IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2007-CP-01377-COA

JERMAINE MCKINNEY — **APPELLANT**

VS.

STATE OF MISSISSIPPI — **APPELLEE**

BRIEF FOR APPELLANT

BY: Jermaine McKinney

Jermaine McKinney #101148
MWCF
503 South Main Street
Columbia MS 39429

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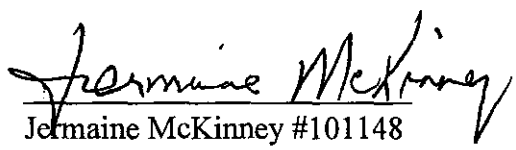
CERTIFICATE OF INTERESTED PERSONS

The undersigned Appellant, Jermaine McKinney, certifies that the following listed persons have an interest 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. Jermaine McKinney, Appellant pro se.
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: 

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STATEMENT OF ISSUES

A.

Appellant Jermaine McKinney was denied effective assistance of counsel during the pretrial proceedings where counsel advised appellant to plead guilty to indictment without having first challenged legality of a multiple counts indictment since the indictment was factually illegal where it failed to state the jurisdiction which the alleged crimes were committed, and where the counts of indictment contradicted the facts alleged in the record, and by mentally coercing Appellant to enter a plea of guilty without giving McKinney a clear notice of the charges against him. Defense counsel failed to object to the indictment recorded under Cause No. 8807.

B.

Defense counsel was ineffective where counsel failed to object to the multiple count indictment under Cause No. 8807, which was used to mentally coerce Appellant to enter plea of guilty while counsel was aware and had knowledge that the indictment was illegal due to violation of the 4th, 5th, 6th, and 14th Amendment to the United States Constitution.

C.

The sentence imposed upon Jermaine McKinney constitutes a denial of due process of law and equal protection of the law as guaranteed him under the 4th, 5th and 14th Amendments of

the United States Constitution where trial court imposed sentence under a two tier sentencing scheme.

D.

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

E.

The trial court erred in failing to grant an evidentiary hearing before actually entering an order denying the PCR motion where there was facts in dispute and the motion met the requirements for conducting an evidentiary hearing.

STATEMENT OF FACTS

On December 14, 2004, McKinney was arrested for Aggravated Assault and Burglary of a Dwelling. Appellant McKinney was on probation at this time and the Probation Officer advised McKinney that the probation would not be violated because the circumstances of the arrest were well known and that McKinney had not committed no actions to cause the arrest. The probation advised McKinney that he was aware that the charges would be dropped. The charges were filed against Appellant McKinney by an ex-girlfriend by the name of Juanita Cooperwood, because of a fall out McKinney had with Ms. Cooperwood a month prior to the arrest. Juanita Cooperwood called Appellant's Probation Officer several times asking how could she drop the charges because she had falsified the charges, and that was the reason why the probation had declined to violate McKinney's violate Appellant McKinney's probation. Juanita Cooperwood

came to court with Appellant McKinney and signed non-prosecution documemnation, but the Prosecuting Attorney decided he still wanted to prosecute Appellant McKinney for the said charges. When Appellant McKinney was released on bond, such bond was violated a couple of months later on a dirty urine, but not because of the pending assault and burglary charges which Appellant McKinney was indicted for on October 6, 2005. Pictures were taken of Juanita Cooperwood and her face was swollen at the time, but she never went to the hospital and there were no broken or fractured bones. There was never an allegation of any weapon being used at anytime during the alleged confrontation. Ms. Copperwood falsified the record stating that Appellant McKinney beat her on her face and body with my fists and kicked her in her stomach. Juanita Cooperwood told Appellant's appointed attorney that she let Appellant McKinney in the house and that Appellant McKinney did not break into nor burglarized her house, and while Appellant McKinney was incarcerated Appellant McKinney talked to Juanita Cooperwood and she advised Appellant that the Investigators told her Appellant McKinney would not get any time because the situation was not serious enough. During April 2004, while Appellant McKinney was out on bond, Appellant McKinney went to court and the grand jury did not pick up the case. Appellant McKinney was told then by a Mr. Perkins, of the West Point Police, the only way the grand jury would pick up the case the next term is if new evidence was presented for an indictment. No new evidence was presented but Appellant McKinney was still indicted on Aggravated Assault and Burglary when Appellant McKinney was expecting the case to be dismissed. On April 6, 2005, before the indictment, Appellant McKinney was returned back to the Court per court order and Ms. Cooperwood told the D.A. several times in the presence of Appellant that she did not want to prosecute. The prosecutor then tricked Cooperwood by leading her to believe that hse did not have any choice and that it was mandatory that she prosecute.

After Appellant McKinney was indicted, the prosecution came to Appellant with a plea of twenty years, and Appellant McKinney turned it down. The prosecutors, along with Appellant's attorney, advised Appellant McKinney that he would go to trial the next day. The next day the plea dropped to twelve years and then dropped to eight years.

Appellant McKinney was not able to see his indictment until after the plea and at that time Appellant's attorney showed Appellant McKinney the indictment where Appellant had been charged on a third count of attempted burglary. It is Appellant's knowledge that the State finally revealed the third charge to Appellant because the state knew that the charge of assault and burglary would not stick, but when Appellant McKinney made bond it was for the assault and burglary, not for attempted burglary. The attempted burglary was revealed unto Appellant McKinney at the last minute. The information stated Appellant McKinney broke a window with intent get into the house, but if the charges had been investigated, it would have been revealed that it was one of those windows that doesn't lock. The window then pulls out, and it was already broke, and when Appellant McKinney pulled the window out the broken pieces fell out. Appellant McKinney then left the house after that and was called on his cell phone by Ms. Cooperwood, who asked Appellant McKinney to come back to the house. Appellant McKinney took the eight years plea for attempted burglary because Appellant felt like it was the best way to get back in Court, since Appellant McKinney was never charged or indicted on that charge, at least Appellant McKinney thought he was not indicted on that charge since Appellant's attorney had never mentioned to Appellant McKinney a bout a third count on the indictment. Appellant McKinney really wanted to go to trial but Appellant McKinney knew that his appointed attorney was on the prosecutors' side. Appellant McKinney accepted the plea because of the mental coercion applied by his attorney and the emotional torture which the state and Appellant's

attorney applied by telling Appellant he would be thrown away and by allowing Appellant to see his daughter from a distance and watching the tears roll down from his parents' faces.

