IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2007-CP-01058-COA

ERIC SHANE ROACH — APPELLANT

VS.

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR APPELLANT

Eric Roach, Appellant

BY: Eric Roach

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Dekalb, MS 39328

ORAL ARGUMENT NOT REQUESTED

PRO SE PRISONER BRIEF

TABLE OF CONTENTS

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STATE OF MISSISSIPPI — APPELLEE

CERTIFICATE OF INTERESTED PERSONS

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

1. Eric Roach, Appellant
2. Honorable Jim Hood, and staff, Attorney General.
3. Honorable James T. Kitchens, Jr., Circuit Court Judge.
4. Honorable Forrest Allgood, District Attorney

Respectfully Submitted,

BY: Eric Roach

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STATEMENT OF ISSUES

ISSUE ONE

Appellant Eric Roach was effective assistance of counsel during the pretrial proceedings because of defense counsel's failure to be abreast of the proceedings, the applicable law, and the facts of the case. Roach was subjected toa violation of his 6th Amendment rights in regards to such actions by his counsel.

ISSUE TWO

The sentence imposed upon Eric Roach constitutes a denial of due process of law in sentencing where Eric Roach was sentenced to a more severe sentence as a first time offender with no prior criminal record. The sentence imposed upon Roach is in direct conflict with the provision of the 5th and 14 Amendments to the United States Constitution.

ISSUE THREE

Appellant was subject toa denial of due process of law where the trial court failed to advise Roach of the correct law in regards to appealing his case after he was convicted and where, in absence of and as a direct result of such failure Roach was unable to appeal his case directly.

ISSUE FOUR

Appellant Roach was denied his right to effective assistance of counsel on direct appeal where the trial court failed to appoint counsel to Roach to perfect and prosecute appeal in that the trial court was aware that counsel assisting Roach, who attempted to appeal conviction and sentence, was no licensed in Mississippi and was therefore without standing and where right to a direct appeal from a criminal conviction and sentence has constitutional origin.

ISSUE FIVE

The indictment which charged Roach with the crime was constitutionally void where indictment failed to set out the judicial district in which criminal offense was charged. Appellant Roach was denied due process of law where he was convicted of the offense of armed robbery withot the prosecution having presented adeuated proof. Roach was denied his fundamental constitutional right toa fair trail.

STATEMENT OF FACTS

Appellant would assert that facts the facts set out in this brief are within his personal knowledge and is provable on the basis of the record and as a mater of law. Appellant Eric Roach presents appeal to this Court upon the following set of facts.

On February 6, 2004, an indictment was filed against Eric Roach in Lowndes County Mississippi, charging that Eric Roach committed the offense of armed robbery.

Appellant Eric Roach was represented a public defender in such case and was convicted by jury verdict on December 1, 2004. Sentence was imposed upon defendant on the same date.

Appellant Eric Roach attempted to appeal his case to the Mississippi Supreme Court by hiring an attorney. However, such attorney was not a member of the Mississippi State Bar and did attempt to appeal the case but was unsuccessful because of his out-of-state status.

Appellant Eric Roach thereafter sought to proceed with his appeal out-of-time which was denied by the Court.

Appellant Eric Roach, after having retained an attorney to execute his right to a direct appeal to the Appellate Court, had no knowledge that he was entitled to a Mississippi licensed attorney to execute and prosecute his appeal in the absence of his ability to retain a Mississippi counsel.

Had Appellant been aware of this fact he would have asked the rial court to appoint his an attorney who was eligible under Mississippi Law to effect the appeal.

The attorney whom Appellant hired to prosecute the appeal never actually made Appellant aware that he could not proceed with the appeal in Mississippi and before Appellant retained his services. Such attorney made Appellant believe that the appeal could be perfected by him and maintained from the start to the conclusion.

Prior to my trial, my trial attorney never performed a pretrial investigation to ascertain what witnesses, on those I identified to him, would be available for the defense and what were the actual facts which could be developed by the defense to refute the factual scenario offered by the prosecution. My attorney never talked to or attempted to talk to the police who were responsible for collecting the evidence and presenting it to the prosecution.

Appellant's attorney never adequately prepared for trial and through not being prepared Appellant's attorney caused Appellant to be found guilty of a crime to which Appellant was innocent of. Appellant's attorney never made the proper objections at trial.

