

COPY

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

NO. 2007-CP-01001-COA

DAVID NICHOLS

APPELLANT

FILED

VS.

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SUPREME COURT
COURT OF APPEALS

STATE OF MISSISSIPPI

APPELLEE

Appeal From The Circuit Court of Tate County, Mississippi
Honorable Andrew Baker, Circuit Judge presiding

BRIEF FOR APPELLANT

BY:

David Nichols

David Sidney Nichols

CMRCF

33714 Hwy 35

Vaiden, MS 39176

Appellant pro se

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CERTIFICATE OF INTERESTED PERSONS

The undersigned Appellant, David Sydney Nichols, pro se, certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Judges or Justices of this Court or the Court of Appeals may evaluate possible disqualification's or recusal:

1. David Sydney Nichols, Appellant/Appellant;
2. Honorable Jim Hood, Atty. General, and his staff;
3. Honorable, John W. Champion, District Attorney
4. Honorable, Andrew Baker, Circuit Court Judge;

Respectfully submitted,

BY:

David Sidney Nichols 
CMRCF
33714 Hwy 35
Vaiden, MS 39176

CERTIFICATE OF INCARCERATION

Appellant, David Nichols., is incarcerated at the Carroll-Montgomery County Regional Correctional Facility in the custody of the Montgomery County Sheriff Department and the State of Mississippi in service of the sentence in this case and have been continuously incarcerated since the imposition of the punishment in this case.

THE SUPREME COURT OF THE STATE OF MISSISSIPPI

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**Appeal From The Circuit Court of Tate County, Mississippi
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BRIEF FOR APPELLANT

A. STATEMENT OF ISSUES ON APPEAL

Appellant's sentence was entered upon ineffectiveness and ill-advice of counsel in regards to:

1. Whether Appellant was denied due process when trial court failed to find a factual basis for the plea of guilty and it was therefore involuntary as a matter of law.

2. Whether Appellant was subjected to a denial of due process of law to ineffective assistance of counsel when counsel failed to object to Count 1 of the indictment for failure to make Appellant aware of the victim(s) that the state had indicted him as having conspired of committing a crime of capital murder and that he will received the death sentence if he did not enter a plea of guilty for murder.

3. **The trial Court Erred in Failing to Conduct Evidentiary Hearing.**

4. Appellant would assert that cumulative error require that this case be reversed.

B. FACTS

To prevent a repetitious quoting of facts relied upon in this brief, Appellant will provide the facts pertinent to each claim immediately preceding argument of the issue raised in this brief.

C. SUMMARY OF ARGUMENT

Appellant Nichols was subjected to a denial of due process when he was coerced into a guilty plea by counsel who failed to inform him of his rights and that there was no factual evidence for conviction. Appellant was denied 6th Amendment rights under the United States Constitution

The Motion to Reconsider filed in this case has merit.

D. ARGUMENT

1. Involuntary pleas of guilty.

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

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

Petitioner's plea of guilty was involuntary where the agreement entered into by Appellant was a product of coercion by and through his counsel with counsel's sole intentions as being to withhold crucial information from Appellant "that there was never any foundation to the capital murder charges against Appellant and the state would not have been able to prove murder under the indictment returned by the grand jury".

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

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

The Mississippi Supreme Court has continuously recognized that a plea of guilty may be challenged for voluntariness by way of the Mississippi Uniform Post Conviction Collateral Relief Act. Under URCCC 8.04(A)(3), "before the trial court may accept a plea of guilty, the court must determine that the plea is voluntarily and intelligently made and that there is factual basis for the plea." In Corley v. State, 585 So.2d 765, 767 (Miss. 1991), the Supreme Court of

Mississippi discussed Rule 3.03(2), Miss. Unif. Crim. R. Cir. Ct. Pract. (1979, as amended), requiring that the trial court have before it "... substantial evidence that the accused did commit the legally defined offense to which he is offering the plea." See, e.g., Brown v. State, 533 So.2d 1118, 1124 (Miss. 1988); Reynolds v. State, 521 So.2d 914, 917 (Miss. 1988).

