COPY

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

NO. 2007-CP-02071-COA

JESSIE MONTRELL OLIVER — APPELLANT

V.

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR APPELLANT

BY: Jessie Oliver

Jessie Montrell Oliver, #R9549
Mississippi State Penitentiary
Unit 29-A
Parchman, MS 38738

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

NO. 2007-CP-02071-COA

JESSIE MONTRELL OLIVER APPELLANT

V

STATE OF MISSISSIPPI APPELLEE

CERTIFICATE OF INTERESTED PERSONS

The undersigned Appellant, Jessie Montrell Oliver, 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. Jessie Montrell Oliver, Appellant pro se.
2. Honorable Jim Hood, and staff, Attorney General.
3. Honorable Robert Chamberlin, Circuit Court Judge.
4. Honorable John Champion, District Attorney.

Respectfully Submitted,

BY: 

Jessie Montrell Oliver, #R9549
Mississippi State Penitentiary
Unit 29-A
Parchman, MS 38738

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

NO. 2007-KA-01297-COA

JESSIE MONTRELL OLIVER APPELLANT

v.

STATE OF MISSISSIPPI APPELLEE

STATEMENT OF ISSUES

ISSUE ONE

Appellant was denied due process law and subjected to a fundamental constitutional violation in sentencing where Appellant was sentenced to a term of 40 years for armed robbery, as a first-time felony offender, after being convicted of armed robbery for first time ever.

ISSUE TWO

The sentence imposed upon Oliver was disproportionate to the offense and excessive under the armed robbery statute since such sentence of 40 years exceeded petitioner's life expectancy. Such actions violated the 5th and 14th Amendments to the United States Constitution.

ISSUE THREE

Appellant Jessie Montrell Oliver received ineffective assistance of counsel before advising Oliver to enter a plea of guilty, in violation of the 6th and 14th Amendments to the United States Constitution as well as the Constitution of the State of Mississippi, where Oliver was denied his constitutional and statutory right to a speedy trial and

where defense counsel failed to give notice to his Oliver that he had a speedy trial violation.

ISSUE FOUR

The Court committed plain error by failure to include in the record, after having been sentenced pursuant to a guilty plea, by subjecting Jessie Montrell to a denial of due process of law where the trial court failed to advise Oliver of the right to a direct appeal of the imposed sentence to the Supreme Court.

ISSUE FIVE

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

a) Failed to object base on speedy trial violation;

b) Failed to summon adequate witnesses;

c) Failed to perform pretrial investigation;

d) Failed to conduct a proper and thorough investigation to talk to witnesses and locate tangible evidence for trial. Defense counsel failed to prepare for trial by being more focused on attempting to persuade Appellant to plead guilty during sentencing in regards to the length of sentence imposed upon a first time offender.

ISSUE SIX

Whether trial court erred in failing to allow the record to contain transcript of guilty plea colloquy in court proceedings and where claims contained issues of denial of due process during proceedings; where Appellant properly designated such records;

and where trial court indicated it had reviewed such records when Court rendered Order denying relief.

STATEMENT OF INCARCERATION

The Appellant is presently incarcerated and is being housed in the Mississippi State Penitentiary at Parchman, Mississippi, in service of a the prison term imposed with the assistance and support of the conviction and sentence under which he now attack in this case. Appellant has been continuously confined in regards to such sentence since date of conviction and imposition by the trial court.

STATEMENT OF CASE

Oliver was sentenced by the Circuit Court of DeSoto County, Mississippi, on October 30, 2006, to a total term of (30) thirty years imprisonment under Count I, Count II and Count III of the multiple count indictment filed in trial court. Oliver was also sentenced to 10 years of post release supervision, five years of reporting and five years of non-reporting.

