IN THE COURT OF APPEALS THE STATE OF MISSISSIPPI

CHRISTOPHER JASON BURROUGH **APPELLANT**

VS. **SUPREME COURT CAUSE NO. 2008-KS-00034-SCT**

STATE OF MISSISSIPPI **APPELLEE**

BRIEF FOR APPELLANT

BY: Christopher Burrough

Christopher Jason Burrough, #120707
Holmes-Humphreys Regional Facility
23234 Highway 12 East
Lexington MS 39095

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CERTIFICATE OF INTERESTED PERSONS

The undersigned Appellant, Christopher Jason Burrough , 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. Chrstopher Burrough, Appellant pro se.
2. Honorable Jim Hood, and staff, Attorney General.
3. Honorable Clarence E. Morga, III, Circuit Court Judge.
4. Honorable, Clyde Hill, Assistant District Attorney.

Respectfully Submitted,

BY: Christopher Burrough

Christopher Jason Burrough, #120707
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STATEMENT OF ISSUES

ISSUE ONE

Appellant Christopher Burrough was denied due process of law where he was convicted of the offense of a felony crime of Burglary of a Dwelling House by enter a plea guilty before the court, based upon his signed "Petition to Enter Plea of Guilty", by which the court failed to consider the factual basis for and why Appellant Burrough decided to enter a plea of guilty, and defense count was ineffective for failure to object.

ISSUE TWO

Appellant Burrough was subjected to a denial of due process of law where the trial court failed to advise Burrough of the correct law in regards to appealing a sentence rendered upon a plea of guilty to the Supreme Court. Appellant Burrough Burrough was never told that, under applicable law, his sentence could be appealed to the Supreme Court for direct, and defense counsel was ineffective for failure to bring this error to the court's attention.

ISSUE THREE

Appellant Burrough would assert that the trial court violated due process of law when trial court increased the sentence and rejected the plea recommendation after

Court had initially sentenced Appellant Burrough under the mistaken belief that there was no plea agreement and recommendation. Trial Court should have sentenced Appellant Burrough to the recommended sentence or allowed the plea to be withdrawn before proceeding to impose a more lengthy sentence then that which the state had recommended in exchange for the guilty plea, and counsel was ineffective for failure to object.

ISSUE FOUR

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

STATEMENT OF INCARCERATION

The Appellant is presently incarcerated and is being housed in the Mississippi Department of Corrections in service of a 25 year prison term imposed by the trial court on two separate convictions and sentences. Appellant has been continuously confined since the date of sentencing.

STATEMENT OF CASE

Christopher Burrough was sentenced by the Circuit Court of Carroll County, Mississippi, on November 17, 2006, to a term of twenty-five (25) years imprisonment, Such sentence was imposed by the court upon hearsay testimony offered by the State of Mississippi from a deputy sheriff of Grenada County, Mississippi. In bringing such hearsay testimony to the Court to secure a greater sentence then the state had already negotiated the plea agreement for, the State actually breached it's agreement with the Appellant and acted against a deal which had already been reached. The state should

have had no standing to prosecute or seek any sentence greater then the sentence already recommended since Appellant had entered his plea of guilty on the basis of such agreement. The trial Court erred in allowing the state to proceed in this manner and in rejecting the agreement already in place on the basis of such improper evidence and actions by the State of Mississippi.

In regards to the post conviction motion, which is on appeal by this case, the trial court never addressed any claim presented in the motion and specifically stated that the motion had no merit and should be denied. This Court should find that such actions constitute a ruling on the merits of every claim and issue presented. The trial court should have conducted an evidentiary hearing.

The trial court never found, as a fact, that Appellant was guilty of violating any condition which it had set and that the state had actually proved any such violation.

STATEMENT OF FACTS

On April 18, 2006 a criminal indictment was filed against Appellant Burrough charging him with the criminal offense of burglary of a dwelling house in the County First Judicial District of Carroll County, Mississippi, under Criminal Cause No. 2006-0007CR1. Honorable Ray Baum of the Carroll County Public Defender Office of Winona, Mississippi was appointed to represent Appellant Burrough in this case where Mr. Baum negotiated an agreement with the prosecutor, Mr. Hill, that a plea of guilty would be entered to the charge of Burglary of a Dwelling House with a recommendation of 10 years, with five (5) years to serve in the MDOC, and five (5) years to serve on post release supervision, to run concurrently with time given on the Auto Burglary

charge, which Burrough was indicted for in Grenada County, Mississippi on May 10, 2006.