Appellant's trial defense attorney failed to make a contemporaneous objections at trial to prevent the state from proceeding on the faulty indictment against Appellant.

ARGUMENT

ISSUE ONE

A. Ineffective Assistance of Counsel during Trial

Appellant was provided with ineffective assistance of counsel during trial where counsel:

a) Failed to summon adequate witnesses;

b) Failed to perform pretrial investigation;

c) Failed to establish facts or investigate and prepare for trial by securing discovery or conferring with the defendant regarding the defense to be raised.

d) Opened the door, during trial, for prosecution to introduce prejudicial evidence against Appellant which evidence was presented to the jury and enhanced Appellant's chances of being found guilty of the armed robbery charged in this case.

e) Failed to seek a continuance in the case within time to prepare for trial but waited until the morning of trial to request a continuance which was denied by trial court.

In Jackson v. State, 815 So.2d 1196 (Miss. 2002), the Supreme Court held the following in regards to ineffective assistance of counsel:.

> Our standard of review for a claim of ineffective assistance of counsel is a two-part test: the 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). This review is highly deferential to the attorney, with a* strong presumption that the attorney's conduct fell within the wide range of reasonable professional assistance. *Id. at 965. With respect to the overall performance of the attorney, "counsel's choice of whether or not to file certain motions, call witnesses, ask certain questions, or make certain objections fall within the ambit of trial strategy" and cannot give rise to an ineffective assistance of counsel claim. Cole v. State, 666 So.2d 767, 777 (Miss. 1995).*
>
> *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).

> *Roach's counsel did in fact fail to fully investigate and interview potential witnesses. This failure constitutes represented deficient performance. While Roach must still show that this deficiency in counsel's performance prejudiced him at trial, the law is clear that an attorney is ineffective when he fails to perform pretrial investigation or interview witnesses. See generally* **Payton v. State, 708 So.2d 559 (Miss. 1998);** *Woodward v. State, 635 So.2d 805, 813 (Miss. 1993) (Smith, J. dissenting); Yarbrough v. State, 529 So.2d 659 (Miss. 1988); Neal v. State, 525 So.2d 1279 (Miss. 1987).*

Roach asserted that he was not guilty in regards to the crime in which he was accused. Roach never admitted to any elements of the crime. Therefore, all witnesses whose names were provided to counsel by Roach should have been called by Roach's attorney to support the presentation that Roach was innocent and the evidence present by the prosecution could be refuted. Roach's attorney never talked to the witnesses and therefore never presented their testimony to the jury. Eric Roach's attorney's failure in this regard most definitely prejudiced Roach at trial. The trial court erroneously denied relief on this claim.

In Ward v. State, 708 So.2d 11 (Miss. 1998), the Supreme Court of Mississippi held the following:

> Effective assistance of counsel contemplates counsel's familiarity with the law that controls his client's case. *See* **Strickland v. Washington**, *466 U.S. 668, 689 (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 his attorney did not know the relevant law).*

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 his attorney's errors, defendant would have received a different result. Nicolaou v. State, 612 So.2d 1080, 1086 (Miss. 1992); Ahmad v. State, 603 So.2d 843, 848 (Miss. 1992).

In Strickland v. Washington, 466 U.S. 668, 687 (1984), the United States Supreme Court held as follows:

> In assessing attorney performance, all the Federal Courts of Appeals and all but a few state courts have now adopted the "reasonably effective assistance" standard in one formulation or another. See Trapnell v. United States, 725 F.2d 149, 151-152 (CA2 1983); App. B to Brief for United States in United States v. Cronic, O. T. 1983, No. 82-660, pp. 3a-6a; Sarno, [466 U.S. 668, 684] Modern

