IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

NO. 2007-CP-01795-COA

CALVIN LEE ROBINSON APPELLANT

V.

STATE OF MISSISSIPPI APPELLEE

BRIEF FOR APPELLANT

Calvin Lee Robinson, #L6862
P. O. Box 5188
Holly Springs, MS 38634-5188

ORAL ARGUMENT NOT REQUESTED

PRO SE PRISONER BRIEF

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

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CALVIN LEE ROBINSON APPELLANT

V

STATE OF MISSISSIPPI APPELLEE

CERTIFICATE OF INTERESTED PERSONS

The undersigned Appellant, Calvin Lee Robinson, 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. Calvin Lee Robinson, Appellant pro se.
2. Honorable Jim Hood, and staff, Attorney General.
3. Honorable Ashley Hines, Circuit Court Judge.
4. Honorable Dewayne Richardson, Assistant District Attorney.

Respectfully Submitted,

BY: Calvin Robinson

Calvin Lee Robinson, #L6862
P. O. Box 5188
Holly Springs, MS 38634-5188

Appellant

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NO. 2007-CP-01795-COA

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STATEMENT OF ISSUES

ISSUE ONE

Whether trial court erred in finding that the Post Conviction Motion filed on September 24, 2007, was a successive Motion within the means of Miss. Code Ann. §99-39-23(6) where the initial Motion filed on July 24, 2004 did not comply with the Post Conviction Relief Act under Miss. Code Ann. §99-39-9.

ISSUE TWO

Whether trial court erred in finding the Post Conviction Motion to be successive where court did not file PCR under new number and treated PCR as a continuation or supplement to the initial Motion which was filed under same cause number.

ISSUE THREE

Petitioner was denied due process of law and subjected to a fundamental constitutional violation in sentencing where Petitioner was sentenced to a term of

30 years with 10 years suspended, as a first-time felony offender, after being convicted of statutory rape during a single incident. Such sentence was outside the scope of the sentencing guidelines, disproportional to the offense charged, and excessive under the procedures outlined in Solem v. Helm, 463 U.S. 277, 291 (1983).

ISSUE FOUR

The indictment failed to provide to provide the appropriate judicial district in which the crime was alleged to have been committed which failure constitute 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 such requirement provides that the Indictment "shall include the County and Judicial in which the indictment is brought."

ISSUE FIVE

The Circuit Court committed plain error by failure to include in the record a factual basis for the plea, and Calvin L. Robinson was subjected to a denial of due process of law where the trial court failed to advise Robinson of the right to directly appeal the imposed sentence to the Supreme Court pursuant to the decision rendered by the Supreme Court in Trotter v. State, 554 So.2d 313, 315 (Miss. 1989); Gunter v. State, 841 So.2d 195 (Miss. App. 2003).

STATEMENT OF INCARCERATION

The Appellant is presently incarcerated and is being housed in the Mississippi Department of Corrections at the Marshall County Correctional Facility in service of a mandatory prison term imposed as a result of the conviction which is the subject of this action. Appellant has been continuously confined in regards to such sentence since date of conviction and imposition by the trial court.

STATEMENT OF CASE

On June 27, 2002, a criminal indictment was filed against Calvin Robinson charging Robinson with the criminal offense of statutory rape under Miss. Code Ann. §97-3-65(1)(b). Honorable Johnny Walls of Greenville, Mississippi was retained to represent appellant in this case. Appellant was represented at pretrial proceeding and at plea colloquy by Honorable Leland Jones of Greenwood, Mississippi.

The indictment charged that Calvin Robinson "... did unlawfully, willfully, and feloniously have (six) sexual intercourse with Tajuana Glass, a female child under the age of fourteen (14) years, and the said Tajuana Glass being twenty-four (24) or more months younger than Calvin L. Robinson, and he, Calvin L. Robinson, not being married to Tajuana Glass, ..."

On December 11, 2002, Robinosn was permitted by the court to enter a plea of guilty to the charge of Statutory Rape in Leflore County under cause number

2002-0149. The court accepted Robinson's plea of guilty and on July 24, 2003, sentenced Robinson to a term of 30 years in the custody of MDOC with 10 years suspended.