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The Mississippi Supreme Court has further continuously recognized that a plea of guilty may be challenged for voluntariness by way of the Mississippi Uniform Post Conviction Collateral Relief Act. Myers v. State, 583 So.2d 174, 177(Miss. 1991);

2. Ineffective Assistance of Counsel.

Appellant was subjected to ineffective assistance of counsel when counsel failed to object Count 1 of the indictment for failure to make Appellant aware of the victim(s) that the state had indicted him as having conspired of committing a crime of capital murder and that he will received the death sentence if he did not enter a plea of guilty for murder.

Appellant was subjected to ineffective assistance of counsel when counsel failed to make Appellant aware of the victim(s) that the state had indicted him as having conspired of committing a crime of capital murder and that he will received the death sentence if he did not enter a plea of guilty murder.

Appellant David Nichols was denied his Sixth Amendment right to effective assistance of counsel where his attorney, representing him during the plea and sentencing proceedings, failed to advise Appellant that the prosecution could not legally obtain a death sentence under indictment where the element of "commission of murder on educational property" was not present since the deceased was killed at his home and Miss. Code Ann. § 97-3-19(2)(g) required that the murder be committed on school property to be heightened to capital murder. Defense counsel compounded and concealed this information from Appellant in order to coerce Nichols into pleading guilty out of fear of a nonexistent death penalty. Had Nichols been aware that he could not be subjected to the death penalty under proof of the case and the language of the indictment, Nichols would not have entered a plea of guilty but would have insisted on going to trial since there were extenuating and mitigating circumstances where Appellant was being molested by the victim at the time the victim was actually killed. Such actions constitute a violation of the 6th Amendment to the United States Constitution and Art. 3, Sec. 14 and 24, of the Constitution of the State of Mississippi.

In Jackson v. State, ___ So.2d ___ (Miss. 2002) (No. 2000-KA-01195-SCT), the Court held the following in regards to ineffective assistance of counsel:

Our standard of review for a claim of ineffective assistance of counsel is a two-part test: the defendant must prove, under the totality of the circumstances, that (1) 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).

Anyone claiming ineffective assistance of counsel has the burden of proving, not only that counsel's performance was deficient but also that he was prejudiced thereby. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Additionally, the

defendant must show that there is a reasonable probability that, but for his attorney's errors, he would have received a different result in the trial court. Nicolaou v. State, 612 So.2d 1080, 1086 (Miss. 1992). Finally, the court must then determine whether counsel's performance was both deficient and prejudicial based upon the totality of the circumstances. Carney v. State, 525 So.2d 776, 780 (Miss. 1988).

Nichols claims that the following instances demonstrate that he suffered ineffective assistance of counsel during his pre-plea proceedings. First, defense counsel never informed Nichols that the prosecution has to prove every element of the indictment in order to be successful in obtaining a death penalty because the indictment alleges that Sandra K. Lipsey and Bryan K. Warner were killed while he and his codefendants were engaged in the commission of the crime of Burglary of a Dwelling with the intent to Murder. Next, counsel influenced and coerced Nichols to plead guilty while ill-advising Nichols of the law and taking advantage of the non-obtainable death penalty threat. Defense counsel never addressed this issue with Nichols before mental coercing him to enter a plea of guilty for two life sentences.

Defense counsel never sought to interview defense witnesses in preparation for the actual trial. This clearly demonstrates ineffective assistance. While Appellant cannot, at this time, name the witnesses not interviewed, the law is clear that an attorney is required to investigate before suggesting or advising the defendant to plead guilty. There is a number of cases holding that an attorney is ineffective when he fails to perform any pre-trial investigation or interview any witnesses at all. 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 him client's case. See Strickland v. Washington, 466 U.S. 668, 689 (1984) (noting that counsel has a duty to bring to bear such skill and knowledge as will render the trial reliable); see also Herring v. Estelle, 491 F.2d 125, 128 (5th Cir. 1974) (stating that a lawyer who is not familiar with the facts and law relevant to the client's case cannot meet the constitutionally required level of effective assistance of counsel in the course of entering a guilty plea as analyzed under a test identical to the first prong of the Strickland analysis); Leatherwood v. State, 473 So. 2d 964, 969 (Miss. 1985) (explaining that the basic duties of criminal defense attorneys include the duty to advocate the defendant's case; remanding for consideration of claim of ineffectiveness where the defendant alleged that him attorney did not know the relevant law). "

In the instant case, defense counsel failed to know the law in regards to capital murder as well as failed to advise Nichols of the law. Either way, it is ineffective assistance of counsel.

