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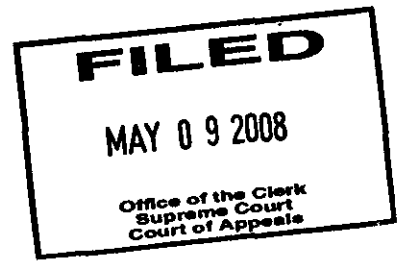
# IN THE COURT OF APPEALS THE STATE OF MISSISSIPPI

NO. CP-2007-01602-COA

GERMAR HARRIS — APPELLANT




V

STATE OF MISSISSIPPI — APPELLEE

**BRIEF FOR APPELLANT**

BY: _____

Germar Harris, #123128
DCF
3800 County Road 540
Greenwood, MS 38930

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**CERTIFICATE OF INTERESTED PERSONS**

The undersigned Appellant, Germar Harris, 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. Germar Harris, Appellant pro se.
2. Honorable Jim Hood, and staff, Attorney General.
3. Honorable Lee J. Howard, Circuit Court Judge.
4. Honorable Frank Clark, Assistant District Attorney.

Respectfully Submitted,

BY: _____

Germar Harris, #123128
DCF
3800 County Road 540
Greenwood, MS 38930

# IN THE COURT OF APPEALS THE STATE OF MISSISSIPPI

NO. CP-2007-01602-COA

GERMAR HARRIS APPELLANT

V

STATE OF MISSISSIPPI APPELLEE

## STATEMENT OF ISSUES

1.

WHETHER TRIAL COURT ERRED IN FAILING TO FIND THAT THE INDICTMENT FAILED TO GIVE ADEQUATE NOTICE BY FAILURE TO ALLEGE SCIENTER ELEMENT EXPRESSLY CONTAINED IN THE PERTINENT STATUTE, AND FAILED TO ALLEGE EACH MATERIAL ELEMENT OF THE OFFENSE FOR SENTENCING PURPOSES, AND COUNSEL WAS INEFFECTIVE FOR FAILURE OBJECT TO THE INDICTMENT FOR FAILURE TO CHARGE ADEQUATE OFFENSE.

2.

WHETHER TRIAL COURT ERRED IN FAILING TO FIND APPELLANT WAS MENTAL COERCED TO ENTER A PLEA OF GUILTY BY HIS REPRESENTING COUNSEL, WHO RENDER INEFFECTIVE ASSISTANCE BY INDUCING HIM TO ENTER A PLEA OF GUILTY, WHICH DENIED HIM EQUAL PROTECTION OF THE LAW AND IN VIOLATION OF HIS DUE PROCESS OF LAW RIGHTS, ALL IN VIOLATION OF THE 5TH, SIXTH AND FOURTEENTH AMENDMENT OF THE U. S. CONSTITUTION.

3.

WHETHER TRIAL COURT ERRED IN FAILING TO FIND THE INDICTMENT FAILED TO GIVE THE JURISDICTION IN WHICH THE CRIME WAS COMMITTED WHICH IS A VIOLATION OF THE SIXTH AMENDMENT OF THE U. S. CONSTITUTION AND RULE 7.06(4) OF THE UNIFORM RULES OF CIRCUIT AND COUNTY COURT PRACTICE, WHERE IT STATES THE INDICTMENT SHALL INCLUDE THE COUNTY AND JUDICIAL DISTRICT IN WHICH THE INDICTMENT IS BROUGHT.

4.

WHETHER TRIAL COURT ERRED IN FAILING TO FIND THAT BECAUSE OF A DEFECTED INDICTMENT, APPELLANT'S PLEA OF GUILTY WAS UNKNOWINGLY, INVOLUNTARILY AND UNINTELLIGENTLY ENTERED DENYING HIM DUE PROCESS OF LAW AND EQUAL PROTECTION OF THE LAW.

5.

WHETHER TRIAL COURT ERRED IN FAILING TO FIND THAT APPELLANT WAS DEPRIVED OF DUE PROCESS OF LAW WHERE TRIAL COURT FAILED TO ADVISE OF HIS RIGHT TO APPEAL THE SENTENCE.