On June 13, 2003, a hearing was held on Robinson's Motion for Leave to Withdraw his Guilty Plea, and the Court found that Robinson had failed to show reason why the Court should grant the relief requested and denied Robinson's motion.

Calvin L. Robinson was a first time offender with no previous convictions. On July 24, 2003, the trial court imposed a sentence of 30 years with 10 years suspended, and five (5) supervised probation, in the custody of the Mississippi Department of Corrections.

On July 24, 2004, exactly one year after he was sentenced, Robinson filed Post-conviction on the grounds that: (1) Guilty Plea was made involuntarily (2) ineffective Assistance of Counsel, and (3) Sentence was not rendered in proportion to evidence presented or Crime (Cruel and Undue Punishment).

On or about October 22, 2004, the court entered an order denying Robinson "Motion for Post Conviction Relief and dismissed the case pursuant to Miss. Code Ann. Section 99-39-11(2).

Appellant subsequently filed a supplemental motion for post conviction relief on September 24, 2007, where the motion was filed under the same civil action cause number as the initial motion.

Appellant Robinson was not provided with a sentence proportionality analysis in this case before being sentenced to 20 years in the custody of the Mississippi Department of Corrections. This was the maximum sentence allowed by law.

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 erroneously dismissed the PCR as successive where the PCR was filed in conviction with the timely filed PCR and was filed under the same cause No. Moreover, the initial PCR was not statutorily valid where it did not comply with Miss. Code Ann. §99-39-9. The initial PCR was invalid and void. The second PCR was therefore not successive.

Calvin Robinson was provided with ineffective assistance of counsel during trial where counsel:

a) Failed to summon adequate witnesses;

b) Failed to perform pretrial investigation;

c) Failed to file pretrial motions including but not limited to the failure to file motion to squash the indictment based on the fact that the indictment failed to charge a crime within the judicial district not previously ascertained by law.

V.

MEMORANDUM OF LAW AND
ARGUMENT IN SUPPORT OF CLAIMS

1.

Whether trial court erred in finding that the Post Conviction Motion filed on September 24, 2007, was a successive Motion within the means of Miss. Code Ann. §99-39-23(6) where the initial Motion filed on July 24, 2004 did not comply with the Post Conviction Relief Act under Miss. Code Ann. §99-39-9.

The trial court found that the motion was successive since a prior letter had been filed, which was treated by the Court as a PCR, and denied. The problem with this finding is that the motion which the court refer to as to make the current motion a successive motion, was not statutorily sustainable to meet the requirements of the Post Conviction Collateral relief Statute and was therefore a void motion. The PCR statute is clear. Such statute sets out the requirements of the PCR motion and provides that:

§ 99-39-9. Requirements of motion and service.

(1) A motion under this article shall name the state of Mississippi as respondent and shall contain all of the following:

(a) The identity of the proceedings in which the prisoner was convicted.

(b) The date of the entry of the judgment of conviction and sentence of which complaint is made.

(c) A concise statement of the claims or grounds upon which the motion is based.

(d) A separate statement of the specific facts which are within the personal knowledge of the prisoner and which shall be sworn to by the prisoner.

(e) A specific statement of the facts which are not within the prisoner's personal knowledge. The motion shall state how or by whom said facts will be proven. Affidavits of the witnesses who will testify and copies of documents or records that will be offered shall be attached to the motion. The affidavits of other persons; and the copies of documents and records may be excused upon a showing, which shall be specifically detailed in the motion, of good cause why they cannot be obtained. This showing shall state what the prisoner has done to attempt to obtain the affidavits, records and documents, the production of which he requests the court to excuse.

(f) The identity of any previous proceedings in federal or state courts that the prisoner may have taken to secure relief from his conviction and sentence.

(2) A motion shall be limited to the assertion of a claim for relief against one (1) judgment only. If a prisoner desires to attack the validity of other judgments under which he is in custody, he shall do so by separate motions.

(3) The motion shall be verified by the oath of the prisoner.

(4) If the motion received by the clerk does not substantially comply with the requirements of this section, it shall be returned to the prisoner if a judge of the court so directs, together with a statement of the reason for its return. The clerk shall retain a copy of the motion so returned.