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 v. State, 574 So.2d 685 (Miss. 1990). 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 v.

State, 574 So.2d at 687; Waldrop, 506 So.2d at 275; Gilliard v. State, 462 So.2d 710, 714 (Miss. 1985). The defendant must show that there is a reasonable probability that for him attorney's errors, defendant would have received a different result. Nicolaou v. State, 612 So.2d 1080, 1086 (Miss. 1992); Ahmad v. State, 603 So.2d 843, 848 (Miss. 1992).

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

In assessing attorney performance, all the Federal Courts of Appeals and all but a few state courts have now adopted the "reasonably effective assistance" standard in one formulation or another. See Trapnell v. United States, 725 F.2d 149, 151-152 (CA2 1983); App. B to Brief for United States in United States v. Cronin, 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. Cronin, 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 defence." Thus, a fair trial is one in which evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding. The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel's skill and knowledge is necessary to accord defendants the "ample opportunity to meet the case of the prosecution" to which they are entitled. Adams v. United States ex rel. McCann, 317 U.S. 269, 275, 276 (1942); see Powell v. Alabama, supra, at 68-69. Because of the vital importance of counsel's assistance, this Court has held that, with certain exceptions, a person accused of a federal or state crime has the right to have counsel appointed if retained counsel cannot be obtained.

See Argersinger v. Hamlin, 407 U.S. 25 (1972); Gideon v. Wainwright, supra; Johnson v. Zerbst, supra. That a person who happens to be a lawyer is present at trial alongside the accused, however, is not enough to satisfy the constitutional command. The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results. An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair. [466 U.S. 668, 686] For that reason, the Court has recognized that "the right to counsel is the right to the effective assistance of counsel." McMann v. Richardson, 397 U.S. 759, 771, n. 14 (1970). Government violates the right to effective assistance when it interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense. See, e. g., Geders v. United States, 425 U.S. 80 (1976) (bar on attorney-client consultation during overnight recess); People v. New York, 422 U.S. 853 (1975) (bar on summation at bench trial); Brooks v. Tennessee, 406 U.S. 605, 612-613 (1972) (requirement that defendant be first defense witness); Ferguson v. Georgia, 365 U.S. 570, 593-596 (1961) (bar on direct examination of defendant). Counsel, however, can also deprive a defendant of the right to effective assistance, simply by failing to render "adequate legal assistance," Cuyler v. Sullivan, 446 U.S., at 344. Id. at 345-350 (actual conflict of interest adversely affecting lawyer's performance renders assistance ineffective). The Court has not elaborated on the meaning of the constitutional requirement of effective assistance in the latter class of cases - that is, those presenting claims of "actual ineffectiveness." In giving meaning to the requirement, however, we must take its purpose - to ensure a fair trial - as the guide. The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning

of the adversarial process that the trial cannot be relied on as having produced a just result. The same principle applies to a capital sentencing proceeding such as that provided by Florida law. We need not consider the role of counsel in an ordinary sentencing, which may involve informal proceedings and standardless discretion in the sentencer, and hence may require a different approach to the definition of constitutionally effective assistance. A capital sentencing proceeding like the one involved in this case, however, is sufficiently like a trial in its adversarial format and in the existence of standards for decision, see Barclay [466 U.S. 668, 687] v. Florida, 463 U.S. 939, 952-954 (1983); Bullington v. Missouri, 451 U.S. 430 (1981), that counsel's role in the proceeding is comparable to counsel's role at trial - to ensure that the adversarial testing process works to produce a just result under the standards governing decision. For purposes of describing counsel's duties, therefore, Florida's capital sentencing proceeding need not be distinguished from an ordinary trial.

III

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

A

As all the Federal Courts of Appeals have now held, the proper standard for attorney performance is that of reasonably effective assistance. See Trapnell v. United States, 725 F.2d, at 151-152. The Court indirectly recognized as much when it stated in McMann v. Richardson, *supra*, at 770, 771, that a guilty plea cannot be attacked as based on inadequate legal advice unless counsel was not "a reasonably competent attorney" and the advice was not "within the range of competence demanded of attorneys in criminal cases." See also Cuyler v. Sullivan, *supra*, at 344. When a convicted defendant [466 U.S. 668, 688] complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness. More specific guidelines are not appropriate. The Sixth Amendment refers simply to "counsel," not specifying particular requirements of effective assistance. It relies instead on the legal profession's maintenance of standards sufficient to justify the law's presumption that counsel will fulfill the role in the adversary process that the Amendment envisions. See Michael v. Louisiana, 350 U.S. 91, 100-101 (1955). The proper measure of attorney performance remains simply