Status of Rules and Standards in State Courts as to Adequacy of Defense Counsel's Representation of Criminal Appellant Eric Roach, 2 A. L. R. 4th 99-157, 7-10 (1980). Yet this Court has not had occasion squarely to decide whether that is the proper standard. With respect to the prejudice that a defendant must show from deficient attorney performance, the lower courts have adopted tests that purport to differ in more than formulation. See App. C to Brief for United States in United States v. Cronic, supra, at 7a-10a; Sarno, supra, at 83-99, 6. In particular, the Court of Appeals in this case expressly rejected the prejudice standard articulated by Judge Leventhal in his plurality opinion in United States v. Decoster, 199 U.S. App. D.C. 359, 371, 374-375, 624 F.2d 196, 208, 211-212 (en banc), cert. denied, 444 U.S. 944 (1979), and adopted by the State of Florida in Knight v. State, 394 So.2d, at 1001, a standard that requires a showing that specified deficient conduct of counsel was likely to have affected the outcome of the proceeding. 693 F.2d, at 1261-1262. For these reasons, we granted certiorari to consider the standards by which to judge a contention that the Constitution requires that a criminal judgment be overturned because of the actual ineffective assistance of counsel. 462 U.S. 1105 (1983). We agree with the Court of Appeals that the exhaustion rule requiring dismissal of mixed petitions, though to be strictly enforced, is not jurisdictional. See Rose v. Lundy, 455 U.S., at 515 -520. We therefore address the merits of the constitutional issue.

II

In a long line of cases that includes Powell v. Alabama, 287 U.S. 45 (1932), Eric Roach v. Zerbst, 304 U.S. 458 (1938), and Gideon v. Wainwright, 372 U.S. 335 (1963), this Court has recognized that the Sixth Amendment right to counsel exists, and is needed, in order to protect the fundamental right to a fair trial. The Constitution guarantees a fair trial through [466 U.S. 668, 685] the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment, including the Counsel Clause: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense." 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; Eric Roach 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 sentence, 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 Appellant Eric Roach a duty of loyalty, a duty to avoid conflicts of interest. See Cuyler v. Sullivan, supra, at 346. From counsel's function as assistant to the defendant derive the overarching duty to advocate the defendant's cause and the more particular duties to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution. Counsel also has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process. See Powell v. Alabama, 287 U.S., at 68 -69. These basic duties neither exhaustively define the obligations of counsel nor form a checklist for judicial evaluation of attorney performance. In any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances. Prevailing norms of practice as reflected in American Bar Association standards and the like, e. g., ABA Standards for Criminal Justice 4-1.1 to 4-8.6 (2d ed. 1980) ("The Defense Function"),

are guides to determining what is reasonable, but they are only guides. No particular set of detailed rules for counsel's conduct can satisfactorily take [466 U.S. 668, 689] account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Any such set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions. See United States v. Decoster, 199 U.S. App. D.C., at 371, 624 F.2d, at 208. Indeed, the existence of detailed guidelines for representation could distract counsel from the overriding mission of vigorous advocacy of the defendant's cause. Moreover, the purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation, although that is a goal of considerable importance to the legal system. The purpose is simply to ensure that criminal defendants receive a fair trial. Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. Cf. Engle v. Isaac, 456 U.S. 107, 133 -134 (1982). A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the *circumstances of counsel's* challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that *counsel's conduct falls within the wide* range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered *sound trial strategy.*" *See Michel v. Louisiana*, supra, at 101. There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular Appellant Eric Roach 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 Appellant Eric Roach. 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 unchangeable; 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 presumptully accurate and fair proceeding were present in the proceeding whose result is challenged. Cf. United States v. Eric Roach, 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 sentencer - including an appellate court, to the extent it independently reweighs the evidence - would have concluded that the balance of aggravating and mitigating circumstances did not warrant death. In making this determination, a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury. Some of the factual findings will have been unaffected by the errors, and factual findings that were affected will have been affected in different ways. Some errors will have had a pervasive effect on the inferences to [466 U.S. 668, 696] be drawn from the evidence, altering the entire evidentiary picture, and some will have had an isolated, trivial effect. Moreover, a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support. Taking the unaffected findings as a given, and taking due account of the effect of the errors on the remaining findings, a court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors.

IV

A number of practical considerations are important for the application of the standards we have outlined. Most important, in adjudicating a claim of actual ineffectiveness of counsel, a court should keep in mind that the principles we have stated do not establish mechanical rules. Although those principles should guide the process of decision, the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. In every case the court should be concerned with whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results. To the extent that this has already been the guiding inquiry in the lower courts, the standards articulated today do not require reconsideration of ineffectiveness claims rejected under different standards. Cf. Trapnell v. United States, 725 F.2d, at 153 (in several years of applying "farce and mockery" standard along with "reasonable competence" standard, court "never found that the result of a case hinged on the choice of a particular standard"). In particular, the minor differences in the lower courts' precise formulations of the performance standard are insignificant: the different [466 U.S. 668, 697] formulations are mere variations of the overarching reasonableness standard. With regard to the prejudice inquiry, only the strict outcome-determinative test, among the standards articulated in the lower courts, imposes a heavier burden on defendants than the tests laid down today.