(5) The prisoner shall deliver or serve a copy of the motion, together with a notice of its filing, on the state. The filing of the motion shall not require an answer or other motion unless so ordered by the court under Section 99-39-11(3).

Miss. Code Ann. § 99-39-9.

The letter filed by Appellant did not meet the requirements of this statute and should have been returned to the petitioner by the Clerk unfiled in accordance with Miss. Code Ann. § 99-39-9(4). Where the Court failed recognize and to follow this mandatory requirement of the statute it should not be allowed to count toward the decision of the current motion being successive. This Court should reverse the finding of the trial court where it is based upon a finding of successiveness because of the prior PCR written as a letter.

2.

Whether trial court erred in finding the Post Conviction Motion to be successive where court did not file PCR under new number and treated PCR as a continuation or supplement to the initial Motion which was filed under same cause number.

The trial court filed the current PCR as a continuation of the prior PCR and under the same cause number. The statute, Miss. Code Ann. § 99-39-7.

> The motion under this article shall be filed as an original civil action in the trial court, except in cases in which the prisoner's conviction and sentence have been appealed to the supreme court of Mississippi and there affirmed or the appeal dismissed. Where the conviction and sentence have been affirmed on appeal or the appeal has been dismissed, the motion under this article shall not be filed in the trial court until the motion shall have first been presented to a quorum of the justices of the supreme court of Mississippi, convened for said purpose either in term-time or in vacation, and an order granted allowing the filing of such motion in the trial court. The procedure governing applications to the supreme court for leave to file a motion under this article shall be as provided in Section 99-39-27.

In the instant case the Appellant's conviction was by a plea of guilty and required that the PCR be filed in the trial court. The motion, in order to be regarded as a separate motion. should have been assigned an original civil action number and filed as such. Otherwise the PCR Motion must be deemed as a part of the original motion in which it's number it contains. The trial court should not have regarded the motion as being successive. This finding should be reversed. Robinson is entitled to a hearing on the merits of his motion.

3.

Petitioner was denied due process law and subjected to a fundamental constitutional violation in sentencing where Petitioner was sentenced to a term of

30 years with 10 years suspended, as a first-time felony offender, after being convicted of statutory rape during a single incident. Such sentence was outside the scope of the sentencing guidelines, disproportional and excessive under the procedures outlined in Solem v. Helm, 463 U.S. 277, 291 (1983).

Robinson is a first time offender with no other similar prior history to the crime he committed. Petitioner Robinson is entitled to relief so as to have his sentence reviewed under a proportionality analysis under the intervening decision rendered in Towner v. State, 837 So.2d 221 (Miss. App. 2003).

i) Intervening Decision By the Court as Authority to Determine Claim

The Court of Appeals of the State of Mississippi has recently decided a case which is supportive of the claim presented reference to a unduly harsh sentence being imposed upon a first time offender. In Towner v. State, 837 So.2d 221, 227 (Miss.App. 2003), the court found that "a sentence of 30 years incarceration, maximum allowable penalty, for a first time drug offender was an excessive sentence and required a sentence proportionality analysis.1

The Towner court held the following:

> "A court's proportionality analysis [of a sentence] under the Eighth Amendment should be guided by objective criteria, including (i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed

[1] It should be noted that under the drug law which the defendant in Towner, supra, was convicted under the term of sentence was not required to be served mandatory. However, in the case at bar, by law, Calvin Robinson must serve his sentence mandatory, without any credit for earned time, parole, or early release. Miss. Code Ann. §47-5-139(1)(d), as amended. Robinson's sentence is therefore twice as heinous as the sentence imposed in Towner, supra.

> for commission of the same crime in other jurisdictions." Solem v. Helm, 463 U.S. 277, 291, 103 S.Ct. 3001, 77 L.Ed.2d 637(1983) (writ of habeas corpus). This Court looks for guidance to the cases of White v. State, 742 So.2d 1126, 1135(¶ 32) (Miss.1999), and Davis v. State, 724 So.2d 342, 346(¶ 17) (Miss.1998), both of which involved the imposition of a maximum sentence of a first offender convicted of the sale of one rock of cocaine. In each case the Mississippi Supreme Court remanded for a review of the sentence. Although the amount of contraband sold by Towner was more than the amount at issue in White or Davis, the first time offender status is the same. However, due to the uniqueness of this particular case, that is, a first time offender was sentenced to the maximum sentence allowed by law, the trial judge acknowledges he may have been too harsh, and the prosecuting district attorney states he has no objection to a re-sentencing hearing. We hold that the case should be remanded for a review of the sentence.