reasonableness under prevailing professional norms. Representation of a criminal defendant entails certain basic duties. Counsel's function is to assist the defendant, and hence counsel owes the client a duty of loyalty, a duty to avoid conflicts of interest. See Cuyler v. Sullivan, supra, at 346. From counsel's function as assistant to the defendant derive the overarching duty to advocate the defendant's cause and the more particular duties to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution. Counsel also has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process. See Powell v. Alabama, 287 U.S., at 68 -69. These basic duties neither exhaustively define the obligations of counsel nor form a checklist for judicial evaluation of attorney performance. In any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances. Prevailing norms of practice as reflected in American Bar Association standards and the like, e. g., ABA Standards for Criminal Justice 4-1.1 to 4-8.6 (2d ed. 1980) ("The Defense Function"), are guides to determining what is reasonable, but they are only guides. No particular set of detailed rules for counsel's conduct can satisfactorily take [466 U.S. 668, 689] account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Any such set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions. See United States v. Decoster, 199 U.S. App. D.C., at 371, 624 F.2d, at 208. Indeed, the existence of detailed guidelines for representation could distract counsel from the overriding mission of vigorous advocacy of the defendant's cause. Moreover, the purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation, although that is a goal of considerable importance to the legal system. The purpose is simply to ensure that criminal defendants receive a fair trial. Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. Cf. Engle v. Isaac, 456 U.S. 107, 133 -134 (1982). A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy." See Michel v. Louisiana, supra, at 101. There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys

would not defend a particular client in the same way. See Goodpaster, [466 U.S. 668, 690] The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases, 58 N. Y. U. L. Rev. 299, 343 (1983). The availability of intrusive post-trial inquiry into attorney performance or of detailed guidelines for its evaluation would encourage the proliferation of ineffectiveness challenges. Criminal trials resolved unfavorably to the defendant would increasingly come to be followed by a second trial, this one of counsel's unsuccessful defense. Counsel's performance and even willingness to serve could be adversely affected. Intensive scrutiny of counsel and rigid requirements for acceptable assistance could dampen the ardor and impair the independence of defense counsel, discourage the acceptance of assigned cases, and undermine the trust between attorney and client. Thus, a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. In making that determination, the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case. At the same time, the court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. These standards require no special amplification in order to define counsel's duty to investigate, the duty at issue in this case. As the Court of Appeals concluded, strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic [466 U.S. 668, 691] choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments. The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. In particular, what investigation decisions are reasonable depends critically on such information. For example, when the facts that support a certain potential line of defense are generally known to counsel because of what the defendant has said, the need for further investigation may be considerably diminished or eliminated altogether. And when a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be

challenged as unreasonable. In short, inquiry into counsel's conversations with the defendant may be critical to a proper assessment of counsel's investigation decisions, just as it may be critical to a proper assessment of counsel's other litigation decisions. See United States v. Decoster, *supra*, at 372-373, 624 F.2d, at 209-210.

B

An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment. Cf. United States v. Morrison, 449 U.S. 361, 364 -365 (1981). The purpose of the Sixth Amendment guarantee of counsel is to ensure [466 U.S. 668, 692] that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding. Accordingly, any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution. In certain Sixth Amendment contexts, prejudice is presumed. Actual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice. So are various kinds of state interference with counsel's assistance. See United States v. Cronie, *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 presumptively accurate and fair proceeding were present in the proceeding whose result is challenged. Cf. United States v. Johnson, 327 U.S. 106, 112 (1946). An ineffective assistance claim asserts the absence of one of the crucial assurances that the result of the proceeding is reliable, so finality concerns are somewhat weaker and the appropriate standard of prejudice should be somewhat lower. The result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome. Accordingly, the appropriate test for prejudice finds its roots in the test for materiality of exculpatory information not disclosed to the defense by the prosecution, United States v. Agurs, 427 U.S., at 104, 112-113, and in the test for materiality of testimony made unavailable to the defense by Government deportation of a witness, United States v. Valenzuela-Bernal, supra, at 872-874. The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability

sufficient to undermine confidence in the outcome. In making the determination whether the specified errors resulted in the required prejudice, a court should presume, absent challenge to the judgment on grounds of evidentiary insufficiency, that the judge or jury acted according to law. [466 U.S. 668, 695] An assessment of the likelihood of a result more favorable to the defendant must exclude the possibility of arbitrariness, whimsy, caprice, "nullification," and the like. A defendant has no entitlement to the luck of a lawless decisionmaker, even if a lawless decision cannot be reviewed. The assessment of prejudice should proceed on the assumption that the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision. It should not depend on the idiosyncrasies of the particular decisionmaker, such as unusual propensities toward harshness or leniency. Although these factors may actually have entered into counsel's selection of strategies and, to that limited extent, may thus affect the performance inquiry, they are irrelevant to the prejudice inquiry. Thus, evidence about the actual process of decision, if not part of the record of the proceeding under review, and evidence about, for example, a particular judge's sentencing practices, should not be considered in the prejudice determination. The governing legal standard plays a critical role in defining the question to be asked in assessing the prejudice from counsel's errors. When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt. When a defendant challenges a death sentence such as the one at issue in this case, the question is whether there is a reasonable probability that, absent the errors, the sentencer - including an appellate court, to the extent it independently reweighs the evidence - would have concluded that the balance of aggravating and mitigating circumstances did not warrant death. In making this determination, a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury. Some of the factual findings will have been unaffected by the errors, and factual findings that were affected will have been affected in different ways. Some errors will have had a pervasive effect on the inferences to [466 U.S. 668, 696] be drawn from the evidence, altering the entire evidentiary picture, and some will have had an isolated, trivial effect. Moreover, a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support. Taking the unaffected findings as a given, and taking due account of the effect of the errors on the remaining findings, a court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors.

IV

A number of practical considerations are important for the application of the standards we have outlined. Most important, in adjudicating a claim of actual ineffectiveness of counsel, a court should keep in mind that the principles

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

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

Under the standards set forth above in Strickland, and by a demonstration of the record and the facts set forth in support of the claims, it is clear that David Nichols has suffered a violation of his constitutional rights to effective assistance of counsel, in violation of the 6th Amendment to the United States Constitution. Defense counsel should have made Nichols aware of the law and should have gave Nichols the right to make an intelligent decision as to where he would plead guilty. The decision cannot be intelligent where Nichols was not provided with all

the relevant information regarding the penalty. This fact, coupled with the fact that counsel failed to investigate and interview the witnesses which would have discovered that the two other defendant gave conflicting evidence in regarding the murders which would have been reasonable doubt for a jury. This Court should recognize such violation and grant post conviction relief to David Nichols who is entitled to a new trial and to have effective assistance of counsel during such trial.

This court has repeatedly held that an allegation that counsel for a defendant failed to advise him of the range of punishment to which he was subject to gives rise to a question of fact about the attorney's constitutional proficiency that is to be determined in the trial Court. See: Nelson v. State, 626 So.2d 121, 127 (Miss. 1993) [The failure to accurately advise Nelson of the possible consequences of a finding of guilt in the absence of a plea bargain ... may, of proven, be sufficient to meet the test in Strickland v. Washington] See also: Alexander v. State, 605 So.2d 1170 (Miss. 1992) [Emphasizing that where a criminal defendant alleges that he pleaded guilty to a crime without having been advised by him attorney of the applicable maximum and minimum sentences a question of fact arises concerning whether the attorney's conduct was deficient].

This Court should conclude that here counsel rendered ineffective assistance of counsel and that such ineffectiveness prejudices Appellant's guilty plea in such a way as to mandate a reversal of the plea as well as the sentence imposed. This Court should reverse that case to the trial Court and direct that an evidentiary hearing be conducted in regards to this case.

Appellant was indicted for the offense of capital murder, in violation of Miss. Code Ann. Sec. 97-3-19(2)(e).

On April 14, 2004, Appellant and his counsels, Honorable Rob McDuff and Shawna Murrel of Jackson, Mississippi, appeared before the trial court and changed the previously

entered plea of not guilty of capital murder to a plea of guilty to the crime of murder. " The state recommended that the Count 1 and Count 4 will be remanded to the file. The Prosecutor added that Nichols' sentence is already fixed by statute, that is a life sentence must be imposed on each count.

