

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

COPY

NO. 2007-CP-01001-COA

DAVID NICHOLS

APPELLANT

VS.

FILED

DEC 26 2007

OFFICE OF THE CLERK
SUPREME COURT
COURT OF APPEALS

STATE OF MISSISSIPPI

APPELLEE

APPELLANT'S REPLY BRIEF

The State of Mississippi has filed it's brief in this case and has failed to refute Appellant's claims that:

a) The State has not rebutted the issue of the trial court having failed to find a factual basis for the pleas of guilty which made the pleas of guilty involuntary as a matter of law. Appellant would assert that the initial brief filed in this case is precise and to the point on this issue where it sets forth the law in regards to an involuntary plea of guilty. Myers v. State, 583 So.2d 174, 177 (Miss. 1991). Appellant would adopt the argument and law presented in his initial brief on this issue and would assert that this Court should grant the relief asserted by this claim and argument..

b) Contrary to the Argument advanced by the state, Nichols has demonstrated that he received ineffective assistance of counsel by the standards

set forth in Strickland v. Washington, 466 U.S. 668, 687-96, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

REPLY ARGUMENT

David Nichols suffered Ineffective Assistance of Counsel

To prevail on an ineffective assistance of counsel claim the complaining party must satisfy the well-established two prong test. First the party must show that counsel's performance was objectively deficient. Then the party must show that, but for counsel's deficient performance, there is a reasonable probability that the result of the trial would have been different. Gilliard v. State, 462 So.2d 710, 714 (Miss. 1985).

In the case at bar, Appellant's counsel absolutely failed to assert Appellant's right to a fair trial where counsel advised Nichols to enter pleas of guilty or he would receive the death sentence. Counsel failed to put forth any effort to prepare for trial or to secure discovery but capriciously advised Appellant Nichols to plead guilty and waive what constitutional rights to a fair trial. Defense counsel was ineffective in advising Nichols to plead guilty to two counsel of murder when counsel was fully aware that such pleas could result in no sentence less than life and that a life sentence for Appellant would mean a death sentence in prison. It would have been in Appellant's interest that he went to trial and proved his

innocence to the charges. A plea of guilty was self-serving and in the best interest to the court appointed attorney where he would receive the same amount of pay for a plea of guilty as he would for a trial on the merits. The state argues that the record belies Appellant's claims. This is simply not correct. The record supports Nichols claims since there is no showing in the record that David Nichols would have received the death sentence. David Nichols was subjected to ineffective assistance of counsel. 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 reconsideration of claim of ineffectiveness where the Appellant alleged that his attorney did not know the relevant law.)

It is clear that Appellant David Nichols was prejudiced by his attorney's failure to present this case to a jury where Nichols have now been sentenced to terms which will result in a death sentence in prison. Defense counsel's advice to Appellant was not beneficial in the least.

This Court should conclude that here counsel rendered ineffective assistance of counsel and that such ineffectiveness prejudices Appellant's conviction in such a way as to mandate a reversal of convictions as well as the sentences imposed. Defense counsel was charged with knowing the law and being familiar with the record and evidence.

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 Appellant must prove, under the totality of the circumstances, that (1) his attorney's performance was deficient and (2) the deficiency deprived the Appellant 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).

[7] [8] [9] ¶ 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 Appellant 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).

Appellant David Nichols respectfully ask this court to review the facts of this case with the decisions rendered in Naylor, Jones, Powell, Berry, and Nathanson, and reverse the convictions and remand to the trial court for a trial on the merits.

In Ward v. State, 708 So.2d 11 (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, 104 S.Ct. 2052, 2065, 80 L.Ed.2d 674 (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 Appellant's case; remanding for consideration of claim of ineffectiveness where the Appellant alleged that his attorney did not know the relevant law).

Appellant would again stress to the Court that to successfully claim ineffective assistance of counsel, the Appellant 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 have visited this issue in decision after decision. A clearly distinguishable decision on such issue would be 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 Appellant. 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; Gillard v. State, 462 So.2d 710, 714 (Miss. 1985). The Appellant must show that there is a reasonable probability that for his attorney's errors, Appellant 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).

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 in this case, it is clear that David Nichols has suffered in violation of his constitutional rights to effective assistance of counsel, in violation of the 6th Amendment to the United States Constitution. The state never refuted such claim in it's brief and this Court should take that into account and reverse and remand with directions that the pleas of guilty be vacated and set aside and a new trial granted in this matter.

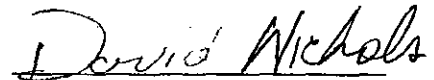
c) While the state argues that Appellant can prove no set of facts in support of his claim which would warrant relief and that for this reason the trial court was correct in failing to grant Appellant an evidentiary hearing. The key words would be beyond doubt. The State has not demonstrated that there was no facts in issue which would necessitate conducting a hearing on this matter.

d) Appellant's cumulative error should be sustained if the Court can find for Appellant on any other error raised.

CONCLUSION

This court should reverse and remand this case to the trial court for proper hearing on the motion since the Court failed to acknowledge that claims existed to warrant an evidentiary hearing.

Respectfully submitted,



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CERTIFICATE OF SERVICE

This is to certify that I, David Sidney Nichols, Appellant pro se, have this date delivered a true and correct copy of the above and foregoing Appellant's Reply Brief, to:

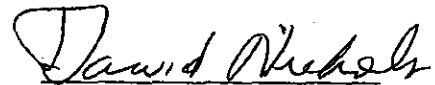
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This, the 26 day of December, 2007.

By:



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