Towner v. State, 837 So.2d 221, 227 (Miss.App. 2003)

Prior to the decision rendered in Towner, and at the time of the imposition of the sentence in this case, the law was simply that: As a general rule, a sentence that does not exceed the maximum period allowed by statute will not be disturbed on appeal. Wallace v. State, 607 So.2d 1184, 1188 (Miss. 1992). Generally, the imposition of a sentence is within the discretion of the trial court, and appellate courts will not review the sentence, if it is within the limits prescribed by statute. Reynolds v. State, 585 So.2d 753, 756 (Miss. 1991).

ii) Retroactive Application of Towner v. State 837 So.2d 221, 227 (Miss. App. 2003)

The Mississippi Supreme Court, In Hall v. Hilbun, 466 So. 2d 856, 875-76 (Miss. 1985), held that judicially enunciated rules of law are applied retroactively. The Hall v. Hilbun court held that:

> It is a general rule that judicially enunciated rules of law are applied retroactively. Legislation applies prospectively only, and we are not thought to be in the business of legislating. Rather, our function is to decide cases justly in accordance with sound legal principles which of necessity must be formulated, articulated and applied consistent with the facts of the case.
>
> Keyes v. Guy Bailey Homes, Inc., 439 So.2d 670 (Miss.1983), abolishing the requirement of privity of contract in home construction contracts applied retroactively; Tideway

Oil Programs, Inc. v. Serio, 431 So.2d 454 (Miss.1983), providing that punitive damages may be recovered in chancery court was applied retroactively; McDaniel v. State, 356 So.2d 1151 (Miss.1978) overruling cases which allowed voluntary intoxication as a defense to a crime applied retroactively.

The general rule applied universally in this country in federal and state courts is simply put in Jones v. Thigpen, 741 F.2d 805 (5th Cir.1984).

"Judicial decisions ordinarily apply retroactively. See Robinson v. Neil, 409 U.S. 505, 507-08, 93 S.Ct. 876, 877-78, 35 L.Ed.2d 29 (1973). 'Indeed, a legal system based on precedent has a built-in presumption of retroactivity. Solem v. Stumes, --- U.S. ----, ----, 104 S.Ct. 1338, 1341, 79 L.Ed.2d 579 (1984)."

--741 F.2d at 810.

Even Pruett v. City of Rosedale, 421 So.2d 1046 (Miss.1982), was held to apply retroactively to that case.

We note that other states, when shedding the "locality rule", have done so in a routine manner by simply adopting the new rule and applying it in a normal (retroactive) fashion without fanfare. See Zills v. Brown, 382 So.2d 528, 532 (Ala.1980) applying this new rule retroactively in Drs. Lane, Bryant, Eubanks & Dulaney v. Otts, 412 So.2d 254, 256-8 (Ala.1982) and May v. Moore, 424 So.2d 596, 597-601 (Ala.1982); Jenkins v. Parrish, 627 P.2d 533, 537 n. 1 (Utah 1981) (rule to be applied retroactively); Orcutt v. Miller, 95 Nev. 408, 595 P.2d 1191, 1194-95 (1979) (new rule routinely applied); Ardoin v. Hartford Accident & Indemnity Co., 360 So.2d 1331, 1339 n. 22 (La.1978) (overruling Percle v. St. Paul Fire & Marine Insurance Co., 349 So.2d 1289, 1303 (La.Ct.App.1977), which had held abandonment of locality rule to be prospective only); Bruni v. Tatsumi, 46 Ohio St.2d 127, 134-35, 346 N.E.2d 673, 679 (1976) (new rule routinely applied); Kronke v. Danielson, 108 Ariz. 400, 403, 499 P.2d 156, 159 (1972) (same); Wiggins v. Piver, 276 N.C. 134, 141, 171 S.E.2d 393, 397-98 (1970) (same); Naccarato v. Grob, 384 Mich. 248, 253-54, 180 N.W.2d 788, 791 (1970) (same); Brune v. Belinkoff, 354 Mass. 102, 108-09, 235 N.E.2d 793, 798 (1968) (same). Even when acknowledging the issue to be one of first impression, one court applied the new rule routinely with no hint of prospective-only application. Morrison v. MacNamara, 407 A.2d 555, 562 (D.C.1979).