STATEMENT OF FACTS

On April 5, 2006, a five (5) count indictment was filed against Jessie Montrell Oliver in Desoto County Mississippi, charging the crime of conspiracy to commit armed robbery in Count 1 and armed robbery in Counts 2, 3, 4 and 5, which crimes were alleged to have occurred in Count 1 June 24, 2005, in violation of Section 91-1-1(a) and July 30, 2005; Count 2, June 24, 2005 in violation of Section 97-3-79; Count 3, July 24, 2005 in violation of Section 97-3-79, Count 4, July 30, 2005 in violation of Section 97-3-79 and Count 5, July 30, 2005 in violation of 97-3-7(2)(b) in Desoto County,

Mississippi. Such charges, with the exception of Count 1, were specifically filed pursuant to Miss. Code Ann. §97-3-79.[1]

Appellant Oliver was represented by Honorable Vanessa Winkler-Brewer in such case and was convicted by entering a plea of guilty to Counts 2, 3 and 4 on October 6, 2006. Sentence was imposed upon defendant on the same date. The Sentence was imposed by the Judge of the Circuit Court.

Jessie Montrell Oliver was a first time offender with no previous convictions. The trial court imposed a sentence of 40 years, that is, on **Count 2**, to serve a term of ten (10) years; **Count 3**, to serve a term of ten (10) years with this sentence running consecutive to the sentence imposed in Count 2; **Count 4**, sentenced to a term of twenty (20) years to be served ten years incarceration, ten years post-release supervision, five of that reporting, five of that non-reporting; and, to run consecutive to the sentence imposed in Count 3 to be served in the custody of the Mississippi Department of Corrections.

The trial Court failed to advised Jessie Oliver that he had the right to appeal any sentences imposed by the court.

The Mississippi Court of Appeals recently decided the case of Towner v. State, 837 So.2d 221 (Miss. 2003), which involved a sentence imposed upon a first time

---

[1] § 97-3-79. Robbery; use of deadly weapon.

Every person who shall feloniously take or attempt to take from the person or from the presence the personal property of another and against his will by violence to his person or by putting such person in fear of immediate injury to his person by the exhibition of a deadly weapon shall be guilty of robbery and, upon conviction, shall be imprisoned for life in the state penitentiary if the penalty is so fixed by the jury; and in cases where the jury fails to fix the penalty at imprisonment for life in the state penitentiary the court shall fix the penalty at imprisonment in the state penitentiary for any term not less than three (3) years.

offender, found that the maximum sentence should be reversed for a sentencing hearing in light of the defendant's first offender status.

That Appellant Oliver was not provided with a sentence proportionality analysis in this case before being sentenced to 40 years in the custody of the Mississippi Department of Corrections. Additionally, the trial court imposed a combined sentence tantamount to a life sentence when the jury failed to impose a life sentence for armed robbery.

That prior to entering the pleas of guilty, Oliver's attorney, Vanessa Price, told Oliver that if he enter a plea of guilty, his girlfriend, Arrica Tawanda Jefferson (Susie) would be released. Oliver specifically told his attorney that he did not want to plead guilty, but he was pleading guilty because he wanted Arrica to get out because they had four children together and she needed to be at home to see after them.

Jessie Oliver's attorney also assured his mother, Geraldine P. Jefferson, that if Oliver and Arrica pleaded guilty, Arrica would be released so she could go home and take care of the children, but after Oliver and Arrica entered the guilty plea, Arrica was not released but was sentenced to five (5) years and she is not scheduled to be released until May 26, 2010. .

That Attorney Vanessa Price represented Arrica Jefferson, Travis Oliver, and Jessie Oliver on the same case, but Jessie Oliver told his attorney he wanted to take his case to trial, however, Attorney Price did not want to take the case to trial, and used Arrica to coerce Jessie Oliver to enter a plea of guilty, by conveying to Jessie Oliver that if he pled guilty, Arrica would get out within the next two weeks if she would not be released on the date she and Jessie Oliver enter the plea of guilty.

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).