> The difference, however, should alter the merit of an ineffectiveness claim only in the rarest case. Although we have discussed the performance component of an ineffectiveness claim prior to the prejudice component, there is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one. In particular, a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed. Courts should strive to ensure that ineffectiveness claims not become so burdensome to defense counsel that the entire criminal justice system suffers as a result.

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

Under the standards set forth above in Strickland, and by a demonstration of the record and the facts set forth in support of the claims, it is clear that Eric Roach has suffered a violation of his constitutional rights to effective assistance of counsel, in violation of the 6th Amendment to the United States Constitution. Roach's attorney was not prepared for trial. She had not partially nor fully investigated the facts of the case or the witness which was available to support Roach's assertions.

B. Ineffective Assistance of Counsel In Direct Appeal Process

In it's ruling regarding Roach's notice of out of time appeal which Roach filed in this criminal cause, the trial court stated the following:

> The Defendant is attempting to appeal his conviction entered on December 1, 2004. At the time of Appellant's sentencing, the Court informed the Appellant of his rights regarding appeal. The Appellant retained counsel, who attempted to file notice of appeal December 22, 2004, but as Appellant admits in his motion, he knew that his counsel would not be able to legally file the notice since his counsel was not a member of the Mississippi Bar. The Appellant has now filed a "Belated Notice of Appeal," pro se, stating that when he discovered his notice of appeal had not been filed, he "immediately" on December 27, 2005, filed notice of appeal himself. The Court finds that the Appellant's Motion for Out-of-Time Appeal should be denied as Appellant did not file notice within the thirty (30) days dictated by the Mississippi Rules of Appellate Procedure and failed to show excusable neglect.

Appellant would assert that the Order of the trial court in this case corroborates this claim that Appellant was denied effective assistance of counsel on appeal. The trial court stood idly by while knowing Appellant's attorney was not a Mississippi licensed attorney, and allowed this unlicensed attorney to attempt to represent Appellant and following that unsuccessful attempt the trial court held this failure against Appellant by finding that Appellant had missed the filing deadline even though the order admits that the unlicensed attorney attempted to file the Notice of Appeal as early as December 22, 2004.

Criminal defendants not only have a right to counsel on appeal but there is a constitutional right to effective assistance of counsel in a direct criminal appeal. Douglas v. California, 372 U.S. 353, 83 S.Ct. 314, 9 L.Ed.2d 811 (1963); Hughes v. Booker, 220 F.3d 346, 348, (5th Cir. 2000); Boykin v. State, ___ So.2d. ___ (Miss. App. 2006) (No. 2005-KA-00628-COA).

The law makes clear that Roach had a constitutional right to counsel on appeal. If the trial court never offered Roach that right by making Roach aware that the court would appoint counsel in the event Roach was unable to acquire a fully licensed Mississippi attorney, Roach's rights were violated. Telling Roach of the right to an appeal and making certain he understands how to execute that right are two entirely different matters. The trial court never properly established that Roach understood his right to appeal his case with the assistance of counsel. This Court should grant a hearing in regards to this matter and grant relief to Appellant in regards to this claim.

ISSUE TWO

The sentence imposed upon Eric Roach constitutes a denial of due process of law in sentencing where Eric Roach was sentenced to a more severe sentence as a first time offender with no prior criminal record. The sentence imposed upon Roach is in direct conflict with the provisions of the 5th and 14th Amendments to the United States Constitution

Appellant Eric Roach was a first time offender who had never been charged with nor convicted of a crime. The sentence of twenty (20) years imprisonment amounted to severe sentence for a first offender which offender to due process clause.