Hall v. Hilbun, 466 So.2d 856 (Miss. 1985)

It is clear from Mississippi law that the decision rendered by the Mississippi Court of Appeals, which is a representative of the Mississippi Supreme Court, should be applied to the case at bar retroactively since this are judicially enunciated rule of law as opposed to Legislation.

iii) The Sentence Imposed in this Case, Without a Sentencing Proportionality Analysis, is an Illegal Sentence under Rule Announced in Towner v. State, 837 So.2d 221, 227 (Miss.App. 2003)

In Towner v. State, 837 So.2d 221, 227 (Miss.App. 2003), the Court of Appeals of the State of Mississippi firmly held that a first time offender convicted of a drug offense should be allowed a sentence proportionality hearing before being sentenced to the maximum sentence allowed by law.2 As a matter of law, without considering any facts affiliated with this case Robinson is entitled to some relief based upon the fact that the same identical thing happened in his case as happened in the Towner case. The Court of Appeals of the State of Mississippi has found that this is an incorrect procedure of law and if it was incorrect in Towner, it was incorrect in the sentencing of Calvin Robinson.

The sentencing proceedings in this case proceeded as follows:

THE COURT: All right, thank you Mr. Walls.

This is a day of sorrow I think for everybody in the courtroom. Mr. Robinson, would you stand up here, please, for sentencing

(THE DEFENDANT APPROACHED THE BENCH WITH HIS ATTORNEY, MR. WALLS.)

THE COURT: Unfortunately the Court -- I think the Court needs to have some reconciliation on both sides of this case, but the

[2] While the Court held such rule of law in a first time drug offender case, Petitioner would avert that first time offenders, no matter what the crime may be, should be entitled to a sentence proportionality analysis determination under this rule. Circuit Courts should not discriminate as to which first time offenders may be entitled to such analysis. Robinson was a man with a prior record which was

Court is not -- this isn't a Court of reconciliation. You have to go to a different forum to receive that relief. In fashioning a sentence in this case, the Court is guided by the statutory provisions. The goals of the deterrence, punishment, separation from society to prevent recurrence of a similar event in the future. I have taken into account all of the comments that I've heard from the witnesses today. And I'm taking into account the defendant's age, his exemplary record with the fire department, also the fact that he has by entry of a guilty plea he's taken responsibility for the actions in the eyes of the law. It's the judgment of the Court that based upon the guilty plea that you be sentenced to serve the term of 30 years in the custody of the department of corrections, that 10 of those years be suspended, that you serve 5 years on supervised probation, and that you pay court costs. The defendant is remanded to the custody of the Leflore County Sheriff's Department to await transportation to the custody of the Department of Corrections.

Court is adjourned.

(COURT WAS THEN ADJOURNED)

Calvin L. Robinson was a first time offender charged with statutory rape while questionably defending himself. Robinson did not prolong the court and

prosecutor's time. As a first time offender, he admitted to his wrong by entering a plea of guilty to the said charge.

As stated above, Calvin L. Robinson was a first time offender and situation was compatible to the factual scenario which the Court of Appeals heard in Towner v. State, supra. Towner was sentenced to 30 year under his first offender status, without the court making any type proportionality analysis. The same manner of sentencing happened to Calvin L. Robinson. In Towner, the case was remanded for a hearing on the proportionality of the sentence where Towner was subsequently sentenced to a term of 16 years. As matter of law, and fundamental constitutional requirements, Robinson is entitled to the same relief of having his sentence remanded to the trial court for a proportionality hearing which he never received before being sentenced to 20 years, the maximum penalty, without a sentence proportionality analysis. Moreover, every other first offender who received the maximum sentence.

iv) Petitioner Calvin L. Robinson is entitled to relief so as to have his sentence reviewed under a proportionality analysis under the intervening decision rendered in Towner v. State, 837 So.2d 221 (Miss. 2003).