ARGUMENT

ISSUE ONE

Appellant was denied due process law and subjected to a fundamental constitutional violation in sentencing where Appellant was sentenced to a term of 40 years for armed robbery, as a first-time felony offender, after being convicted of armed robbery for first time ever.

and

ISSUE TWO

The sentence imposed upon Oliver was disproportionate to the offense and excessive under the armed robbery statute since such sentence of 40 years exceeded petitioner's life expectancy. Such actions violated the 5th and 14th Amendments to the United States Constitution.

Appellant Oliver alleges that by the court imposing a judgment of 40 years for armed robbery as a first time offender, and without considering his life span and/or without making a Sentencing Proportionality Analysis imposing sentence upon Oliver, due to the fact that without a jury, he should have been sentenced to less than a life sentence, denied him due process of law and equal protection of the law as afforded and guaranteed him under the Fourteenth Amendment of the United States

Constitution. For argument sake, he relies on the following intervening decision of the Mississippi Court of Appeals:

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

The Court of Appeals of the State of Mississippi has recently decided a case which is supportive of this 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.

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 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).

Oliver had never been convicted of a felony offense until his conviction in this case. Oliver's felony free conviction record should have been taken under consideration when the sentence was imposed in this case. The trial court never considered such.

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 Towner decision rendered by the Mississippi Court of Appeals, which is a representative of the Mississippi Court of Appeals, should be applied to the case at bar retroactively since this is 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 Oliver is entitled to some relief based upon the Towner case. The Court of Appeals of the State of Mississippi has found that the sentencing of a first offender, without a proportionality hearing, is an incorrect procedure. If such procedure was incorrect in Towner, it was incorrect in the sentencing of Jessie Montrell Oliver.

iv) Appellant was denied due process law and subjected to a fundamental constitutional violation in sentencing where Appellant

[2] While the Court held such rule of law in a first time drug offender case, Appellant 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.

was sentenced to a total term of 40 years, as a first-time offender, after being convicted of conspiracy to commit armed robbery and armed robbery and where sentence exceeded Petitioner's life expectancy and was an excessive sentence for armed robbery unless imposed by a jury. Trial court failed to apply a proportionality analysis.

As stated above, Jessie Montrell Oliver was a first time offender who was charged with armed robbery. A factual scenario which was similar to the case here was heard in Towner v. State, supra, where Towner was sentenced to 30 years under his first offender status, without the court making any type proportionality analysis. The same manner of sentencing happened to Jessie Montrell Oliver. 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 a matter of law, and fundamental constitutional requirements, Oliver is entitled to the same relief of having his sentence remanded to the trial court for a proportionality hearing which Oliver never received before being sentenced to a term of 40 years for armed robbery, without a sentence proportionality analysis.

In Luckett v. State, supra, the court stated:

> A defendant convicted under this statute may not be sentenced to life imprisonment unless the jury fixes the penalty at life imprisonment. In cases where the jury does not fix the penalty at life imprisonment, the judge must sentence the defendant to a definite term reasonably expected to be less than life. Lee v. State 322 So2d 751 (Miss. 1975);see also Cunningham v.State, 467 So.2d 902 (Miss. 1985). In fixing the sentence, the trial court should make a record of, and consider, the age and life expectancy of the defendant and any other pertinent facts which would aid in fixing a proper sentence.

In Stewart v. State, 372 So.2d 257, 259 (Miss. 1979), a case which was cited by the Luckett decision, this court stated following:

> Defendant contends that the imposition of a 75 year sentence is excessive under the statute, and the sentence amounts to cruel and unusual punishment in violation of the Constitutions of the United States and the State of Mississippi. We reject the argument that the sentence constitutes cruel and unusual punishment in violation of the Constitutions, but hold that the sentence is