## STATEMENT OF INCARCERATION

The Appellant is presently incarcerated and is being housed in the Mississippi Department of Corrections at Greenwood, Mississippi, in service of a 25 year prison term imposed by the trial court.

## STATEMENT OF CASE

Germar Harris was sentenced by the Circuit Court of Lowndes County, Mississippi, on August 24, 2006, to a term of twenty-five (25) years imprisonment, with

five (5) years post release supervision. Appellant's post conviction motion clearly stated that the indictment was faulty where it failed to provide adequate notice of the elements of the offense and that defense counsel coerced Appellant into the plea. Additionally, Appellant asserted that the trial court never informed him of his right to directly appeal the sentence, an option which Appellant would have sought had he been told. The trial court never addressed these issues in the order denying the PCR. The trial court, without requiring a response from the offending attorney, rejected any notion of ineffective assistance of counsel based upon an agreement where the state recommended, and the court approved, to retire several pending repetitive charges to the filed.[1]

## STATEMENT OF FACTS

On May 1, 2006, an indictment was filed against Germar Harris in Lowndes County Mississippi, charging that Harris committed the offense of sale of a cocaine.

Appellant turner was represented Honorable Carrie Jourdan in such case and was convicted, by plea of guilty, on August 24, 2006. Sentence was imposed upon defendant on the same date.

Upon conviction of the charge, the trial court imposed a sentence of 25 years in the custody of the Mississippi Department of Corrections.The Court also tacked on a 5 year post release supervision.

[1] The Court did not mention that the state could not successfully prosecute these charges anyway since they were conjured up by the state to use as a bargaining piece for defense counsel to display to Appellant as a disguise to manipulate Appellant into a plea of guilty. This is a trick which is commonly used by the prosecution and defense attorneys upon unsuspecting defendants charged and appearing before the trial court. The state produced duplicate charges, none of which had any foundation, to be given to the defense attorney as his tool to use to persuade Appellant to plead guilty to just one offense for a harsh and severe sentence. This procedure was allowed with the with the blessings of the trial court after the trial court condoned it.

## STANDARD OF REVIEW

In reviewing a trial court's decision to deny a motion for post-conviction relief the standard of review is clear. The trial court's denial will not be reversed absent a finding that the trial court's decision was clearly erroneous. Kirksey v State, 728 So.2d 565, 567 (Miss. 1999).

## SUMMARY OF ARGUMENT

The trial court erred in finding that the claims in the PCR was without merit where court did not conduct as evidentiary hearing.

## LEGAL ARGUMENT IN SUPPORT OF CLAIMS FOR RELIEF

1

WHETHER TRIAL COURT ERRED IN FAILING TO FIND THAT THE INDICTMENT FAILED TO GIVE ADEQUATE NOTICE BY FAILURE TO ALLEGE SCIENTER ELEMENT EXPRESSLY CONTAINED IN THE PERTINENT STATUTE, AND FAILED TO ALLEGE EACH MATERIAL ELEMENT OF THE OFFENSE FOR SENTENCING PURPOSES, AND COUNSEL WAS INEFFECTIVE FOR FAILURE OBJECT TO THE INDICTMENT FOR FAILURE TO CHARGE ADEQUATE OFFENSE.

Here, in the case sub judice, Appellant Harris's defense counsel, Carrie Jordan, stated that she was not aware that Harris was scheduled to appear in court on August 24, 2006, and that she was not ready or prepared. Appellant's attorney had not investigated nor researched the case, except that she had only looked at the video, and therefore she suggested that Harris enter a plea of guilty and take the deal offered by the prosecutor because if Harris proceeded to court for trial before a jury, he would get 30 years, if he failed to enter a plea to the count one charge and received a sentence of 25 years. This statement was witnessed by **Tameka Brooks** brooks who provided an affidavit to that effect. Harris's Attorney told Ms. Tameka Brooks after sentencing that Harris is under the 25% rule,

which means that he would get a reduction of sentence for early release after serving 25% of the 25 year sentence. However, before sentence Attorney Jordan told Ms. Brooks that if Harris enter a plea of guilty to Count #1, all other charges would be retired to the file and Harris would be sentenced to 8 to 12 years. This information was based on what the Prosecutor had relayed to his attorney as a promise and agreement they would recommend that Harris receive 8 to 12 years if he enter a plea of guilty.