V.

MEMORANDUM OF LAW IN SUPPORT

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

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

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

VI.

INEFFECTIVE ASSISTANCE OF COUNSEL

Appellant Jermaine McKinney was denied him Sixth Amendment right to effective assistance of counsel where his attorney, representing him during the plea and sentencing proceedings, advised Jermaine McKinney to plead guilty to the charge without first having objected to or challenged the indictment which was illegal on it's face where it failed to give the Jurisdiction where the alleged crimes were committed when appellant had knowledge of charges pending in two other counties which may have occurred under the same jurisdiction, and where the counts charged in the indictment was contradictory and conflicting with the facts recorded in the record, notwithstanding the indictment failed to give the defendant/appellant a clear notice of the charges before counsel mentally coerced Appellant to enter a plea of guilty. Defense counsel never objected to the indictment recorded under Criminal Cause No. 8807.

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

Our standard of review for a claim of ineffective assistance of counsel is a two-part test: the defendant must prove, under the totality of the circumstances, that (1) him attorney's performance was deficient and (2) the deficiency deprived the defendant of a fair trial. *Hiter v. State, 660 So.2d 961, 965 (Miss.1995).*

Anyone claiming ineffective assistance of counsel has the burden of proving, not only that counsel's performance was deficient but also that he was prejudiced thereby. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Additionally, the defendant must show that there is a reasonable probability that, but for him attorney's errors, he would have received a different result in the trial court. Nicolaou v. State, 612 So.2d 1080, 1086

(Miss. 1992). Finally, the court must then determine whether counsel's performance was both deficient and prejudicial based upon the totality of the circumstances. Carney v. State, *525 So.2d 776, 780 (Miss. 1988).*

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

> Effective assistance of counsel contemplates counsel's familiarity with the law that controls him client's case. *See* **Strickland v. Washington**, *466 U.S. 668, 689 (1984) (noting that counsel has a duty to bring to bear such skill and knowledge as will render the trial reliable); see also* **Herring v. Estelle**, *491 F.2d 125, 128 (5th Cir. 1974) (stating that a lawyer who is not familiar with the facts and law relevant to the client's case cannot meet the constitutionally required level of effective assistance of counsel in the course of entering a guilty plea as analyzed under a test identical to the first prong of the* **Strickland** *analysis);* **Leatherwood v. State**, *473 So. 2d 964, 969 (Miss. 1985) (explaining that the basic duties of criminal defense attorneys include the duty to advocate the defendant's case; remanding for consideration of claim of ineffectiveness where the defendant alleged that him attorney did not know the relevant law).*

In the instant case, defense counsel failed properly represent McKinney effectively by failing to investigate the indictment or object to the fact that the indictment was an illegal instrument.

To successfully claim ineffective assistance of counsel, the defendant must meet the two-prong test set forth in Strickland v. Washington, 466 U.S. 668, 687 (1984). This test has also been recognized and adopted by the Mississippi Supreme Court. Alexander v. State, 605 So.2d 1170, 1173 (Miss. 1992); Knight v. State, 577 So.2d 840, 841 (Miss. 1991); Barnes v. State, 577 So.2d 840, 841 (Miss. 1991); McQuarter v. State, 574 So.2d 685, 687 (Miss. 1990); Waldrop v. State, 506 So.2d 273, 275 (Miss. 1987), aff'd after remand, 544 So.2d 834 (Miss. 1989); Stringer v. State, 454 So.2d 468, 476 (Miss. 1984), cert. denied, 469 U.S. 1230 (1985).

The Mississippi Supreme Court visited this issue in the decision of Smith v. State, 631 So.2d 778, 782 (Miss. 1984). The Strickland test requires a showing of (1) deficiency of

counsel's performance which is, (2) sufficient to constitute prejudice to the defense. McQuarter 506 So.2d at 687. The burden to demonstrate the two prongs is on the defendant. Id; Leatherwood v. State, 473 So.2d 964, 968 (Miss. 1994), *reversed in part, affirmed in part*, 539 So.2d 1378 (Miss. 1989), and he faces a strong rebuttable presumption that counsel's performance falls within the broad spectrum of reasonable professional assistance. McQuarter, 574 So.2d at 687; Waldrop, 506 So.2d at 275; Gilliard v. State, 462 So.2d 710, 714 (Miss. 1985). The defendant must show that there is a reasonable probability that for him attorney's errors, defendant would have received a different result. Nicolaou v. State, 612 So.2d 1080, 1086 (Miss. 1992); Ahmad v. State, 603 So.2d 843, 848 (Miss. 1992).

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

> In assessing attorney performance, all the Federal Courts of Appeals and all but a few state courts have now adopted the "reasonably effective assistance" standard in one formulation or another. See Trapnell v. United States, 725 F.2d 149, 151-152 (CA2 1983); App. B to Brief for United States in United States v. Cronic, O. T. 1983, No. 82-660, pp. 3a-6a; Sarno, [466 U.S. 668, 684] Modern Status of Rules and Standards in State Courts as to Adequacy of Defense Counsel's Representation of Criminal Client, 2 A. L. R. 4th 99-157, 7-10 (1980). Yet this Court has not had occasion squarely to decide whether that is the proper standard. With respect to the prejudice that a defendant must show from deficient attorney performance, the lower courts have adopted tests that purport to differ in more than formulation. See App. C to Brief for United States in United States v. Cronic, supra, at 7a-10a; Sarno, supra, at 83-99, 6. In particular, the Court of Appeals in this case expressly rejected the prejudice standard articulated by Judge Leventhal in him plurality opinion in United States v. Decoster, 199 U.S. App. D.C. 359, 371, 374-375, 624 F.2d 196, 208, 211-212 (en banc), cert. denied, 444 U.S. 944 (1979), and adopted by the State of Florida in Knight v. State, 394 So.2d, at 1001, a standard that requires a showing that specified deficient conduct of counsel was likely to have affected the outcome of the proceeding. 693 F.2d, at 1261-1262. For these reasons, we granted certiorari to consider the standards by which to judge a contention that the Constitution requires that a criminal judgment be overturned because of the actual ineffective assistance of counsel. 462 U.S. 1105 (1983). We agree with the Court of Appeals that the exhaustion rule

requiring dismissal of mixed petitions, though to be strictly enforced, is not jurisdictional. See Rose v. Lundy, 455 U.S., at 515 -520. We therefore address the merits of the constitutional issue.