excessive because it is for a longer period of time than permitted by statute. We have conflicting decisions on the latter question. See Lee v. State, 322 So.2d 751 (Miss.1975), and McAdory v. State, 354 So.2d 263 (Miss.1978). In Lee, the defendant was convicted of forcible rape and sentenced to life imprisonment. We affirm the conviction but remanded for imposition of proper sentence and stated: The appellant next contends the sentence of life imprisonment by the court was beyond the limits of Mississippi Code Annotated section 97-3-65 (Supp.1974). With regard to punishment it states: ". . . upon conviction shall be imprisoned for life in the state penitentiary if the jury by its verdict so prescribes; and in cases where the jury fails to fix the penalty at life imprisonment the court shall fix the penalty at imprisonment in the state penitentiary for any term as the court, in its discretion, may determine." With this contention we agree. The jury returned a verdict of guilty. It did not fix the penalty at life imprisonment in the penitentiary thereby, in accord with the statute, leaving the question of sentence within the court's discretion. The issue presented is whether a trial judge under this section may impose a sentence of life when the jury has "failed" to do so. We think not. In Bullock v. Harpole, 233 Miss. 486, 102 So.2d 687 (1958). we had this to say concerning a similar statute: "It can be readily seen, as stated in the Dickerson case, Supra (Dickerson v. State, 202 Miss. 804, 32 So.2d 881), that the statutes place the death sentence within the sole province of the jury, and no such sentence can be imposed by any judge unless he has the authority of the jury therefor." (233 Miss. at 494, 102 So.2d at 690.) The statute before us places the imposition of a life sentence within the sole province of the jury and, in our opinion, no such sentence can be imposed by a judge unless he has the authority from the jury so to do. The statute presupposes, absent a jury recommendation of life imprisonment, that the judge will sentence the defendant to a definite term reasonably expected to be less than life. We therefore affirm and remand for proper sentence.

Here the trial court has imposed a sentence upon Oliver which, as a matter of law, is excessive.

The court should find that the sentence of 40 years imposed upon Oliver, at the age of 27, was an excessive sentence when combined with Oliver's age (total of 67 years) at the time of sentencing exceeded his life expectancy of 50.5 years. The court specifically asked Oliver, "do you understand that on each of your three counts the maximum penalty is life in prison **if set by a jury**, and **anything less than life as set by this Court**, and a $10,000-dollar fine?" And, Oliver answered the court by saying, "yes, sir. TR 18. Therefore, Oliver was expecting to receive sentences totaling less than life if sentenced by the court. The said sentence was arbitrary and conspicuous without prior notice, which is a violation of his due process of law rights under the Fifth and Fourteenth Amendment of the U. S. Constitution.

Oliver's illegal Judgment should be vacated for resentencing to a term of sentence less than life.

ISSUE THREE

Appellant Jessie Montrell Oliver received ineffective assistance of counsel before advising Oliver to enter a plea of guilty, in violation of the 6th and 14th Amendments to the United States Constitution as well as the Constitution of the State of Mississippi, where Oliver was denied his constitutional and statutory right to a speedy trial and where defense counsel failed to give notice to his Oliver that he had a speedy trial violation.

Speedy Trial.

Jessie Montrell Oliver was charged and arrested for the crimes, which he stands convicted of by entering a plea of guilty for on or about April 05, 2006. The record indicates that Oliver was locked up for a total of 432 days while awaiting trial in this cause. See TR 25. The record does not indicate that Oliver waived his speedy trial rights. Even Oliver's counsel was ineffective for failure to advise Oliver of his speedy trial rights before advising him to enter a plea of guilty. The speedy trial clock, from a constitutional standpoint, commenced to tick on that day. Beavers v. State, 498 So.2d 788 (Miss. 1998).

In Beavers , the court stated the following.

> [1] Our first question is ascertainment of the point in time when the speedy trial clock began to run against the prosecution. Generally speaking, the starting point appears to be that moment when the defendant is first effectively accused of the offense. > Perry v. State, 419 So.2d 194, 198 (Miss.1982). Compare > Page v. State, 495 So.2d 436, 439 (Miss.1986). We have cases treating as this point of accusation the time of indictment and, in cases where the accused is already incarcerated, the point in time when a detainer was lodged against him. > Bailey v. State, 463 So.2d 1059, 1062 (Miss.1985); > Perry v. State, 419 So.2d at 198. Our two most recent pronouncements on the subject held the time of arrest to be the time of accusation. > (FN2) > Lightsey v. State, 493 So.2d 375,