Harris is alleging that his counsel mentally coerced him to enter a plea of guilty and illegally induced him to enter a plea by misleading him that he would only receive an 8 to 12 year sentence based on a false promise of the prosecutor.. See Smith v. Blackburn, 785 F.2d 545 (5th Cir. 1986), which states:

Harris contends that based upon this false information given by his counsel, his guilty plea was involuntarily and unintelligently entered. See Smith v. Blackburn, 785 f.2d 545 (5th Ci.r. 1986), which provides that:

> "However, the state's failure to keep a plea bargain it has made to induce a defendant to enter a guilty plea is reason for granting a writ of habeas corpus, for a plea bargain is not merely a contract between the defendant and the state but, in addition, induces the accused to waive important constitutional rights. As we said in McKenzie v. Wainwright, 632 F2d 649 (5th Cir. 1980:
>
> > "when a defendant pleads guilty on the basis of a promise by his defense attorney or the prosecutor, whether or not such promise is fulfillable, breach of that promise taints the voluntariness of his plea." A Appellant who relies on such an unfulfilled state promise to obtain his release may not rely on conclusory allegations or even his own unsupported testimony. He must prove: 1) the exact terms of the alleged promise; 2) exactly when, where, and by whom such a promise was made; and 3) the precise identity of an eyewitness to the promise." See the following cases:
>
> See Dunn v. Maggio, 712 998 (5th Cir. 1983), cert. denied, 465 U.S. 1031, 104 S.Ct. 1297, 79 L.Ed.2d 697 (1984). See Garrett v. Maggio, 685 F.2df 158, 159 (5th Cir. 1982), cert. denied, 459 U.S. 1114, 103 S.Ct. 747, 74 L.Ed.2d 966 (1983). Dunn v. Maggio, 712 F.2d 998, 1001-02 (5th Cir. 1983), cert. denied, 456 U.S. 1031, 104 S.Ct. 1297, 79 L.Ed.2d 697 (1984). [fn10] Hayes v. Maggio, 699 F.2d 198, 205 (5th Cir. 1983) citing Blackledge v. Allisson, 431 U.S. 63, 76, 52 L.Ed.2d 136 (1977). See also Bryan v. United States, 492 F.2d 775, 778 (5th Cir.)

(en banc), cert. denied, 419 U.S. 1079, 95 S.Ct. 668, 42 L.Ed.2d 674 (1974); Williams v. Estelle, 681 F.2d 946, 948 (5th Cir. 1982), cert. denied, ___ U.S. ___, 105 S.Ct. 571, 83 L.Ed.2d 511 (1984). Jones v. Estelle, 584F.2d 687, 689(5th Cir. 1978). Brady v. United States, 397 U.S. 742, 755, 90 S.Ct. 146, 147, 25 L.Ed.2d 747 (1970). Hayes, supra,699 F2d at 203 .United States v. Kerdachi, 756 F.2d 349, 352 (5th Cir. 1985). Santobello v. New York, 404 U.S. 257, 262, 92 S.Ct. 495, 499, 30 L.Ed.2d 427 (1971) (emphasis added). See also Acosta v. Turner, 666 F.2d 353, 358 (5th Cir. 1982; United States v. Ocanas, 606 F.2d 687, 689 (5th Cir. 1980), cert. denied, 451 U.S. 984, 101 S.Ct. 2316, 68 L.Ed.2d 840 (1981); United States v. Nuckols, 606 F.2d 566, 570 (5th Cir. 1979); Jones v. Estelle, 584 687, 689 (5th Cir. 1978); United States v. Shanahan, 574 F.2d 1228, 1230-31 (5th Cir. 1978); Vandenades v. United States, 523 F.2d 1220, 1224 (5th Cir. 1975). Loftin and Woodward, Inc. v. United States, 577 F.2d 1206, 1232 (5th Cir. 1978). [fn17] Every v. Blackburn, 78 F.2d 1138, 1146 (5th Cir. 1986), citing Young v. United States, 315 U.S. 257, 258-59, 62 s.Ct. 510, 511 86 L.Ed. 832 (1942). Sibron v. State of New York, 392 U.S. 40, 58, 88 S.Ct. 1889, 1900, 20 L.Ed.2d 917 (1968). Cf. Self v. Blackburn, 751 F.2d 789, 793 (5th Cir. 1985); Garrett v. Maggio, 685 f.2d 158, 160 (5th Cir. 1982), cert. denied, 459 U.S. 1114, 103 S.Ct. 747, 74 L.Ed.2d 966 (1983).