II

In a long line of cases that includes Powell v. Alabama, 287 U.S. 45 (1932), Johnson v. Zerbst, 304 U.S. 458 (1938), and Gideon v. Wainwright, 372 U.S. 335 (1963), this Court has recognized that the Sixth Amendment right to counsel exists, and is needed, in order to protect the fundamental right to a fair trial. The Constitution guarantees a fair trial through [466 U.S. 668, 685] the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment, including the Counsel Clause: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in him favor, and to have the Assistance of Counsel for him defence." Thus, a fair trial is one in which evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding. The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel's skill and knowledge is necessary to accord defendants the "ample opportunity to meet the case of the prosecution" to which they are entitled. Adams v. United States ex rel. McCann, 317 U.S. 269, 275 , 276 (1942); see Powell v. Alabama, supra, at 68-69.

Because of the vital importance of counsel's assistance, this Court has held that, with certain exceptions, a person accused of a federal or state crime has the right to have counsel appointed if retained counsel cannot be obtained. See Argersinger v. Hamlin, 407 U.S. 25 (1972); Gideon v. Wainwright, supra; Johnson v. Zerbst, supra. That a person who happens to be a lawyer is present at trial alongside the accused, however, is not enough to satisfy the constitutional command. The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results. An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair. [466 U.S. 668, 686] For that reason, the Court has recognized that "the right to counsel is the right to the effective assistance of counsel." McMann v. Richardson, 397 U.S. 759, 771 , n. 14 (1970). Government violates the right to effective assistance when it interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense. See, e. g., Geders v. United States, 425 U.S. 80 (1976) (bar on attorney-client consultation during overnight recess); Herring v. New York, 422 U.S. 853 (1975) (bar on summation

at bench trial); Brooks v. Tennessee, 406 U.S. 605, 612 -613 (1972) (requirement that defendant be first defense witness); Ferguson v. Georgia, 365 U.S. 570, 593 -596 (1961) (bar on direct examination of defendant). Counsel, however, can also deprive a defendant of the right to effective assistance, simply by failing to render "adequate legal assistance," Cuyler v. Sullivan, 446 U.S., at 344 . Id. at 345-350 (actual conflict of interest adversely affecting lawyer's performance renders assistance ineffective). The Court has not elaborated on the meaning of the constitutional requirement of effective assistance in the latter class of cases - that is, those presenting claims of "actual ineffectiveness." In giving meaning to the requirement, however, we must take its purpose - to ensure a fair trial - as the guide. The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result. The same principle applies to a capital sentencing proceeding such as that provided by Florida law. We need not consider the role of counsel in an ordinary sentencing, which may involve informal proceedings and standardless discretion in the sentencer, and hence may require a different approach to the definition of constitutionally effective assistance. A capital sentencing proceeding like the one involved in this case, however, is sufficiently like a trial in its adversarial format and in the existence of standards for decision, see Barclay [466 U.S. 668, 687] v. Florida, 463 U.S. 939, 952 -954 (1983); Bullington v. Missouri, 451 U.S. 430 (1981), that counsel's role in the proceeding is comparable to counsel's role at trial - to ensure that the adversarial testing process works to produce a just result under the standards governing decision. For purposes of describing counsel's duties, therefore, Florida's capital sentencing proceeding need not be distinguished from an ordinary trial.

III

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

A

As all the Federal Courts of Appeals have now held, the proper standard for attorney performance is that of reasonably effective assistance. See Trapnell v. United States, 725 F.2d,

at 151-152. The Court indirectly recognized as much when it stated in McMann v. Richardson, supra, at 770, 771, that a guilty plea cannot be attacked as based on inadequate legal advice unless counsel was not "a reasonably competent attorney" and the advice was not "within the range of competence demanded of attorneys in criminal cases." See also Cuyler v. Sullivan, supra, at 344. When a convicted defendant [466 U.S. 668, 688] complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness. More specific guidelines are not appropriate. The Sixth Amendment refers simply to "counsel," not specifying particular requirements of effective assistance. It relies instead on the legal profession's maintenance of standards sufficient to justify the law's presumption that counsel will fulfill the role in the adversary process that the Amendment envisions. See Michael v. Louisiana, 350 U.S. 91, 100 -101 (1955). The proper measure of attorney performance remains simply reasonableness under prevailing professional norms. Representation of a criminal defendant entails certain basic duties. Counsel's function is to assist the defendant, and hence counsel owes the client a duty of loyalty, a duty to avoid conflicts of interest. See Cuyler v. Sullivan, supra, at 346. From counsel's function as assistant to the defendant derive the overarching duty to advocate the defendant's cause and the more particular duties to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution. Counsel also has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process. See Powell v. Alabama, 287 U.S., at 68 -69. These basic duties neither exhaustively define the obligations of counsel nor form a checklist for judicial evaluation of attorney performance. In any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances. Prevailing norms of practice as reflected in American Bar Association standards and the like, e. g., ABA Standards for Criminal Justice 4-1.1 to 4-8.6 (2d ed. 1980) ("The Defense Function"), are guides to determining what is reasonable, but they are only guides. No particular set of detailed rules for counsel's conduct can satisfactorily take [466 U.S. 668, 689] account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Any such set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions. See United States v. Decoster, 199 U.S. App. D.C., at 371, 624 F.2d, at 208. Indeed, the existence of detailed guidelines for representation could distract counsel from the overriding mission of vigorous advocacy of the defendant's cause. Moreover, the purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation, although that is a goal of considerable importance to the legal system. The purpose is simply to ensure that criminal defendants receive a fair trial. Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after

conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. Cf. Engle v. Isaac, 456 U.S. 107, 133 -134 (1982). A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy." See Michel v. Louisiana, supra, at 101. There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way. See Goodpaster, [466 U.S. 668, 690] The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases, 58 N. Y. U. L. Rev. 299, 343 (1983). The availability of intrusive post-trial inquiry into attorney performance or of detailed guidelines for its evaluation would encourage the proliferation of ineffectiveness challenges. Criminal trials resolved unfavorably to the defendant would increasingly come to be followed by a second trial, this one of counsel's unsuccessful defense. Counsel's performance and even willingness to serve could be adversely affected. Intensive scrutiny of counsel and rigid requirements for acceptable assistance could dampen the ardor and impair the independence of defense counsel, discourage the acceptance of assigned cases, and undermine the trust between attorney and client. Thus, a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. In making that determination, the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case. At the same time, the court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. These standards require no special amplification in order to define counsel's duty to investigate, the duty at issue in this case. As the Court of Appeals concluded, strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic [466 U.S. 668, 691] choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.

In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments. The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. In particular, what investigation decisions are reasonable depends critically on such information. For example, when the facts that support a certain potential line of defense are generally known to counsel because of what the defendant has said, the need for further investigation may be considerably diminished or eliminated altogether. And when a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable. In short, inquiry into counsel's conversations with the defendant may be critical to a proper assessment of counsel's investigation decisions, just as it may be critical to a proper assessment of counsel's other litigation decisions. See United States v. Decoster, supra, at 372-373, 624 F.2d, at 209-210.

B

An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment. Cf. United States v. Morrison, 449 U.S. 361, 364 -365 (1981). The purpose of the Sixth Amendment guarantee of counsel is to ensure [466 U.S. 668, 692] that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding. Accordingly, any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution. In certain Sixth Amendment contexts, prejudice is presumed. Actual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice. So are various kinds of state interference with counsel's assistance. See United States v. Cronic, ante, at 659, and n. 25. Prejudice in these circumstances is so likely that case-by-case inquiry into prejudice is not worth the cost. Ante, at 658. Moreover, such circumstances involve impairments of the Sixth Amendment right that are easy to identify and, for that reason and because the prosecution is directly responsible, easy for the government to prevent. One type of actual ineffectiveness claim warrants a similar, though more limited, presumption of prejudice. In Cuyler v. Sullivan, 446 U.S., at 345 -350, the Court held that prejudice is presumed when counsel is burdened by an actual conflict of interest. In those circumstances, counsel breaches the duty of loyalty, perhaps the most basic of counsel's duties. Moreover, it is difficult to measure the precise effect on the defense of representation corrupted by conflicting interests. Given the obligation of counsel to avoid conflicts of interest and the ability of trial courts to make early inquiry in certain situations likely to give rise to conflicts, see, e. g., Fed. Rule Crim. Proc.

44(c), it is reasonable for the criminal justice system to maintain a fairly rigid rule of presumed prejudice for conflicts of interest. Even so, the rule is not quite the per se rule of prejudice that exists for the Sixth Amendment claims mentioned above. Prejudice is presumed only if the defendant demonstrates that counsel "actively represented conflicting interests" and that "an actual conflict of interest adversely affected 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. States v United. Valenzuela-Bernal, 458 U.S. 858, 866 -867 (1982), and not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding. Respondent suggests requiring a showing that the errors "impaired the presentation of the defense." Brief for Respondent 58. That standard, however, provides no workable principle. Since any error, if it is indeed an error, "impairs" the presentation of the defense, the proposed standard is inadequate because it provides no way of deciding what impairments are sufficiently serious to warrant setting aside the outcome of the proceeding. On the other hand, we believe that a defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case. This outcome-determinative standard has several strengths. It defines the relevant inquiry in a way familiar to courts, though the inquiry, as is inevitable, is anything but precise. The standard also reflects the profound importance of finality in criminal proceedings. [466 U.S. 668, 694] Moreover, it comports with the widely used standard for assessing motions for new trial based on newly discovered evidence. See Brief for United States as Amicus Curiae 19-20, and nn. 10, 11. Nevertheless, the standard is not quite appropriate. Even when the specified attorney error results in the omission of certain evidence, the newly discovered evidence standard is not an apt source from which to draw a prejudice standard for ineffectiveness claims. The high standard for newly discovered evidence claims presupposes that all the essential elements of a presumptively accurate and fair proceeding were present in the proceeding whose result is challenged. Cf. United States v. Johnson, 327

U.S. 106, 112 (1946). An ineffective assistance claim asserts the absence of one of the crucial assurances that the result of the proceeding is reliable, so finality concerns are somewhat weaker and the appropriate standard of prejudice should be somewhat lower. The result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome. Accordingly, the appropriate test for prejudice finds its roots in the test for materiality of exculpatory information not disclosed to the defense by the prosecution, United States v. Agurs, 427 U.S., at 104 , 112-113, and in the test for materiality of testimony made unavailable to the defense by Government deportation of a witness, United States v. Valenzuela-Bernal, supra, at 872-874. The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.
In making the determination whether the specified errors resulted in the required prejudice, a court should presume, absent challenge to the judgment on grounds of evidentiary insufficiency, that the judge or jury acted according to law. [466 U.S. 668, 695] An assessment of the likelihood of a result more favorable to the defendant must exclude the possibility of arbitrariness, whimsy, caprice, "nullification," and the like. A defendant has no entitlement to the luck of a lawless decision maker, even if a lawless decision cannot be reviewed. The assessment of prejudice should proceed on the assumption that the decision maker is reasonably, conscientiously, and impartially applying the standards that govern the decision. It should not depend on the idiosyncracies of the particular decision maker, such as unusual propensities toward harshness or leniency. Although these factors may actually have entered into counsel's selection of strategies and, to that limited extent, may thus affect the performance inquiry, they are irrelevant to the prejudice inquiry. Thus, evidence about the actual process of decision, if not part of the record of the proceeding under review, and evidence about, for example, a particular judge's sentencing practices, should not be considered in the prejudice determination.
The governing legal standard plays a critical role in defining the question to be asked in assessing the prejudice from counsel's errors. When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt. When a defendant challenges a death sentence such as the one at issue in this case, the question is whether there is a reasonable probability that, absent the errors, the sentencer - including an appellate court, to the extent it independently reweighs the evidence - would have concluded that the balance of aggravating and mitigating circumstances did not warrant death. In making this determination, a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury. Some of the factual findings will have been unaffected by the errors, and factual findings that were affected will have been affected in different ways. Some errors will

have had a pervasive effect on the inferences to [466 U.S. 668, 696] be drawn from the evidence, altering the entire evidentiary picture, and some will have had an isolated, trivial effect. Moreover, a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support. Taking the unaffected findings as a given, and taking due account of the effect of the errors on the remaining findings, a court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors.