That Appellant Burrough entered the plea of guilty with the understanding and belief that he would be sentenced to a term of 10 years with 5 year to serve, and serve 5 years on post release supervision, to run concurrently with the time give on the Auto Burglar charge, which he was indicted for in Grenada County, Mississippi on May 10, 2006. On July 30, 2004, after Appellant Burrough had pleaded guilty, on May 17, 2006, the trial court imposed a 25 year sentence on the Burglary of Dwelling House as charged in the indictment, without giving Appellant Burrough an opportunity to withdraw his plea of guilty, and proceed to trial by a jury, and without considering a sentence of 5 years post release supervision. Furtherm the trial court never considered imposing 25 years concurrently with Burglary of an Automobile charge, which Burrough was indicted for in Grenada County, Mississippi on May 10, 2006.

That before sentencing, the Court stated that Burrough was a habitual thief and a habitual criminal.[1] That the trial court indicated that the court rejected the plea agreement on the basis that Burrough failed to appear at sentencing on May 15, 2006, and because on the night of May 15, 2006, he was arrested for attempting to commit a crime. That the trial court never attempted to allow Appellant Burrough the opportunity to withdrawal his pleas of guilty after the court found that there was a plea agreement and the court would not and did not intend to adopt or follow the agreement and recommendation.[2]

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[1] Burrough had not been indicted or charged as a habitual offender in eith case.

[2] That the trial court stated to Burrough that the Court would not accept the State's recommendation if Burrough did not appear on the 15th or if Burrough committed any crime while he was on bond before the 15th of May, 2006.

Upon the filing of the post conviction relief motion in this case the trial court denied relief without conducting an evidentiary hearing or requiring the state of Mississippi to file an answer to the well pleaded facts and claims set out in the PCR motion.

STANDARD OF REVIEW

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

SUMMARY OF ARGUMENT

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

LEGAL ARGUMENT IN SUPPORT OF CLAIMS FOR RELIEF

The Mississippi Supreme Court has long recognized that the courts of the State of Mississippi are open to those incarcerated at Mississippi Correctional facilities and Institutions raising questions regarding the voluntariness to 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).

ARGUMENT

A.

The trial Court erred in failing to find that Appellant Burrough was denied due process of law where he was convicted of the offense of a felony crime of Burglary of a Dwelling House by entry a plea guilty before the court, based upon his signed "Petition to Enter Plea of Guilty", by which the court failed to consider the factual basis for and why defendant Burrough decided to enter a plea of guilty, and defense counsel was ineffective for failure to object.

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 Mississippi Correctional facilities and Institutions 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.

B.

The trial Court erred in failing to find that Appellant was subjected to a denial of due process of law where the trial court failed to advise Burrough of the correct law in regards to appealing a sentence rendered upon a plea of guilty to the Supreme Court. Appellant Burrough was never told that, under applicable law, his sentence could be appealed to the Supreme Court for direct review where Court had rejected a previously approved and recommended sentence on the court's own motion, and defense counsel was ineffective for failure to bring this error to the court's attention.

The trial court failed to advise Christopher Jason Burrough that he had no 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 Burrough a direct appeal of the sentence imposed. The trial court judge made fundamental error where the Court failed to advise Burrough 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 directly appeal the sentence to the Supreme Court. Trotter v. State, 554 So. 2d 313, 86 A.L.R.4th 327 (Miss. 1989).

The law supports the assertion here that the trial court was incorrect in it's failure provide Burrough with the information regarding appealing the sentence to the Supreme Court in view of the controversy surrounding the manner in which the court arrived at the sentence. A defendant is not barred from appealing by having pleaded

guilty. Neblett v. State, 75 Miss. 105, 21 So. 799 (1897); Jenkins v. State, 96 Miss. 461, 50 So. 495 (1909).

Thus, the trial court was clearly incorrect, as a matter of law, in advising Burrough that there was no right to appeal from the sentence. Petitioner's sentence should be vacated for further proceedings.