"The government must "adhere strictly to the terms and conditions of the plea agreement it negotiates." The Appellant need not show, therefore, that the government's unkept promise was the sole inducement for his plea of guilty. As the Supreme Court has stated, "when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." Harris has adduced evidence making this showing."

Tameka Brooks was an eyewitness to what was said to Harris by his attorney and what was promised to Harris after he had entered a plea of guilty. Harris is alleging that his counsel was ineffective and untrustworthy and he Harris is also alleging herein that his plea bargain was dishonored, and because constitutional rights was deviously violated and that such illegal action was arbitrary and capricious, he is entitled to a hearing pursuant to Blackledge v. Allison, 431 U.S. 6531, 97 S.Ct. 1621, 51 L.Ed. 136 (1977). And, after the true findings, the court must vacate his sentence for resentencing to time served.

2.

WHETHER TRIAL COURT ERRED IN FAILING TO FIND THE INDICTMENT FAILED TO GIVE THE JURISDICTION IN WHICH THE CRIME WAS COMMITTED WHICH IS A VIOLATION OF THE SIXTH AMENDMENT OF THE U. S. CONSTITUTION AND RULE 7.06(4) OF THE UNIFORM RULES OF CIRCUIT AND COUNTY COURT PRACTICE, WHERE IT STATES THE INDICTMENT SHALL INCLUDE THE COUNTY AND JUDICIAL DISTRICT IN WHICH THE INDICTMENT IS BROUGHT.

The U. S. Constitutional of the United States under the Sixth Amendment states:

> **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."**

Appellant Harris is alleging that his conviction and sentence for sale of cocaine under Section 41-29-139 was based on a notice of charge given in an indictment which failed to allege the judicial district as an element so that the grand jury could make a determination that the crime was in fact committed in the right Judicial District that should have been previously ascertained by law in according Sixth Amendment of the United States and Rule 7.06(4) the Uniform Rules of Circuit and Court of Practice.

Under the **Sixth Amendment**, the accused has the right and shall, in all prosecutions enjoy the right to a public trial by an impartial jury of the state and district wherein the crime shall been committed, **"which district shall have been previously ascertained by law".** If the grand jury or the court failed to give the Harris notice of the jurisdiction by which the crime was committed within the indictment or the record, such an error is "fatal error", making the trial,

conviction and sentence illegal. Therefore, this court must find that fatal error has been committed and that Harris should be released from his illegal incarceration immediately or instanter. Harris also alleges that his conviction and sentence under and a defective indictment is also a fatal error under Rule 7.06 of the Uniform Rules of Circuit and County Court Practice which states as following:

"The indictment upon which the defendant is to be tried shall be a plain, concise and definite written statement of the essential facts constituting the offense charged and shall fully notify the defendant of the nature and cause of the accusation. Formal and technical words are not necessary in an indictment, if the offense can be substantially described without them. An indictment shall also include the following:

1. The name of the accused;

2. The date on which the indictment was filed in court;

3. A statement that the prosecution is brought in the name and by the authority of the State of Mississippi;

4. The **county** and **judicial district in which the indictment is brought**;

5. The date and, if applicable, the time at which the offense was alleged to have been committed. Failure to state the correct date shall not render the indictment insufficient;

6. The signature of the foreman of the grand jury issuing it; and

7. The words "against the peace and dignity of the state."

" The court on motion of the defendant may strike from the indictment any surplusage, including unnecessary allegations or aliases." (Amended effective August 26, 1999.)