After Appellant Nichols entered him plea of guilty to Count 2 and Count 3 for Murder, the trial court imposed such sentences upon Appellant in the amount of life on each count to run concurrently.

Appellant would further assert to this Court that the trial court erred by not finding him guilty as the trier of facts. The trial judge failed to ask Nichols to explain how he committed each murder or who did exactly what in the commission of the crimes. The trial court knew or should have known that Nichols were charged in both Count 2 and Count 3 along with two other defendants. Therefore, Court did not make a factual finding of the trial of facts by getting Nichols to admit to who exactly committed the murders and how the murders were committed. This was critical information that should have made part of the record. The Court must obtain such information to determine whether Nichols had in fact committed capital murder of the victims as he was charged in the two indictment counts, in order that Nichols could be sentenced by the statute which he was charged under. Nichols contends that he would not have entered a plea of guilty for a sentence of life imprisonment if the State could not prove that he alone committed capital murder as charge. Nichols was clearly deprived of due process of law under the 5th and 14th Amendments to the United States Constitution.

Most crucial in this instance is the fact that the trial court failed to find and adjudicate Nichols guilty of murder in either case. The Court merely imposed the sentences upon Nichols

without any finding of fact on guilt or innocence. The Court excepted the offered "plea" to count 2 and count 3 but never adjudicated David Nichols to be guilty.

Nichols would assert here that he did not commit the murders, and according to the affidavits entered into the discovery, another person committed the murders.

3. The trial Court Erred in Failing to Conduct Evidentiary Hearing.

The Trial Court's finding that the Petition should be summarily dismissed constituted an abuse of discretion and should be reversed by this Honorable Court for an evidentiary hearing on the merits. Under the law where there is a question of fact the trial court should conduct an evidentiary hearing. This Court should therefore FIND THE TRIAL COURT'S RULING TO BE CLEARLY ERRONEOUS and remand this case to the trial court for evidentiary hearing on the merits.

The trial court should have actually conducted an evidentiary hearing without any entry of a ruling regarding the motion. The claims contained in the motion are well pleaded and concise. Appellant was entitled to develop additional facts, during a hearing, to support his motion. This Court is now, once again, confronted with factual problems in this case which could have been fully and finally resolved in the trial court by an evidentiary hearing or, possibly, by development of fact and expansion of the record in conformance with Miss. Code Ann. §99-39-17 (Supp. 1992). The trial court never made any determination as to the actual claims presented in the motion. Not one single claim was explored and addressed on the basis of the record. The court merely denied and dismissed the claims as being without merit. The trial court should have made some form of factual determination on this matter.

This Court has previously stated that it is committed to the principle that a post-conviction collateral relief petition which meets basic requirements is sufficient to mandate

an evidentiary hearing unless it appears beyond doubt that the appellant can prove no set of facts in support of his claim which would entitle him to relief. Alexander v. State, 605 So.2d 1170, 1173 (Miss. 1992); Horton v. State, 584 So.2d 764, 768 (Miss. 1991); Wilson v. State, 577 So.2d 394, 397 (Miss. 1991); Myers v. State, 583 So.2d 174, 178 (Miss. 1991); Sykes v. State, 578 So.2d 617 (Miss. 1991); Wright v. State, 577 So.2d 387 (Miss. 1991); Billiot v. State, 515 So.2d 1284 (Miss. 1987).

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

The trial court's decision not to grant an evidentiary hearing here forced another needless appeal upon an already overloaded and overtaxed appellate court. The trial court should have, at a minimum, granted an evidentiary hearing on the claims contained in the post-conviction relief motion. Relief beyond that point would have depended upon the developments at the evidentiary hearing. Neal v. State, 525 So.2d 1279, 1280-81 (Miss. 1987); Sanders v. State, 440 So.2d 278, 286 (Miss. 1983); Baker v. State, 358 So.2d 401 (Miss. 1978. Appellant made a substantial showing of the denial of his constitutional rights under states law, as demonstrated by the record, that the trial court did not follow the proper law in regards to the indictment and it's contents. Appellant Nichols would ask this Court to vacate the ruling of the trial court and remand this case to the trial court for an evidentiary hearing.