Roach was sentenced to a term of 20 mandatory years for the offense of armed robbery. Such sentence by law, cannot be subjected to earned time reduction. The sentence was excessive to the crime and offender. Towner v. State, 837 So.2d 221 (Miss. App. 2003); Solem v. Helm, 463 U.S. 277, 103 S.Ct. 3001, 77 l.Ed.2d 637 (1983), questioned in Harmelin v. Michigan, __ U.S. ___, 111 S.Ct. 2680, 115 L.Ed.2d 762 (Miss. 1988).

While the sentence was within the number of years allowed by the statute, it was not consistent with a sentence satisfactory for a first time offender. Moreover, the law supports an argument that the trial court's actions was an abuse of discretion in imposing such a severe sentence upon Roach as compared to the sentences imposed upon other defendants for the same offense in the same jurisdiction and surrounding jurisdictions. The cumulative effect of the sentence renders it excessive. This Court should grant relief on this claim.

ISSUE THREE

Appellant was subjected to a denial of due process of law where the trial court failed to advise Roach of the correct law in regards to appealing his case after he was convicted and where, in absence of and as a direct result of such failure Roach was unable to appeal his case directly.

The trial court did not advise Roach of his right to appeal the conviction and sentence and to make Roach aware of the fact that he had the right to counsel on appeal and the court would appoint counsel in the event Roach was financially unable to retain counsel. In failing to make Roach aware of this critical right Roach was unable to properly perfect his appeal to the Supreme Court of Mississippi. Roach attempted to proceed with his appeal but was unable to retain an attorney with a legitimate Mississippi license to practice law. The trial court was fully aware of such attempt but continued to deny Roach this critical right to counsel on appeal which the constitution has long ago allowed to a criminal defendant seeking to appeal his conviction and sentence. As pointed out above, the trial court should have pointed out to Roach that while his current attorney did not have the legal standings to represent him in Mississippi, the law allowed that he was entitled to be represented by an appointed counsel on appeal as a matter of right.

An indigent defendant in a direct criminal appeal is entitled to competent counsel to defend him in his first appeal as of right. U.S. v. Mills, 895 F.2d 897, 904 (2nd Cir. 1990) (citing Morris v. Slappy, 103 S.Ct. 1610, 1617 (1983); Wheat v. U.S., 108 S.Ct. 1692, 1700 (1988)).

In Ross v. Moffitt, 417 U.S. 600, 94 S.Ct. 2437, 41 L.Ed.2d 341 (1974) (citing Douglas v. California, 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed.2d 811 (1963)), the United States Supreme Court held that although the Fourteenth Amendment requires appointed counsel on the first appeal for indigent defendants, it does not require appointed counsel to indigent defendants seeking discretionary, second-tier, appellate review. See Wainwright v. Torna, 455 U.S. 586, 102 S.Ct.

1300, 71 L.Ed.2d 475 (1982). In the instant case Roach is asserting that his rights were violated in the first appeal as of right.

In Harris v. State, 704 So.2d 1286 (Miss. 1997), the Court held that:

> Harris's case has received a full appellate review by the Court of Appeals on the record and briefs of counsel. He was entitled to and had appellate counsel before that court. That was his right. Miss. Code Ann. §99-35-101 (Supp. 1994), provides that any person convicted in circuit court has a right to appeal to the Supreme Court, except when the conviction is upon a plea of guilty. Harden v. State, 460 So.2d 1194, 1200 (Miss. 1984). Under our present appellate scheme, all appeals are to this Court, but are subject to assignment to the Court of Appeals. Miss. Code Ann. §§ 9-4-1 to 17 (Supp 1996). (See discussion of the appellate structure in Marshall v. State, 662 So.2d 566 (Miss. 1995)). Furthermore, where states have incorporated appellate review as an integral part of the system for final adjudication of guilt or innocence, that review is raised to the plane of federal due process and equal protection. Evitts v. Lucey, 469 U.S. 387, 392, 105 S.Ct. 830, 833-34, 83 L.Ed.2d 821 (1985); Griffin v. Illinois, 351 U.S. 12, 18, 76 S.Ct. 585, 590, 100 L.Ed. 891 (1956).

This court should find that the trial court erred in failing tom grant relief in this claim and should reverse and remain this case for the granting of post conviction relief on this ground and allow the Appellant an out of time appeal.

ISSUE FOUR

Appellant Roach was denied his right to effective assistance of counsel on direct appeal where the trial court failed to appoint counsel to Roach to perfect and prosecute appeal in that the trial court was aware that counsel assisting Roach, who attempted to appeal conviction and sentence, was not licensed in Mississippi and was therefore without standing and where right to a direct appeal from a criminal conviction and sentence has constitutional origin.