The law is clear that the indictment not only must allege the county which the crime was committed but also, it must allege the judicial district in the indictment where the indictment is

brought alleging the whereabouts the crime was committed.

Harris contends that such an error is fatal and by the state, grand jury and circuit court committing such an error the indictment must not stand. Therefore, Harris's conviction by guilty plea and sentence are illegal must be reversed and vacated with order to release him from his illegal incarceration.

3.

BECAUSE OF A DEFECTED INDICTMENT, PETITIONER'S PLEA OF GUILTY WAS UNKNOWINGLY, INVOLUNTARILY AND UNINTELLIGENTLY ENTERED DENYING HIM DUE PROCESS OF LAW AND EQUAL PROTECTION OF THE LAW.

Appellant Harris was denied due process of law where he unknowingly entered a plea of guilty to be convicted of the offense in the indictment, which the element of the indictment was defected and in error. Without the indictment being corrected by going back before a grand jury to determine the amount of drugs for sentencing purposes, made Harris' guilty plea involuntary and unintelligently entered, which caused an illegal sentence to be imposed by the Court.

Appellant was given notice of the charge which did not give the amount of cocaine possessed and sold or transferred by Him. The indictment must track the statue of the crime and statute of sentencing including the amount of cocaine as an element of the indictment. His indictment, unknowingly to him was defected and incorrectly presented to the grand jury by the state, without any objection from the defense counsel who knew or should have known that the indictment was defected.

Before the defendant could be sentenced correctly by the court the grand jury must be able to determine was the defendant in fact guilty of selling or transferring a certain amount of

cocaine possessed for conviction and sentencing purposes. Petitioner's counsel failed or refused to reveal the fatal error of the indictment to Harris before entering a plea of guilty. Such plea of guilty was made without Harris fully knowledge of the erroneous elements of the charge without proof that it went before a grand jury, and without the trial court making aware of the said error before imposing an enhanced penalty that he was facing.

The record clearly demonstrates that during the plea colloquy Harris did not admit to the required elements of law which must be admitted before a plea of guilty may be accepted. There was no admission by Harris that he knowingly possessed "Thirty (30) grams or more or forty (40) grams of cocaine, which he could be imprisonment for not less than ten (10) years nor more than thirty (30) years..." as a factual basis for the plea, as recorded under Section 41-29-139 (E). Harris had to be sentenced under Subsection "E" in order to cover the 25 year sentence that he received. According to the law the trial court never made a factual basis for the plea. The plea were not voluntary under these circumstances.

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., Davis 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 [2]

[2] While the Mississippi Supreme Court specified "Inmates at the Mississippi State Penitentiary", it is clear that this decision would apply to any inmate confined within or without the State of Mississippi who has been subjected to a Mississippi

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 trial court failed to find a factual basis for the plea of guilty and it was therefore involuntary as a matter of law.

Harris would claim here that his guilty plea was involuntary and was entered after being illegally advised by his counsel. A plea of guilty is not binding upon a criminal defendant unless it is entered voluntarily and intelligently. Myers v. State, 583 So.2d 174, 177 (Miss. 1991). A plea is viewed as voluntary and intelligent when the defendant is not informed of the charges against him and the consequences of his plea. Alexander v. State, 605 So.2d 1170, 1172 (Miss. 1992). A defendant must be told that a guilty plea involves a waiver of the right to a trial by jury, the right to confront adverse witnesses, and the right to protection against self incrimination. Boykin v. Alabama, 395 U.S. 238, 243, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969).

See also Hannah v. State, 2004-Ct-00725-S.Ct (Miss. 7-20-2006), where the court explained:

> I. VOLUNTARINESS OF HANNAH'S GUILTY PLEA
>
> "Mississippi Uniform Rule of Circuit and County Court Practice 8.04(3) regulates the entry of guilty pleas: Before the trial court may accept a plea of guilty, the court must determine that the plea is voluntary and intelligently made and that there is a factual basis for the plea. A plea of guilty is not voluntary if induced by fear, violence, deception, or improper inducements. A showing that the plea of guilty was voluntarily and intelligently made must appear in the record."