4. Cumulative Error

Appellant asserts that even in the event this Honorable Court hold that each of the aforesaid claims raised, standing alone, does not constitute cause to grant relief, the cumulative effect of each acted to deprive David Nichols of his constitutional rights to a fair trial, as

guaranteed to him under the Sixth and Fourteenth Amendments to the United States Constitution, and Article 3, Sections 14 and 26 of our Mississippi Constitution. Rainer v. State, 473 So.2d 172, 174 (Miss. 1985); Williams v. State, 445 So.2d 798, 814 (Miss. 1984)

In cases such as the one presented here, the Supreme Court has not hesitated in reversing other defendants convictions and ordering a new trial, for "(a) fair trial is, after all, the reasons we have our system of justice; it is a paramount distinction between free and totalitarian societies." Johnson v. State, 476 So.2d 1195 (Miss. 1985), cited with approval in Fisher v. State, 481 So.2d 283 (Miss. 1985).

"It is one of the crowning glories of our law that, no matter how guilty one may be, no matter how atrocious his crime, nor how certain his doom when brought to trial anywhere, he shall, nevertheless, have the same fair and impartial trial accorded to the most innocent defendant. Those safeguards crystallized into the constitution and laws of the land as the result of centuries of experience, must be, by the courts, sacredly upheld as well as in the case of the guiltiest as of the most innocent defendant answering at the bar of his country. And it ought to be a reflection always potent in the public mind, that where the crime is atrocious, condemnations is sure, when all these safeguards are accorded the defendant, and therefore the more atrocious the crime, the less need is there for any infringement of these safeguards." Tennison v. State, 79 Miss. 708, 713, 31 So. 421, 422 (1902), cited and quoted with approval in Johnson v. State, *supra*.

The importance to which the Honorable Mississippi Supreme Court has jealously guarded an accused's right to a fair trial and fair judicial process is further reflected in Cruthirds v. State, 2 So.2d 154 (Miss. 1941):

"The storm of opposition, brute force and hate which is sweeping across a large part of the universe has levered to the ground the temple of justice in many countries, and even in our own it has been shaken and broken in places, yet we may fervently hope that when the storm shall have spent its fury there will remain undisputed, as one of the foundational pillars of that temple, the right of all men, whether rich or poor, strong or weak, guilty or innocent, to a fair trial, orderly and impartial trial in the courts of the land. Id. at 146. "

The case sub judice falls within the perimeters of that described in Scarborough v. State, 37 So.2d 748 (Miss. 1948):

"This is not one of those case for the application of the rule that a conviction will be affirmed unless it appears that another jury could reasonably reach a different verdict upon a proper trial then that returned on the former one,

but rather it is a case where the constitutional right of an accused to a fair and impartial trial has been violated. When that is done, the defendant is entitled to another trial regardless to the fact that the evidence on the first trial may have shown him to be guilty beyond every reasonable doubt. The law guarantees this to one accused of crime, and until he has had a fair an impartial trial within the meaning of the Constitution and the laws of the State, he is not to be deprived of him liberty by a sentence in the state penitentiary." Id. At 750.

Since the right to a fair trial is a fundamental and essential right, under form of our government, Johnson v. State, supra, there shall be no procedural to these assignments of error, which collectively denied David Nichols his constitutional fundamental right to a fair trial, being raised for the first time in a post-conviction setting. Gallion v. State, 469 So.2d 1247 (Miss. 1985).

Appellant Nichols did not receive a fair trial in this case and, for that reason, as outlined above, he was unable to prove his innocence to the crime because the police and prosecuting authorities, as well as his attorney, used unfair and illegal tactics to get him to incriminate himself. Appellant's trial attorney was grossly ineffective during the trial court proceedings. This Court should grant the motion and direct that the conviction and sentence be set aside and that this case proceed to trial.

CONCLUSION

Based upon the facts contained in the record, the presentation and argument contained in this brief, as well as the trial court's failure to conduct a hearing in the matter, Appellant would urge this Honorable Court to reverse and remand this case to the trial court to allow Appellant to develop facts in support of his claims.

Respectfully submitted,

BY: David Nichols
David Sidney Nichols [REDACTED]
Appellant

CERTIFICATE OF SERVICE

This is to certify that I, David Sydney Nichols., have this date served a true and correct copy of the above and foregoing Brief for Appellant, by United State Postal Service, first class postage prepaid, upon:

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