IV

A number of practical considerations are important for the application of the standards we have outlined. Most important, in adjudicating a claim of actual ineffectiveness of counsel, a court should keep in mind that the principles we have stated do not establish mechanical rules. Although those principles should guide the process of decision, the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. In every case the court should be concerned with whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results. To the extent that this has already been the guiding inquiry in the lower courts, the standards articulated today do not require reconsideration of ineffectiveness claims rejected under different standards. Cf. Trapnell v. United States, 725 F.2d, at 153 (in several years of applying "farce and mockery" standard along with "reasonable competence" standard, court "never found that the result of a case hinged on the choice of a particular standard"). In particular, the minor differences in the lower courts' precise formulations of the performance standard are insignificant: the different [466 U.S. 668, 697] formulations are mere variations of the overarching reasonableness standard. With regard to the prejudice inquiry, only the strict outcome-determinative test, among the standards articulated in the lower courts, imposes a heavier burden on defendants than the tests laid down today. The difference, however, should alter the merit of an ineffectiveness claim only in the rarest case. Although we have discussed the performance component of an ineffectiveness claim prior to the prejudice component, there is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one. In particular, a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed. Courts should strive to ensure that ineffectiveness claims not become so burdensome to defense counsel that the entire criminal justice system suffers as a result.

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

Under the standards set forth above in Strickland, and by a demonstration in the record and the facts set forth in support of the claims, it is clear that Appellant Jermaine McKinney has suffered a violation of him constitutional rights to effective assistance of counsel, in violation of the 6th Amendment to the United States Constitution. Defense counsel should have adequately investigated the indictment and made appropriate objections to the multiple counts in which the indictment set forth. The indictment should have shown the Jurisdiction by which the Crimes were committed under. McKinney's alleged crimes were shown committed on the same date in the multiple counts indictment, and without stating the jurisdiction district where the crimes committed, the indictment failed to give McKinney a clear notice of charge as afforded under the Sixth (6th) Amendment of the United States Constitution. McKinney' attorney conspired with the prosecutors and used false charges in the indictment to coerce McKinney to enter a plea of guilty to Count #3, that his counsel failed to reveal to him at first. The first two counts (Burglary of a Dwelling and Aggravated Assault) show that the actus reus (the criminal intent) was contradicting to the actus reus alleged in Count #3 (Attempted Burglary of Dwelling) and to the facts of the case alleged in the record. Therefore, where the record shows that the victim (Juanita Cooperwood) falsified the record, showing in the "Victim's Impact Statement" stating that she was "beat in face & body with fists & kicked in stomach", but count # 3 shows that McKinney went to the house of the victim, broke out a window by attempting to enter the house through the said broken window, but was intercepted (stopped) and failed therein (in other words, failed to enter the house). Therefore, if Mckinney failed to enter the house, the information alleged in the record is false. However, counsel took advantage of the false

information and used it to coerce McKinney into entering a plea of guilty. Appellant's attorney was clearly ineffective, and Appellant's conviction by enter a plea of guilty and sentence should be reversed and the Appellant should be discharged from his illegal incarceration.

COUNSEL WAS INEFFECTIVE FOR FAILURE TO OBJECT TO THE MULTIPLE COUNTS INDICTMENT UNDER CAUSE NO. 8807, WHICH WAS USED TO MENTALLY COERCE APPELLANT TO ENTER A PLEA OF GUILTY KNOWING THAT SAID INDICTMENT WAS ILLEGAL DUE TO VIOLATION OF THE 4TH, 5TH, 6TH AND 14TH AMENDMENT OF THE U.S. CONSTITUTION.

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

> The trial court found the appellant's statement to have been freely and voluntarily made. It did not, however, rule upon the statement of the sheriff with regard to whether it was an inducement or offer of leniency to the appellant if he would confess. In Robinson v. State, , 613, , 51 (1963), we stated: "* * * a mere exhortation or adjuration to speak the truth will not exclude a confession, but where such adjuration is accompanied by an expression that it would be better for the accused to tell the truth, some courts have refused to admit such confession. * * *", citing Mathews v. State, 102 Miss. 549, 59 So. 842 (1912) and Frazier v. State, (Fla. 1958). We held in Robinson that the statement or confession made subsequent to an exhortation to "square with the State, or the City, whoever the crime was against" and with the "`man upstairs' and that if he didn't, he wasn't trying to help himself" was the equivalent of an inducement, rendering the statement inadmissible in evidence as being involuntarily made. In Mitchell v. State, 24 So. 312 (Miss. 1898), we held that a confession given by the defendant was not voluntarily made subsequent to the defendant's being advised by the sheriff that it would be better for him to tell all about it. Recently, in Agee v. State, , 674 (Miss. 1966), we held: A confession made after the accused has been offered some hope of reward if he will confess or tell the truth cannot be said to be voluntary. This Court has long adhered to the rule that when the offer of reward or hope of leniency is made by a private individual the same rule applies. In Clash v. State, , (1927) a confession was held inadmissible when it was signed by the accused after a private individual had told him that, "* * * `If he would tell us about the money, and return it, we would let him out of jail on bond.'" In Johnson v. State, 89 Miss. 773, 42 So. 606 (1906) private citizens told the accused that, "* * * it would be better for him to confess, as it would go lighter with him if he told the truth." The confession that followed these statements by private

citizens was held inadmissible. Although the statement made by the sheriff that the appellant would be better off by telling the truth was probably not intended as an inducement, yet, when it is considered under the circumstances in which it was made, we conclude it very probable that the statement caused the appellant to confess. Some of these circumstances were that the appellant was a twenty-year-old Negro youth of previous good reputation, having never been incarcerated before, who was desirous of being released from jail. These factors, when considered with the additional fact that the sheriff is the highest officer of the county, a representative of the State, speaking in his official capacity to a youth accused of a crime, cast such doubt upon the confession as to render it inadmissible in evidence. We are of the opinion the confession was not voluntarily made and that its admission constitutes reversible error. Page 560