C.

The trial Court erred in failing to find that Appellant the court violated due process of law when the court increased the sentence and rejected the plea recommendation after Court had initially sentenced Appellant under the mistaken belief that there was no plea agreement and recommendation. Trial Court should have sentenced Appellant to the recommended sentence or allowed the plea to be withdrawn before proceeding to impose a more lengthy sentence then that which the state had recommend in exchange for the guilty plea, and counsel was ineffective for failure to object.

Appellant was subjected to a denial of due process of law where the trial court allowed Appellant to plead guilty on the belief and basis that a sentence of 10 years with the M.D.O.C., 5 years to serve, 5 years on post release supervision, with the time to run concurrent with the Auto Burglary charges which he was indicted for May 10, 2006 in Grenada County under Cause No. 2006-058CR. Instead the court imposed a 25 years sentence without allowing Appellant the opportunity to withdraw the plea when the state's recommendation of a 10 year sentence was the driving force behind the decision to plead guilty.

The law is clear that plea bargaining is encouraged. It is important to distinguish between an open or blind plea and a formal plea bargain. The former is simply an admission of guilt by the defendant without the promise of any binding formal

sentencing recommendation by the State. Swindle v. State, 881 So.2d 174(¶ 4) (Miss. 2004). Presumably the defendant's own conscience, his need to repent, and his belief that the judge will be `intrinsically fair are the factors that convince him to throw himself at the mercy of the court and hope for a sentence deserving of his particular indiscretion. While in the same jungle, a plea bargain is a different animal and driven by different motivations. Noel v. State, 943 So.2d 768 (Miss.App. 2006). Oft stated and widely known, a guilty plea must be voluntarily and intelligently made regardless of its type. URCCC 8.04 A(3). Also, the defendant must be competent to understand the nature of the charge, the consequences flowing from the plea, and those constitutional protections abandoned by pleading guilty. URCCC 8.04 A(4). As opposed to a blind plea, ***at least part of the allure of a plea bargain is the promised recommendation of the State and expectation of the defendant that the sentencing court will honor that recommendation***. Noel v. State, 943 So.2d 768, 772 (Miss.App. 2006). The plea recommendation is poignantly shown in the record of this case.

While the Court in Noel, supra, rejected the claim that the trial court erred in failing to grant relief to the Appellant in his post conviction motion after the court had rejected the plea agreement and sentenced Noel to a more severe sentence, the decision in Noel is not decisive in this case since the facts are totally different. The Court in Noel sufficiently advised Noel that even where the state made a plea recommendation that the Court was bound by nor obligated to accept the agreement but may impose any sentence which the court deemed appropriate in accord with the range of sentence dictated by statute for the crime. In the instant case the Court not

only never told Appellant this information but the court were not even aware of the fact that it had to. The Court stated that it was under the impression that this was an open plea and rejected all assertions that it were not until a record was produced. The Court then reluctantly reduced three years from the sentence it had imposed when still made the sentence exceed the recommended term by five years.

Here, in the case now before this Court on appeal, during the guilty plea colloquy proceeding, the state recommended as following:

BY THE COURT: Do you want to go ahead for the record and make your recommendation?

BY MR. HILL: I do, Your Honor.

BY THE COURT: All right.

BY MR. HILL: The State would recommend that the Defendant be sentenced to serve a term of ten years in the custody of the Mississippi Department of Corrections; provided, however, that after he has served five years in custody, that he be released on five years of post release supervision. In addition, the Defendant's property loss and damages amounted to $2,853.00. We would ask that the Defendant be ordered to return to Mr. Terry Boynton restitution in the amount of $2,853.00 and be ordered to pay all court costs, fees and assessments associated with the case.

BY THE COURT: Is that y'all 's understanding of what it would be?

BY MR. BAUM: Your Honor, it is. In addition, we have agreed with the District Attorney's Office that Mr. Burrough would plead to a bill of information for pending charges in Grenada County and that that would run concurrent with this charge.

BY THE COURT: Okay. I will postpone sentencing until May the 15th in Carrollton. You are out on bond right now?

BY THE DEFENDANT: Yes, sir.