> 378 (Miss.1986); > Burgess v. State, 473 So.2d 432, 433 (Miss.1985). One's right to a speedy trial as a matter of common sense has reference to that point in time when the prosecution may begin to crank up the machinery of the criminal justice process. It also has reference to the criminal act with which the accused is charged, for that is the event the truth of which must ultimately be probed in open court. The present record reflects that this point in time occurred on March 23, 1982, the date Beavers was arrested, and charged with burglary. Whether Beavers' right to a speedy trial was respected must be determined by reference to that date. > Lightseyv. State, 493 So.2d at 378.

Beaver v. State, 498 So.2d at 789-790. Also see Moore v. State, 837 So.2d 794 (Miss. 2003).

The indictment was filed against Oliver on April 5, 2006. Oliver was arraigned on the indictment on October 30, 2006, and all proceedings was filed on or about February 2007. TR 1

We have already established that Oliver's "constitutional right" to speedy trail accrued at the time he was arrested. The statutory right to speedy trial, being a separate matter, attached from the date of assignment. Riley v. State, So.2d Miss. App. 2003) (2003 WL 1818156).

In the instant case, it is clear that Oliver suffered a violation of his "constitutional right" to a speedy trial since there was a delay of longer than 270 days between the date of arrest and the date he actually came to trial. There is no motion for continuance filed by Oliver and counsel made no objections at trial. Clearly counsel was ineffective before trial or during the guilty plea colloquy proceedings.

This Court should find that Oliver suffered a violation of his constitutional right to speedy trial and that counsel was ineffective in failing to raise this issue before or during the guilty plea proceedings.

In the case Miller v. State, 2005-KA-00566-S.Ct(Miss. 5-17-2007) the appeal court stated as following:

I. DENIAL OF A SPEEDY TRIAL.

This Court has stated that the: [r]eview of a speedy trial claim encompasses the fact question of whether the trial delay rose from good cause. Under this Court's standard of review, this Court will uphold a decision based on substantial, credible evidence. If no probative evidence supports the trial court's finding of good cause, this Court will ordinarily reverse. DeLoach v. State,722 So.2d 512, 516 (Miss. 1998) (citations omitted) (emphasis added). Miller now argues, for the first time, that the delay in her trial violated a statutory right to a trial within 270 days of her arraignment under Miss. Code Ann. § 99-17-1 (Rev. 2000) and a constitutional right to a speedy trial under the Sixth and Fourteenth Amendments to the United States Constitution; Article 3, Section 26 of the Mississippi Constitution; and the unanimous holding of the United States Supreme Court in Barker v. Wingo, 407 U.S. 514, 92 S.cT. 2182, 33 L. Ed. 2d 101 (1972).

As this issue is raised for the first time on appeal, the trial court was not afforded the opportunity to conduct an evidentiary hearing and consider evidence and/or testimony regarding the speedy trial issue. This Court is ill-suited to act as a fact-finder. See Southern v. Miss. State Hosp., 853 So.2d 1212, 1214 (Miss. 2003) ("The role of an appellate court is not to be a fact finder but rather determine and apply the law to the facts determined by the trier of fact."). Therefore, this issue is dismissed without prejudice. If properly filed, the circuit court, a court of record, with testimony and exhibits, is better positioned to assess Miller's claim of a speedy trial violation under the totality of the circumstances via an evidentiary hearing. At that evidentiary hearing, both the defendant and the State may address the length of the delay, the reason for the

delay, the timeliness and adequacy of Miller's assertion of her right, and prejudice to Miller, along with other relevant circumstances. See Barker, 407 U.S. at 530, 533 .

The sentence imposed upon Oliver was disproportionate to the offense and excessive under the armed robbery statute since such sentence of 40 years exceeded petitioner's life expectancy. Such actions violated the 5th and 14th Amendments to the United States Constitution.