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

In the recent case of Miller v. State, , 559 (Miss. 1971), we held: The trial court found the appellant's statement to have been freely and voluntarily made. It did not, however, rule upon the statement of the sheriff with regard to whether it was an inducement or offer of leniency to the Robinson v. State, , 613, , 51 (1963), Page 627 we stated: "* * * a mere exhortation or abjuration to speak the appellant if he would confess. In truth will not exclude a confession, but where such abjuration is accompanied by an expression that it would be better for the accused to tell the truth, some courts have refused to admit such confession. * * *", citing Mathews v. State, 102 Miss. 549, 59 So. 842 (1912) and Frazier v. State, (Fla. 1958). We held in Robinson that the statement or confession made subsequent to an exhortation to "square with the State, or the City, whoever the crime was against" and with the "`man upstairs' and that if he didn't, he wasn't trying to help himself" was the equivalent of an inducement, rendering the statement inadmissible in evidence as being involuntarily made. In Mitchell v. State, 24 So. 312 (Miss. 1898), we held that a confession given by the defendant was not voluntarily made subsequent to the defendant's being advised by the sheriff that it would be better for him to tell all about it. In Agee v. State, , 674 (Miss. 1966), we were of the opinion that a confession was involuntarily given. We stated: A confession made after the accused has been offered some hope of reward if he will confess or tell the truth cannot be said to be voluntary. This Court has long adhered to the rule that when the offer of reward or hope of leniency is made by a private individual the same rule applies. In Clash v. State, , (1927), a confession was held inadmissible when it was signed by the accused after a private individual had told him that, "* * * `if he would tell us about the money, and return it, we would let him out of jail on bond.'" In Johnson v. State, 89 Miss. 773, 42 So. 606 (1906) private citizens told the accused that, "* * * it would be better for him to confess, as it would go lighter with him if he told the

truth." The confession that followed these statements by private citizens was held inadmissible.

Violation of the Fourth Amendment

Amendment IV. Unreasonable searches and seizures.

"The right of the people to be secure in their persons, ... shall not be violated, and no warrants shall issue but upon probable cause, **supported by oath or affirmation** and particularly describing ... the persons ... to be seized."

The record shows that McKinney was charged and indicted on false information given in the record by the victim alleged in Counts #1 and Count #2, which the prosecutor knew or should have known was false, because there were no evidence to convict McKinney on the said charges by a jury. Therefore the **oath or affirmation** was false and was not supported by the evidence. The counsel knew or should have known to file a motion to squash the said indictment on Counts One and Two, instead of falsely using the said counts to coerce McKinney to enter a plea of guilty.

Violation of the Fifth Amendment

Amendment V. Criminal actions — Provisions concerning — **Due process of law** ...

"No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury,..., nor **shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; ...."**

Here, it is clearly shown that the use of Count 1 and 2 of the Indictment was the intent to compel McKinney to enter a plea of guilty, and to deprive him of his life and liberty without due process of law. Count 1 and 2 knowingly and trickery added to the indictment under false information to compel McKinney to enter a plea of guilty and compelled to be a witness against himself, which is a clear violation of the Fifth Amendment of the United States Constitution. The record clearly shows in the "Victim's Impact Statement" that the information given, stating

that Juanita Cooperwood was beaten in the face and body with the fists of McKinney and kicked in the stomach without any medical record or a Physician statement in the record to verify this fact, was false information. Juanita Cooperwood stated in the record that she wanted the defendant to go to jail. Therefore, Count 1 and Count 2 in the indictment derived from this false information which the prosecution had no proof to get a conviction before a jury. McKinney's attorney knew or should have known that he should have filed a pretrial motion to squash the said indictment, but instead, he took the advantage to conspire with the prosecution to compel McKinney to enter a plea of guilty to Count 3 of the Indictment which also failed to give a jurisdiction district ascertained by law. The action of the prosecution and McKinney's attorney is a denied of due process of law.

The court must rule that McKinney's plea was involuntarily and unintelligently entered according to law, and issue an order vacating the guilty plea and sentence and discharged him from his illegal incarceration.

Violation of the Sixth Amendment

> **Amendment VI. Rights of the accused.**
>
> "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 caused 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**." [Emphasis added]

The multiple count indictment which charged three related charges did not state the jurisdiction on the face of the indictment, nor was the jurisdiction previous ascertained in any parts of the record as required Mississippi law and constitutional law. These counts of the indictment were used by the prosecution and defense counsel to coerce McKinney to enter into

an to enter a plea of guilty to the Count 3 charge, which they knew that McKinney could not be convicted for Counts No. 1 and 2, due the fact that the victim had given a false affidavit, stating that McKinney broke into her house and beat her in the face and body with his fists and kicked her in the stomach. All she wanted as she admitted in the record that she, Junaita Cooperwood that the defendant to go to jail. The conspiracy of the defense attorney with the state to use the illegal indictment to coerce McKinney to enter a plea of guilty agreement violated McKinney constitutional rights and the said counsel rendered ineffective assistance of counsel in violation of the Sixth Amendment of the U. S. Constitution. McKinney contended in his personal knowledge statement that his attorney did not make him aware of the 3rd Charge, charging him with attempted burglary. Improper notice of the charges were given due to the fact that his appointed counsel only made known to him Count 1, (Assault) and Count 2 (Burglary), and he did not know of the Count #3 until after he would not enter a plea of guilty to Count 1 and 2.