In Towner, the Court of Appeals of the State of Mississippi, which render ruling tantamount to a ruling by the Mississippi Supreme Court, found that a proportionality analysis is the appropriate procedure before a first time offender

can be sentenced to the maximum term allowable under the statute. In such an analysis the trial court should consider the elements which the court has recognized in Towner.

The decision rendered by the Court of Appeals of the State of Mississippi in Towner v. State, 837 So.2d 221 (Miss. 2003), constitutes an intervening decision in this case since the decision will have direct impact upon the sentence imposed upon Robinson under the same conditions and circumstances.

The sentence imposed upon Calvin L. Robinson should be remanded for a sentence proportionality analysis.

4.

The indictment failed to give the judicial district 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 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 Robinson is alleging that his guilty plea conviction and sentence for Statutory Rape of one Tajuana Glass, which was charged to have occurred in Leflore County, Mississippi on or abut the 3rd day of March, 2002, the Judicial District was not properly identified by the indictment and was not previously ascertained by law under the Sixth Amendment of the United States and under Rule 6.06(4) and 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 Calvin L. Robinson notice of the judicial district by which the crime was committed within the indictment or with 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 the proceedings against Robinson is void and Robinson should be released from his illegal incarceration immediately.

Robinson 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 Petitioner avers that he has the right to petitions and give notice of the above error in this post-conviction proceeding pursuant to Section 99-39-5 of Miss. Code Ann. 1972, where states:

Miss. Code Ann. § 99-39-5 (1) & (2) (2000) states as follows:

(1) Any prisoner in custody under sentence of a court of record of the State of Mississippi who claims:

(a) That the conviction or the sentence was imposed in violation of the Constitution of the United States or the Constitution or laws of Mississippi;

(b) That the trial court was without jurisdiction to impose sentence;

(c) That the statute under which the conviction and or sentence was obtained is unconstitutional;

(d) That the sentence exceeds the maximum authorized by law;

(e) That there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;

(f) That his plea was made involuntarily;

(g) That his sentence has expired; his probation, parole or conditional release unlawfully revoked; or he is otherwise unlawfully held in custody;

(h) That he is entitled to an out of time appeal;

(i) That the conviction or sentence is otherwise subject to collateral attack upon any grounds of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding or remedy; may file a motion to vacate, set aside or correct the judgment or sentence, or for an out of time appeal.

(2) A motion for relief under this article shall be made within three years after the time in which the prisoners' direct appeal is ruled upon by the Supreme Court of Mississippi or, in case no appeal is taken, within three years after the time for taking an appeal from the judgment of conviction or sentence has expired, or in case of a guilty plea, within three years after entry of the judgment of conviction. Excepted from this three-year statute of limitations are those cases in which the prisoner can demonstrate either that there has been an intervening decision of the Supreme Court of either the State of Mississippi or the United States which would have actually adversely affected the outcome of his conviction or sentence or that he has evidence, not reasonably discoverable at the time of trial, which is of such nature that it would be practically conclusive that had such been introduced at trial it would have caused a different result in the conviction or sentence. Likewise excepted are those cases in which the prisoner claims that his sentence has expired or his probation, parole or conditional release has been unlawfully revoked."

See Kelly v. State, 797 So.2d 1003 (Miss. 2000).

Robinson's conviction and sentence should be considered as illegal based on the fatal defective error of the indictment, which its failure to give adequate notice of the charge, when it failed to give the judicial district of where the alleged statutory rape of Tajuana Glass was committed. Therefore, the court should have no other alternative but to issue an order vacating the conviction ascertained by the plea and the judgment of the court and release him instanter from his illegal incarceration.

5.

PETITIONER WAS DEPRIVED OF DUE PROCESS OF LAW WHERE TRIAL COURT FAILED TO ADVISE ROBINSON 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 Calvin L. Robinson was subjected to a denial of due process of law where the trial court failed to advise Calvin L. Robinson of the right to directly appeal the sentence imposed sentence to the Supreme Court.