The Court was required, by law, to address the speedy trial law during the guilty plea proceeding to see was Oliver intended to waive his speedy trial rights. The Court even failed to allow the State to respond to the speedy trial issue,. This Court should grant post conviction relief on this claim

The Excessive Sentence Claim.

Jessie Oliver's sentence was excessive fore the offense of armed robbery where the sentence exceeded Oliver's life expectancy. The Court imposed a sentence of 40 years imprisonment. According to the Mississippi Department of Corrections records, Oliver was born May 16, 1979. . On Oliver's year of birth he had a life expectancy of 63.7 years. Jessie Montrell Oliver was 27 years of age on October 30, 2006, the date he was sentenced by the trial court. On that date he, therefore, according to the date of birth which the state has recognized in their records, had an additional 36.7 expected years to live. The sentence imposed by the trial court exceeds Oliver's life expectancy by 4.7 years. As a matter of law, the sentence is excessive and illegal. Stewart v. State, 372 So.2d 257, 258 (Miss. 1979).

In Stewart, the Mississippi Supreme Court held the following in regards to a similar claim under this statute.

> Defendant was convicted of armed robbery under Section 97-3-79 Mississippi Code Annotated (Supp.1978). > ([FN1]) The verdict of the jury was: "We, the jury, find the defendant guilty as charged." The jury did not fix the penalty at imprisonment for life and the trial judge sentenced the defendant to 75 years in the State Department of Corrections.
>
> Defendant contends that the imposition of a 75 year sentence is excessive under the statute, and the sentence amounts to cruel and unusual punishment in violation of the Constitutions of the United States and the State of Mississippi. We reject the argument that the sentence constitutes cruel and unusual punishment in violation of the Constitutions, but hold that the sentence is excessive because it is for a longer period of time than permitted by statute.

The Supreme Court found that a 75 year sentence was excessive. In the instant case, Oliver was sentenced to a term of 40 years for armed robbery. However, when the 40 years imposed upon Oliver is calculated under Oliver's date of birth and the life expectancy for a black male at the time Oliver was actually born, the sentence imposed by the trial court in this case, although not as excessive as the sentence imposed upon Stewart, is nevertheless, constitutionally excessive. The sentence exceeds the number of year which the Court could impose because it exceeds the 63.7 year life expectancy of Oliver. The sentence is therefore, as the court found in Stewart, excessive because it exceeds the period which is permitted by Miss. Code Ann. §97-3-79, it should be found to be constitutionally void.

Based upon Mississippi law and the fact that Oliver's sentence was excessive to his actual life expectancy, this Court should vacate the sentence and direct that a new sentencing hearing be conducted on Jessie Montrell Oliver.

ISSUE FOUR

The Court committed plain error by failure to include in the record, after having been sentenced pursuant to a guilty plea, by subjecting Jessie Montrell to a denial of due process of law where the trial court failed to advise Oliver of the right to a direct appeal of the imposed sentence to the Supreme Court.

The trial court failed to advise Jessie Montrell Oliver 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 Oliver a direct appeal of the sentence imposed. The trial court judge made fundamental error where it failed to advise Oliver 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, the Supreme Court held as follows:

> 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 Oliver's guilty plea may have automatically waived his right to appeal the conviction itself, it was not explained to Oliver 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 Oliver 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). There was not a voluntary and informed waiver made by Oliver not to appeal his imposed sentence.

The Court must vacate the judgment or at least hold an evidentiary hearing on whether

defendant Oliver was in fact denied the right to appeal his sentence and if the Court determines in the affirmative then Oliver should be granted an out-of time appeal of the sentence and it's terms of imposition.

ISSUE FIVE

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

a) Failed to object base on speedy trial violation;

b) Failed to summon adequate witnesses;

c) Failed to perform pretrial investigation;

d) Failed to conduct a proper and thorough investigation to talk to witnesses and locate tangible evidence for trial. Defense counsel failed to prepare for trial by being more focused on attempting to persuade Appellant to plead guilty during sentencing in regards to the length of sentence imposed upon a first time offender.