In a recent case, Neal v. State, 2004-CA-00669-COA (Miss. App. 8-15-2006). the court stated:

> "An accused has a constitutional right "to be informed of the nature and cause of the accusation." U.S. Const. Amend. . This State's Constitution does not expand the right. Miss. Const. art. , § . 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, , (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 (Miss. 1989).

Here, in the case sub judice, the facts clearly shows that McKinney's appointed counsel nor the prosecution never serve McKinney with a copy of the Indictment to give him notice of the charges before trial or before he decided to enter a plea of guilty to a lesser charge of attempt burglary, and he did not know that he was charged with a 3rd Count until after the last minutes,

when he refused to enter a plea of guilty to charges that he knew and the prosecution knew along with his attorney that he will be found not guilty.

This Court should conclude that here counsel rendered ineffective assistance of counsel and that such ineffectiveness consisted of Counsel's failure to challenge or object to the indictment where that was valid claims for objection. Petitioner's conviction upon his guilty plea and sentence must be reversed and the Appellant herein must be discharged from his illegal incarceration.

VII.

DENIAL OF DUE PROCESS OF LAW IN SENTENCING WHERE SENTENCE WAS IMPROPERLY IMPOSED UPON APPELLANT UNDER A TWO TIER FASHION.

The sentence imposed upon Jermaine McKinney constitutes a denial of due process of law and equal protection of the law as guaranteed him under the 4th, 5th and 14th Amendments of the United States Constitution. The trial court sentenced McKinney as follows:

> Thereupon, the Defendant was sentenced by the Court to serve a term of **8 eight** years in the Mississippi Department of Corrections. The Defendant shall pay a fine in the amount of $200.00 and restitution $ ____, and all costs of court all of which is to be paid during the period of Post-Release Supervision as set forth in this Order.
>
> . . . .
>
> In addition to the above stated terms of incarceration, the Court, pursuant to Section 47-7-34 Miss. Code (1972) Annotated, hereby sentences the Defendant to be placed on **5 (five)** years of Post-Release Supervision after release from confinement under the following terms and conditions: ..... **See Exhibit "B", attached hereto.**

Clearly, in accord with e recent decision rendered in Johnson v. State, 925 So.2d 86 (Miss. 2006) and Sweat v. State, 912 So.2d 458, 460 (Miss. 2005, this sentence is illegal. The trial court here is actually attempting to supervise Appellant for a period of 5 years after

Appellant has actually served out the 8 years the Court actually imposed. This is illegal because after McKinney serve the 8 years there is no additional jurisdiction. The Supreme Court has actually previously set out the controlling authority to be applied in this instance.

The previous decisions rendered in regards to post release supervision requires that the court imposed a sentence to be served with a period of such sentence suspended and the defendant placed on post release supervision to follow. If the defendant successfully serve out the period to be served then he would be released under post release supervision, to be supervised for a maximum period of five year and with any suspended period of the sentence over the period of five years to be served under unsupervised status. Sweat v. State, 912 So.2d 458, 460 (Miss. 2005); Johnson v. State, 925 So.2d 86, 101 (Miss. 2006).

In the instant case the trial court did not impose a portion of the sentence to be served and a portion to be suspended and the defendant to be placed on post release supervision. The post release supervision was imposed in a fashion of being a separate term from the actual eight years. This is not what the law allows. This court should find that the trial court erred in failing to fashion the sentence in the form as the Supreme Court has clearly defined. Appellant would urge that post conviction relief be granted and that the sentence be vacated and found to be null and void. .

Here the trial court clearly failed to follow the law in imposing such a sentence. Sweat v. State, 912 So.2d 458 (Miss. 2005).

In Sweat, supra, 912 So.2d at 460, the court stated:

> Here, it is clear that the trial court sentenced Sweat under §47-7-34. Therefore, we modify the trial Court's sentence so that following his eight years of incarceration, Sweat will be released to twelve years of post-release supervision but that he is required to report to MDOC officials for only five

years and the remaining seven years will be "unsupervised" post release supervision.

In the instant case the trial court's sentence fail to comply with the decision rendered in Sweat as well as the requirements of Miss. Code Ann. §47-7-34. The sentence is therefore null and void and should be considered as a waiver of the Court's jurisdiction to supervise Appellant or enforce terms of such an illegal sentence.

VIII.

TRIAL COURT FAILED TO CORRECTLY INFORM McKINLEY THAT HE COULD APPEAL THE SENTENCE IMPOSED UPON PLEA OF GUILTY

The trial court informed McKinley, when accepting the plea of guilty, that there could be no appeal. This was incorrect. Even upon a plea of guilty the law would allow McKinley a direct appeal of the sentence imposed. The trial court judge made fundamental error where it failed to advise McKinley of this avenue of review of the sentence in regards to the plea of guilty. The trial court, in fact, advised McKinley of the exact opposite. 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 trial Court, in ruling on the PCR, placed this claim in the category with McKinley appealing a conviction within the meanings of Miss. Code Ann. Sec. 99-35-105. McKinley have never asserted that he had a right to appeal the conviction. Such an appeal is not what the Supreme Court considered when it decided the case of Trotter v. State where the Court held that there was a right to appeal the sentence on a guilty plea. If there is a right to proceed with such a thing then it follows that the trial court should not allow this right to be waived away without first making the defendant aware of the action. What McKinley actually did and what he knew at the time he committed such action was two different things.

This Court should not condone the trial court and the state taking advantage of an unknowledgable defendant merely because the defense attorney will not step forward to represent the client. This Court should reverse and remand this case.

IX

The trial court erred in failing to grant an evidentiary hearing before denying motion where contents of the motion satisfied the requirements for conducting an evidentiary hearing before any denial of such motion could be entered.