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conviction and sentence which they desire to attack collaterally.

Appellant Harris's plea of guilty was involuntary where he had been given notice of an indictment by the grand jury showing no amount of cocaine in the face of the indictment for sentencing purposes which he had agreed to enter a plea of guilty. Unknowingly to the defendant and without prior notice, the District Attorney with knowledge of the defense attorney caused Harris to enter a plea before the court to an erroneous and illegal indictment. The court arbitrarily and capriciously and erroneously made a factual finding of an amount of cocaine that was not an indictment's element. Appellant was a victim of coercion by and through his counsel with counsel's sole intentions to complete the case without fully protecting the interest of his client. Counsel failed below an objection standard by allowing his client to entered a plea of guilty the defected elements of the indictment without going back before the grand jury for a determination of the amount drug to be charged for enhancement purposes. "

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

The Mississippi Supreme Court has long recognized that the courts of the State of Mississippi are open to those incarcerated at the Mississippi State Penitentiary 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.

In Neal v. State, 936 So.2d 463 (Miss.App. 2006), a recent case handed down by the Supreme Court that reversed this case, saying:

ISSUE 3: Involuntary Plea ¶ 15. "Neal argues that he was not informed of the elements of the crimes. As a matter of federal constitutional law, a guilty plea is valid only if it is entered "voluntarily, knowingly, and intelligently, with sufficient awareness of the relevant circumstances and likely consequences.'" Bradshaw v. Stumpf, 125 S.Ct. 2398, 2405, (2005) (quoting Brady v. United States, 397 U.S. 742, 748 (1970)). ¶ 26. The objective of this constitutional standard is to satisfy the due process requirement that a defendant receive "real notice of the true nature of the charge against him." Bousley v. United States, 523 U.S. 614, 618 (1998) (quoting Smith v. O'Grady, 312 U.S. 329, 334 (1941)). The trial court accepting a guilty plea is responsible for assuring that a defendant entering a guilty plea actually understands the nature and elements of the crime for which a defendant is admitting guilt. A requirement for this objective to be met and therefore for a guilty plea to be valid, is that a defendant is informed of the elements of the crime. Stumpf, 125 S.Ct. at 2405 . A court accepting a guilty plea does not need to explain the crime's elements to the defendant on the record but can satisfy this constitutional prerequisite by other means, such as counsel's representing to the court that the elements of a crime have been explained to the defendant. Stumpf, 125 S.Ct. at 2405."

In Smith v. States, 636 So.2d 1220 (Miss. 1994), the court stated:

"It is possible that a defective guilty plea transcript may be rehabilitated and cured by evidence adduced in a post-conviction hearing. See Gaskin v. State, 618 So.2d 103 (Miss. 1993);

Horton v. State, 584 So.2d 764, 768 (Miss. 1991). For that reason, judgment of the circuit court should be reversed and the cause remanded for an evidentiary hearing on all issues. "

The court should grant an evidentiary hearing on this issue to determine whether Harris was involuntarily entered in according rule 8.04.

4

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

The Court committed plain error by failure to include in the record a factual basis of the plea, and Germar Harris was subjected to a denial of due process of law where the trial court failed to advise Harris of the right to directly appeal the imposed sentence to the Supreme Court.

The trial court failed to advise Germar Harris that he had the right to appeal the actions of the Court in the sentence it arrived at in regards to the plea. Even upon a plea of guilty the law would allow Harris a direct appeal of the sentence imposed. The trial court judge made fundamental error where it failed to advise Harris of this avenue of review of the sentence in regards to the plea of guilty. The law is clear that a defendant who pleads guilty has a right to a directly appeal the sentence to the Supreme Court. Trotter v. State, 554 So. 2d 313, 86 A.L.R.4th 327 (Miss. 1989).