Jessie Montrell Oliver was denied his constitutional right to effective assistance of counsel where his attorney failed to raise the speedy trial issue before advising his client to enter a plea of guilty. Thus, Oliver was therefore entitled to effective representation by counsel before trial, during the guilty plea colloquy proceeding, he was entitled to the right to appeal his sentence, the right to be advised that he could pursue this illegal sentence by filing a post conviction proceeding within a 3 year period. Defense counsel ignored the speedy trial claim by the failure to object and by failure to bring the matter up before the court. This court should find that counsel was deficient and prejudicial in failing to raise this claim and that such actions violated the two prongs set out in Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.ED 2d 674 (1984).

The trial Court was required, by law, to address the speedy trial law during the guilty plea proceeding to see was Oliver intended to waive his speedy trial rights. The Court even failed to allow the State to respond to the speedy trial issue,. This Court should grant post conviction relief on this claim. *defendant must show that there is a reasonable probability that, but for his attorney's errors, he would not have enter a plea of guilty to the said armed robbery charges.*

This court should find that post conviction relief should be granted in this instance.

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 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).

Appellant Jessie Oliver's counsel did in fact fail to fully investigate and interview potential witnesses and that failure represented deficient performance. While Oliver was required to 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 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 Jessie Montrell Oliver has suffered a violation of his constitutional rights to effective assistance of counsel, in violation of the 6th Amendment to the United States Constitution.

Additionally, trial counsel never objected to the excessive sentence which the trial court imposed upon Oliver and which sentenced has been shown to be excessive in the claims presented here. No claim of such sentence was presented by counsel on the direct appeal filed in this case.

Jessie Montrell Oliver was clearly provided with ineffective assistance of counsel at trial. Where Oliver was represented by the same attorney who represented each of the co-defendants which had different interests. This claim is not procedurally barred and may be raised here for the first time. Read v. State, 430 So.2d 832, 836-837 (Miss.1983).

> We expressly reject so much of the argument advanced by the State of Mississippi as would have us hold that the ineffective assistance of counsel issue is procedurally barred here because it was not properly raised or preserved in the trial court. That argument is wrong because the Reads never had a meaningful opportunity to raise the issue in the court below.
>
> In addition, that holding is completely at odds with the spirit of Brooks v. State, 209 Miss. 150, 46 So.2d 94 (1950). In Brooks, this Court, per Justice Percy M. Lee, recognized that
>
> Errors affecting fundamental rights are exceptions to the rule that questions not raised in the trial court cannot be raised for the first time on appeal. [> 209 Miss. at 155, 46 So.2d at 97].
>
> Today, however, state courts are being allowed not inconsiderable leeway when it comes to enforcing procedural rules to bar litigation of federal constitutional rights. > Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977); > Engle v. Isaac, 456 U.S. 107, 102

> S.Ct. 1558, 71 L.Ed.2d 783 (1982). Given such leeway, it is peculiarly appropriate that state courts be faithful stewards of those fundamental rights adjudication of which is thus entrusted to them. It is appropriate that this Court keep the spirit of Brooks alive. The State's brief would have us take advantage of this leeway--and, in effect, preclude any defendant ever raising the troublesome, unpleasant and no doubt frequently abused claim of ineffective assistance of counsel. The State's invitation should be rejected.

430 So.2d 832, Read v. State, (Miss. 1983)

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

ISSUE SIX

Whether trial court erred in failing to allow the record to contain transcript of guilty plea colloquy in court proceedings and where claims contained issues of denial of due process during proceedings; where Appellant properly designated such records; and where trial court indicated it had reviewed such records when Court rendered Order denying relief.