The Trial Court's finding that the Petition should be summarily dismissed without an evidentiary hearing constitutes an abuse of decreation and should be reversed by this Honorable Court for an evidentiary hearing on the merits. Under the law where there is a question of fact the trial court should conduct an evidentiary hearing. The question of fact being that Ms. Cooperwood was told that she had no choice but to prosecute the charge and that the state mislead Ms. Cooperwood into not contesting the state proceeding on charges which Ms. Cooperwood admits she fabricated. Finally, the defense attorney and the state workd in conspiracy to secure a guilty plea to the charges which was the state's only way to get a conviction after Ms. Cooperwood lost her will to continue with charges which she had made up. Court should therefore FIND THE TRIAL COURT'S RULING TO BE VOID and remand this case to the trial court for evidentiary hearing on the merits.

The trial court should have actually conducted an evidentiary hearing without any entry of a ruling regarding the motion. The claims contained in the motion are well pleaded and concise. This fact is confirmed by the nearly two year delay between the date in which the motion was filed and the date in which the trial court filed an order. Appellant was entitled to develop additional facts, during a hearing, to support his motion. This Court is, once again, confronted

with factual problems in this case which could have been fully and finally resolved in the trial court by an evidentiary hearing or, possibly, by development of fact and expansion of the record in conformance with Miss. Code Ann. §99-39-17 (Supp. 1992). For instance, the petition filed in the trial court asserts under the first claim that the plea of guilty and conviction constitute an involuntary plea where there was deception by the defense attorney. While the petition clearly states this, the trial court never indicated that it had examined the guilty plea transcript when the law clearly requires such. Moreover, even though the designation of record on appeal designates the plea transcript to be included in the record, it is not filed among the documents forwarded to this court as the record on appeal. The Supreme Court has held that when such a claim is advanced by a petition for post-conviction relief, it must be refuted with a record of the actual plea transcript. ***"While a transcript of the proceeding is essential, other offers of clear and convincing evidence which prove that the defendant entered a guilty plea voluntarily are sufficient. For example, where an evidentiary hearing has established that a defendant's guilty plea was entered voluntarily, the fact that a record was not made at the time the plea was entered will not be fatal."*** Wilson v. State, 577 So.2d 394 (Miss. 1991). In the instant case, the trial court never conducted an evidentiary hearing or examined the plea transcript for evidence to dispute the claim. This court cannot do so because the transcript is not a part of the record as volume one. The trial court failed to follow the mandatory requirements of the post conviction procedure Act when it failed to examine the transcript. This act sets out the following requirements:

> § 99-39-11. Judicial examination of original motion; dismissal; filing answer, (2) If it plainly appears from the face of the motion, any annexed exhibits and the prior proceedings in the case that the movant is not entitled to any relief, the judge may make an order for its dismissal and cause the prisoner to be notified.

(3) If the motion is not dismissed under subsection (2) of this section, the judge shall order the state to file an answer or other pleading within the period of time fixed by the court or to take such other action as the judge deems appropriate.

(4) This section shall not be applicable where an application for leave to proceed is granted by the Supreme Court under Section 99-39-27.

(5) Proceedings under this section shall be subject to the provisions of Section 99-19-42.

In the instant case now before the bar of this Court, the trial court never indicated that it had examined the record of the pleas and the law require that an evidentiary hearing be conducted in such an instance. ***"If defendant's guilty pleas were involuntary, then not only defendant's sentences, but also his or her guilty pleas, must be vacated, even though defendant only sought to vacate sentences and did not specifically seek to vacate pleas."*** Courtney v. State, 704 So.2d 1352 (Ct. App. 1997).

The Supreme of Mississippi Court has previously held that it is committed to the principle that a post-conviction collateral relief petition which meets basic requirements is sufficient to mandate an evidentiary hearing unless it appears beyond doubt that the petitioner can prove no set of facts in support of his claim which would entitle him to relief. Alexander v. State, 605 So.2d 1170, 1173 (Miss. 1992); Horton v. State, 584 So.2d 764, 768 (Miss. 1991); Wilson v. State, 577 So.2d 394, 397 (Miss. 1991); Myers v. State, 583 So.2d 174, 178 (Miss. 1991); Miller v. State, 578 So.2d 617 (Miss. 1991); Wright v. State, 577 So.2d 387 (Miss. 1991); Billiot v. State, 515 So.2d 1284 (Miss. 1987).

In tandem, with the allegations in the post-conviction relief motion being supported by the record, Appellant was entitled to an "in court opportunity to prove his claims." Neal v. State, 525 So.2d 1279, 1281 (Miss. 1987).

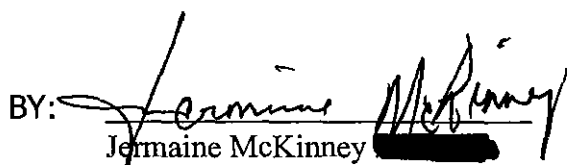
The trial court's decision not to grant an evidentiary hearing here forced another needless appeal upon an already overloaded and overtaxed appellate court. The trial court should have. at

a minimum, granted an evidentiary hearing on the claims contained in the post-conviction relief motion. Relief beyond that point would have depended upon the developments at the evidentiary hearing. Neal v. State, 525 So.2d 1279, 1280-81 (Miss. 1987); Sanders v. State, 440 So.2d 278, 286 (Miss. 1983); Baker v. State, 358 So.2d 401 (Miss. 1978). This point is especially clear where there was no record transcript of the plea included in the one volume record filed with the clerk of this court. Appellant McKinney would ask this Court to vacate the ruling of the trial court and remand this case to the trial court for an evidentiary hearing.

CONCLUSION

Appellant McKinney respectfully submits that based on the authorities cited herein and in support of his brief, that this Court should vacate the guilty plea, conviction and sentence imposed as well as the action taken by the trial court in regards to the post conviction relief motion. This case should be remanded to the trial court for an evidentiary hearing.

Respectfully submitted,

BY: 

Jermaine McKinney [redacted]
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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above and foregoing Motion for Post Conviction Relief, has been mailed to: Honorable Forrest Allgood, District Attorney, P. O. Box 1044, Columbus, MS 39703; Honorable James Kitchens, Circuit Court Judge, P. O. 1387, Columbus, Ms 39703.; Honorable Jim Hood, Attorney General, P. O. Box 220, Jackson, MS 39205.

This, the 12 day of January, 2008.

Jermaine McKinney

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