The trial court failed to advise Calvin L. Robinson 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 Calvin L. Robinson a direct appeal of the sentence imposed. The trial court judge made fundamental error where it failed to advise Calvin L. Robinson 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).

In Trotter, supra, the following occurred:

> 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 Calvin L. Robinson's guilty plea may have automatically waived his right to appeal the conviction itself, it was not explained to Calvin L. Robinson that he had the right to directly appeal the sentence of the court and the terms of such sentence. Since there was a right to appeal the sentence, as recognized in Trotter, this action by the trial court constitute plain and fundamental error not subject to the three year time bar. During the guilty plea hearing, the court failed to demonstrate in the record that Calvin L. Robinson 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.

6.

INEFFECTIVE ASSISTANCE OF COUNSEL

Petitioner was provided with ineffective assistance of counsel during trial Court proceedings where counsel:

a) Failed to summon adequate witnesses;

b) Failed to perform pretrial investigation;

c) Failed to file pretrial motions including but not limited to the failure to file motion to squash the indictment based on the fact that the indictment failed to charge a crime within the judicial district not previously ascertained by law.

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.

Robinson's counsel did in fact fail to fully investigate and interview potential witnesses and that failure represented deficient performance. While Robinson must still show that this deficiency in counsel's performance prejudiced him at trial during entering his plea or guilty or before the said proceeding at the stage of trial preparation , the law is clear that an attorney is ineffective when he fails to perform pretrial investigation or interview witnesses to see whether his client could prevail at trial before recommending or suggesting that his client enter a plea of guilty. 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).

Robinson's attorney never presented this evidence because he never carried out the necessary pretrial investigations to secure such evidence. Robinson's attorney failure in this regard most definitely prejudiced Robinson's choice to be tried by a jury instead of entering a plea of guilty. His counsel failed to let him know that he is completely innocence of the charge until he is proven guilty by a jury.

The Record indicates that after having entered a plea of guilty, Robinson was sentenced on July 24, 2003. The Court did not give Robinson notice that he could appeal his sentence to the Supreme Court if he was not satisfied with the sentence imposed. However, exactly one year after the sentence was imposed, Robinson related to his counsel that he wanted to withdraw his plea of guilty, and his counsel failed to advise Robinson that he had the right to appeal the guilty plea conviction and his sentence to the Supreme Court. Nevertheless, Robinson filed a pro se motion for post conviction relief on July 24, 2003, exactly on the same date of his Sentence imposed by the Court. In the said proceeding, Robinson presented the following claims:

1. His guilty plea was made involuntarily
2. he received ineffective assistance of counsel and,
3. his sentence was not rendered in proportion to the evidence presented or the severity of the crime.

The Court found that Robinson's claims were without merit and denied his post-conviction relief pursuant to Miss. Code Ann. Section 99-39-11(2). The Court and Robinson's attorney knew Robinson's intent was to appeal his conviction and sentence on his own, therefore, the court should have construed

Robinson's request for post-conviction relief as an attempt to appeal his sentence, and order his counsel to file an appeal on his behalf.

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 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 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 CALVIN L. ROBINSON has suffered a violation of his constitutional rights to effective assistance of counsel, in violation of the 6th Amendment to the United States Constitution. .

Petitioner would urge this Court to grant post conviction relief in regards to this claim and to conduct an evidentiary hearing on this issue.

CONCLUSION

Appellant Robinson 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: Calvin Robinson

Calvin Lee Robinson, #L6862
P. O. Box 5188
Holly Springs, MS 38634-5188

CERTIFICATE OF SERVICE

This is to certify that I, Calvin Lee Robinson, have this date served a true and correct copy of the above and foregoing Brief for Appellant, by United States Postal service, first class postage prepaid, to: Honorable Jim Hood, Attorney General, 5th Floor of Gartin Justice Building, Jackson, MS 39205; Honorable Ashley Hines, Circuit Court Judge, P. O. Box 1315, Greenville, Ms 38702; Honorable Dewayne Richardson, District Attorney, P. O. Box 426 Greenville, Ms 38702.

This, the 25, day of November, 2008

Calvin Robinson

Calvin Lee Robinson, #L6862
P. O. Box 5188
Holly Springs, MS 38634-5188