Appellant designated, inter alia, the following portions of the record in perfecting the appeal to this Court:

1. The transcript of all testimony to include opening and closing arguments as well as in chambers conferences and testimony on any motions presented to the court in Cause No. 2006-0222C(D);
2. All letters, orders, discovery, agreements, affidavits, statements, transcripts or any other clerks papers contained in this cause. (R. 62)

While Appellant clearly designated these records to be made a part of the record on appeal, the trial court never included these records in the appeal. The trial court judge indicated, in denying the PCR, that the Court had made a through review of the court files, including the transcripts of the plea and sentencing hearings, reveals that it

is undeniably clear that Oliver's sworn statements contained in Oliver's PCR motion are "overwhelmingly belied by unimpeachable documentary evidence in the record" causing this Court to therefore conclude that Oliver's sworn statements are "a sham" and that no evidentiary hearing is required. (R. 59)

The trial Court clearly referenced the record and transcript as having reviewed these documents in reaching the conclusion that the motion was a sham and should be summarily dismissed but the Court simply failed to share that record and transcript with the record for this Court. The PCR motion clearly challenges the voluntariness and competency of the plea and assistance provided during the plea. The transcript of the proceedings are therefore relevant. It cannot be argued otherwise.

It is the duty of the Appellant to make the record contain the information. In fact, the transcript of this hearing was not even forwarded to this Court by the trial court clerk. Ford v. State, 708 So.2d 73, 74 (Miss. 1998) ("It is appellant's duty to preserve and prepare the record for appeal."), Kolberg v. State, 704 So.2d 1307, 1322 (Miss. 1997) ("[I]t is the duty of the appellant to present a record of the trial sufficient to show that the error of which he complains on appeal has occurred . . ."); Holland v. State, 705 So.2d 307, 350 (Miss. 1997); Jackson v. State, 684 So.2d 1234, 1226 (Miss. 1996). It is an appellant's duty to justify his arguments of error with a proper record, which does not include mere assertions in his brief, or the trial court will be considered correct. Am. Fire Prot., Inc. v. Lewis, 653 So.2d 1387, 1390 (Miss. 1995). Facts alleged to exist by Appellant must be proved and placed before this Court by a certified record as required by law; otherwise, the Court cannot know of their existence. Phillips v. State, 421 So.2d

476, 478 (Miss. 1982). While the trial court has indicated the record shows the plea to be a sham, the record filed do not indicate a transcript of the is contained.

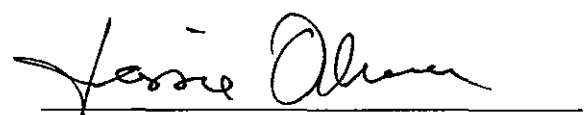
Appellant properly filed his designation of record on appeal with the Clerk of the trial Court and with the Clerk of this Court. The record was in the possession of the Clerk of the trial Court and the Court Reporter. Since the trial Court indicated it had reviewed the transcript of the plea then this transcript should be in the record. However, the trial court, in this case, has failed in other cases to send up a transcript of the proceedings and caused remand. Hall v. State, ___ So.2d ___ (Miss. App. 2006) (No. 2005-KA-00990-COA; Decided December 5, 2006).

The Supreme Court has previously held that the plea colloquy transcript should be placed in the record following a plea of guilty. The trial court failed to place the plea colloquy transcript in the record and this Court should reverse and remand this case to the trial court for additional proceedings and an evidentiary hearing.

CONCLUSION

Appellant Oliver respectfully submits that based on the authorities cited herein and in support of his brief, that this Court should reverse the decision of the trial court and 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:

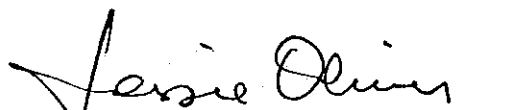
By: 

Jessie Montrell Oliver, #L5730
Unit 29-A
Parchman, MS 38738

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 Robert Chamberlin, Circuit Court Judge, P. O. Drawer 280, Hernando, MS 38632; Honorable John Champion, District Attorney, 365 Losher Street, Ste 210, Hernando, Ms 38632.

This, the 3 day of April, 2008.



Jessie Montrell Oliver, #L5730
Unit 29-A
Parchman, MS 38738