On August 3, 1987, a sentencing hearing was held. After a full hearing in which Trotter contested the imposition of sentence, Trotter was sentenced to serve two years on each of the two burglary charges, the sentences to run concurrently. From that sentence, Trotter appeals, claiming that the delay of more than four years in sentencing him violated his fifth amendment right to due process and his sixth amendment right to a speedy trial. He also claims that the delay in sentencing violated certain provisions of the Mississippi Constitution, as well as Rule 6.01 of the

Mississippi Uniform Rules of Circuit Court Practice. A preliminary point needs to be addressed. The State contends that this appeal should be dismissed for lack of jurisdiction because Trotter pleaded guilty to the charges against him. The State cites Miss. Code Ann. § 99-35-101 (1972), which states: Any person convicted of an offense in a circuit court may appeal to the supreme court, provided, however, an appeal from the circuit court to the supreme court shall not be allowed in any case where the defendant enters a plea of guilty. In Burns v. State, 344 So.2d 1189 (Miss. 1977), this Court implied that an appeal from a sentence imposed pursuant to a guilty plea is not equivalent to an appeal from the guilty plea itself. In Burns, an appeal from denial of a habeas corpus petition challenging the legality of a sentence imposed subsequent to a guilty plea was treated by this Court as a direct appeal. While the Court acknowledged the language of §99-35-101, the Court stated: "[W]e do not deem the present case as an appeal from a guilty plea." Burns, 344 So.2d at 1190.

Although Harris' guilty plea may have automatically waived his right to appeal the conviction itself, it was not explained to Harris that he had the right to appeal the sentence of the court and the terms of such sentence. During the guilty plea hearing, the court failed to demonstrate in the record that Harris knowingly and voluntarily waived his right to appeal his sentence. United States v. Robinson, 187 F.3d 516 (5th Cir. 1999). In Robinson, the Fifth Circuit stated:

> "Although a defendant may waive his right to appeal as part of a plea agreement with the government, this waiver must be "informed and voluntary."

United States v. Baty, 980 F.2d 977, 978 (5th Cir. 1992) (quoting United States v. Melanco, 972 F.2d 566, 567 (5th Cir. 1992).

This court must vacate the judgment and hold an evidentiary hearing on whether

defendant's was in fact denied the right to appeal his sentence.

5.

**INEFFECTIVE ASSISTANCE OF COUNSEL**

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).*

*¶9. 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).*

*¶10. Jackson claims that the following instances demonstrate that he suffered ineffective assistance of counsel during his trial. First, Jackson claims the fact that he was under the influence of powerful narcotics was not sufficiently brought to the attention of the jury. Although Jackson concedes that his trial counsel did address the issue, he argues that it "should have been better presented." Unlike Jackson, we find it easy to believe that Jackson's attorney might have declined to emphasize Jackson's drug abuse for tactical reasons and conclude that this issue falls squarely under the ambit of trial strategy. Furthermore, as the State properly notes, we have expressly rejected the idea that voluntary intoxication is a defense to murder in Greenlee v. State, 725 So.2d 816, 822-23 (Miss. 1998), stating:*

> *Greenlee submits that while voluntary intoxication is not a defense to the crime of murder, the fact that the defendant was intoxicated negates the existence of the specific intent to commit the offense. Thus, Greenlee concludes that because he had taken three hits of LSD before the offense, he did not have the specific intent to commit murder. For this reason, Greenlee argues that the drug induced state he was in reduced murder to manslaughter and, therefore, he should have at least been granted the instruction so that this question could go to the jury. However, this argument is tantamount to a request for the jury to consider Greenlee's intoxication as a defense to the specific intent crime of murder. In McDaniel v. State, 356 So.2d 1151 (Miss.1978), this Court overruled this argument which had previously been successful. The Court stated:*
>
> *If a defendant, when sober, is capable of distinguishing between right and wrong, and the defendant voluntarily deprives himself of the ability to distinguish between right and wrong by reason of becoming intoxicated and commits an offense while in that condition, he is criminally responsible for such acts.*