Appellant would assert and adopt all arguments and points of law contained under the above and preceding argument and issue as being supportive of this issue and would incorporate same herein as if each line was fully rewritten.

ISSUE FIVE

The indictment which charged Roach with the crime was constitutionally void where indictment failed to set out the judicial district in which criminal offense was charged.

The record indicates that the original indictment was executed on February 6, 2004, showing the crime of armed robbery was committed in the County of Lowndes County, Mississippi.

Rule 7.06 (4), Miss. Unif. Rules of Circuit and County Court Pro. requires that the indictment set out the county and judicial district in which the indictment is brought. In the instant case the indictment sets out the county in which the Appellant was indicted but fails to state any judicial district or court in which the proceedings were assigned. Rule 7.06, which was promulgated by the Supreme Court of Mississippi, requires that the "indictment shall also include the following:

"The county and judicial district in which the indictment is brought;" Cridiso v. State, ___ So.2d ___ (Miss. App. 2006); (No. 2004-KA-00413-COA (Miss.App. 10-10-2006); Gray v. State, 887 So.2d 158 (Miss. 2004).

Appellant would assert that without this required jurisdictional statement and information being contained in the indictment, the indictment is faulty and the Circuit Court was without jurisdiction to proceed without a waiver of indictment being executed by the accused. Neal v. State, 936 So.2d 463 (Miss.App. 2006). Thew Circuit Court errerd in failing to find this when the post conviction relief motion was considered by the court.

In Neal, 936 So.20 463, 466 (Miss. App. 2006), the Court held the following:

> Neal argues that due to defects in the charging documents, the circuit court was without jurisdiction and his plea was involuntary. His argument focuses on the failure of the Information to state the armed robbery element of "exhibition

> of a deadly weapon." The Information also referred to the robbery statute instead of to the statute for armed robbery. Miss. Code Ann. §§97-3-73 & 97-3-79 (Rev. 2000). Finally, the waiver of indictment document failed to refer to armed robbery.
>
> An accused has a constitutional right "to be informed of the nature and cause of the accusation." U.S. Const. Amend. IV. This State's Constitution does not expand the right. Miss. Const. art. III, §26. Entering a guilty plea does not waive an indictment's failure to include an element of a crime, nor does the plea waive subject matter jurisdiction. Conerly v. State, 607 So.2d 1153, 1156, (Miss. 1992). An indictment charging the essential elements of a crime must be served on a defendant in order for a court to obtain subject matter jurisdiction over the subject of a particular offense. Jefferson v. State, 556 So.2d 1016, 1021 (Miss. 1989).

These findings are clear and holds that where there are defects in the charging instrument then the court is without jurisdiction to adjudicate a guilty finding on the charges even where there has been a plea of guilty. This post conviction court should find that where the indictment was faulty in it's attempt to acquire jurisdiction then the conviction and sentence imposed there under should be null and void as a matter of law. While the court in Neal was focused upon the charging document's failure to refer to armed robbery, the essential elements here are no different. Here the claim can be viewed as being even stronger where the indictment failed to set out the judicial district of the offense. Moreover, the indictment merely asserts that Roach only exhibited a box-cutter as the deadly weapon. This Court should so find and should issue and order dismissing the conviction and sentence with prejudice.

CONCLUSION

Appellant would urge this Court to reverse and remand this case to the trial court and find that the trial court erred in failing to grannt post conviction relief in this case. Appellant would further request that this court direct the trial court to conduct an evidentiary hearing on the issues raised in the PCR motion and denied by the trial court without a hearing. It is clear that Appellant

presented a prima facie case for hearing. Appellant would pray that this Court grant any other relief which the Court deems to be just and proper under the law.

Respectfully submitted,

BY: Eric Roach

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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 Jim Hood, P. O. Box 220, Jackson, Ms 39205; Honorable James T. Kitchens, Circuit Court Judge, P. O. Box 1378, Columbus, MS 39703; Honorable Forrest Allgood, District Attorney, P. O. Box 1044, Columbus, Ms 39703.

This, the ____ day of December, 2007.

Respectfully submitted,

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