never reconstructed the record and never conducted an evidentiary hearing. This trial court never rendered any finding upon the Rule 9.06 claim, which Appellant presented in the post conviction motion. Such claim can only be decided by a full review of the record which the trial court never included after Appellant did all which was possible to make the record contain those portions which would support his claims on appeal. Court have firmly held that the case will be reversed and remanded when this Court is presented with only one

side of the argument to review, an insufficient record and a judgment that has no clear support from the record. IN RE J.D.W., 881 So.2d 929 (Miss.App. 2004).

#### ISSUE SIX

#### THE MOVANT WAS DENIED DUE PROCESS OF LAW BY THE CONTRAVENTION OF RULE 9.06 OF THE MISSISSIPPI UNIFORM.

The Court was duty bound to conduct an evidentiary hearing given the knowledge of the mental and emotional condition of the defendant. It is the defendant's position that once the defendant's counsel motioned the Court that he had reasonable grounds to believe the defendant was incompetent to stand trial and the Court ordered the defendant to submit for a mental examination , the Court was statutorily bound to comply with the rule prior to trial and/or plea. In Howard v State, 701 So. 2d. 274, 280 ( Miss. 1997), the Supreme Court ruled that once it has invoked Rule 9.06 by ordering a mental examination of a defendant before or during the trial, the trial court , after the examination, must conduct a competency hearing after which the Court must weigh the evidence and render a determination of whether the defendant is competent to stand trial. The Court failed to conduct said hearing herein therefore the guilty plea accepted was not based upon a true finding of competency, knowing and voluntariness in violation of Mississippi Statutory law and the due

process clause to the United States Constitution , as well as the Mississippi Constitution.

#### ISSUE SEVEN

#### WHETHER THE APPELLANT WAS DENIED DUE PROCESS OF LAW AND DENIAL OF RIGHTS UNDER MISSISSIPPI CODE ANNOTATED 99-39-11 IN THE REVIEW OF THE POST CONVICTION MOTION

The appellant contends that he has been summarily denied due process of law pursuant to Mississippi Code Annotated 99-39-11 wherein the trial court admitted that at the time of the decision it did not have before it the original motion in which to review. ( R.E. 16). The decision by the trial court reflects a summary disposition of the case without providing due process pursuant to both the Constitution and Mississippi statutory law. For this reason and the above referenced the decision by the lower court should be reversed.

#### CONCLUSION

The Appellant asserts that he was denied effective assistance of counsel during the proceedings; that his plea was not voluntary and that Rule 9.06 was not complied with. Moreover, the trial Court referred to findings in the record which portions were not included in the actual record filed with this Court even after the Appellant had designated the record be filed and after this Court had Order that the record be



reconstructed. The trial court denied relief on the basis of a record, which was not reconstructed, and without addressing all claims. This Court should, at the least, remand this case to the trial court and require that the record be reconstructed and supplemented after an evidentiary hearing. This Court should remand and order that an evidentiary hearing be conducted or that the plea of guilty be vacated and that the not guilty plea be reinstated

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that I, Wanda Abioto, Attorney for Appellant, have this date served a true and correct copy of the above and foregoing Brief

for Appellant, by United States Postal Service, first class postage prepaid,  
upon:

Honorable Jim Hood  
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Hon. Michael Taylor  
Circuit Court Judge  
P. O. Box 1350  
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This, the \_\_\_\_\_ day of May, 2009.

Respectfully submitted,

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