*Greenlee, 725 So.2d at 822-23 (Miss. 1998) (internal citations omitted) (quoting McDaniel v. State, 356 So.2d 1151, 1161 (Miss. 1978)). Jackson cites no authority for the proposition that his attorney should be considered ineffective for failing to bring to the jury's attention facts which should have had no bearing on the jury's verdict.*

*Harris counsel did in fact fail to fully investigate and interview potential witnesses and that failure represented deficient performance. While Nobles 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).*

In Ward v. State, ___ So.2d ___ (Miss. 1998) (96-CA-00067), the Supreme Court held the following:

> Effective assistance of counsel contemplates counsel's familiarity with the law that controls 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 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 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), 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 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; 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 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 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 Micheal 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 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. Johnson, 327 U.S. 106, 112 (1946). An ineffective assistance claim asserts the absence of one of the crucial assurances that the result of the proceeding is reliable, so finality concerns are somewhat weaker and the appropriate standard of prejudice should be somewhat lower. The result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to

have determined the outcome. Accordingly, the appropriate test for prejudice finds its roots in the test for materiality of exculpatory information not disclosed to the defense by the prosecution, United States v. Agurs, 427 U.S., at 104 , 112-113, and in the test for materiality of testimony made unavailable to the defense by Government deportation of a witness, United States v. Valenzuela-Bernal, supra, at 872-874. The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.
In making the determination whether the specified errors resulted in the required prejudice, a court should presume, absent challenge to the judgment on grounds of evidentiary insufficiency, that the judge or jury acted according to law. [466 U.S. 668, 695] An assessment of the likelihood of a result more favorable to the defendant must exclude the possibility of arbitrariness, whimsy, caprice, "nullification," and the like. A defendant has no entitlement to the luck of a lawless decision maker, even if a lawless decision cannot be reviewed. The assessment of prejudice should proceed on the assumption that the decision maker is reasonably, conscientiously, and impartially applying the standards that govern the decision. It should not depend on the idiosyncrasies of the particular decision maker, such as unusual propensities toward harshness or leniency. Although these factors may actually have entered into counsel's selection of strategies and, to that limited extent, may thus affect the performance inquiry, they are irrelevant to the prejudice inquiry. Thus, evidence about the actual process of decision, if not part of the record of the proceeding under review, and evidence about, for example, a particular judge's sentencing practices, should not be considered in the prejudice determination.
The governing legal standard plays a critical role in defining the question to be asked in assessing the prejudice from counsel's errors. When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt. When a defendant challenges a death sentence such as the one at issue in this case, the question is whether there is a reasonable probability that, absent the errors, the 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 Germar Harris has suffered a

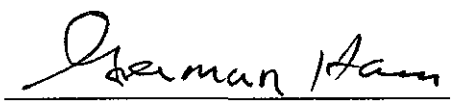
violation of his constitutional rights to effective assistance of counsel, in violation of the 6th Amendment to the United States Constitution.

Appellant would urge this Court to REVERSE AND REMAND THIS CASE TO THE TRIAL COURT AND DIRECT THAT THE TRIAL COURT conduct an evidentiary hearing on these issues.

## CONCLUSION

Appellant Germar Harris respectfully submits that based on the authorities cited herein, and in support of his brief, that this Court should reverse and remand this case to the trial court for additional proceedings. In the alternative, this Court should reverse and render the conviction and sentence on the basis of fundamental constitutional plain error committed by the trial court.

Respectfully submitted,

By: 

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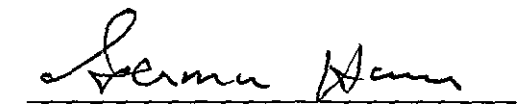
## CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above and foregoing Brief for Appellant have been served, by United States Postal service, upon: Honorable Jim Hood, Attorney General, P. O. Box 220, Jackson, Mississippi 39205; Honorable Lee

Howard, Circuit Court Judge, P. O. Box 1387, Columbus, MS 39703; Honorable Forrest Allgood, District Attorney, P. O. Box 1044, Columbus, MS 39703.

This, the 9 day of May, 2008.



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