BY THE COURT: Here is the deal. I'm going to leave you out on bond until the 15th. **If you violate the law** in any way between now and then, I'm not going to accept this recommendation, and I will just sentence you to whatever I think you ought to have.[3]

BY THE DEFENDANT: Yes, sir.

BY THE COURT: You don't -- be there by 10 o'clock on the 15th.

BY THE DEFENDANT: Yes, sir. Here?

BY THE COURT: No, in Carrollton. At the Courthouse in Carrollton.

See Guilty Plea Transcript, page 8 - 9.

After Burrough failed to appear for sentencing, on the 17th day of May, 2006, the following accrued at the sentencing hearing, after establishing in the record that Burrough is a prior convicted felony for receiving stolen property in 1995:

BY MR. HILL: Your Honor, first of all, I would like to say for the record that on this past Monday, May the 15th, the Defendant, as the Court has noted, was supposed to appear. We called for the Defendant. He was not present. He had someone to call and advise the Court and counsel that he was on his way but had car trouble and could not come but that he would be here shortly. We waited all day, and he did not appear. Attempts to call the number back that he called from were unsuccessful, and nobody heard from him.

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[3] It has not been proven in any court of law that Appellant violated the law but yet the trial court trippled the sentence on the basis of hearsay information of what it was believed Appellant had done.

After the Court issued the warrant at the end of May the 15th, law enforcement was notified, and they were looking for him. On the night of the 15th, Chief Deputy Spellman called me at home and advised me that they had located Mr. Burrough and that he was involved in criminal activity when they located him. He was at Bill Ashmore's Wrecker Service establishment on that Monday night, or on the night that he was arrested. And Mr. Bill Ashmore at my request is present to describe to the Court what he was doing." See Sentencing Transcript, page 3

After the court heard testimony of the alleged crime allegedly committed by Burrough and another on the night of May 15, 2006, the court proceeded with the sentencing as following:

BY THE COURT: Have you got anything?

BY MR. BAUM: No, sir. I do not.

BY THE COURT: Mr. Burrough, have you got anything?

BY THE DEFENDANT: (The Defendant shakes his head.)

BY THE COURT: Among other things I told Mr. Burrough on the day that he plead guilty was that if he didn't do what I told him to do, if he didn't show up and he violated the law again, that I was not going to accept the recommendation of the State. That was a true statement.

You have not been charged as a habitual offender, Mr. Burrough, but what you are is a habitual thief, a habitual criminal, and not a very smart one at that and we are not going to deal with you any more for a while. I sentence you to the maximum on this charge of twenty-five (25) years in the Mississippi Department of Corrections. And I order that he pay that restitution that was ordered that was, that y'all referenced --

BY MR. HILL: -- We described it for the record.

BY THE COURT : That you referenced to me. It was about $2,500 to the man that he broke in on. Okay, that will be the sentence of the Court. You are remanded to the custody of the Sheriff. Have a seat over there. See Sentencing Transcript, page 9 - 10.

Here, it seem that the Court sentenced Burrough as a habitual offender without being charged as a habitual offender and without due process of law. The Court even failed to give Burrough the opportunity to withdraw his plea of guilty before sentencing. By doing so, the Court denied Burrough due process of law and equal protection of the law as afforded him under state and federal law.

If a trial court does not intend to follow the sentencing recommendation of a plea bargain, be it at the time of the guilty plea, at the conclusion of a sentencing hearing, or some time in between, justice requires the court to inform the defendant that the court intends to sentence him either more or less harshly than recommended by the State and to afford the defendant the opportunity to withdraw the guilty plea that was in part, if not wholly, induced by the expectation of a specific sentence. It is clear here that Appellant had an expectation of a certain amount of years, which he believed the Court was required to impose, since the record reflected that the court sentenced Burrough to a hasher sentence than was agreed upon in the petition to enter plea of guilty and as was agreed upon by the court after the State made it recommendation.

If a trial judge does not intend to sentence the defendant in accordance with the recommendation accompanying the plea bargain, the judge should advise the

defendant of such intentions prior to accepting a guilty plea, or if already accepted, afford the defendant an opportunity to withdraw the guilty plea if they so chose. When confronted with the latter of the two pleas the court need only ensure that the defendant clearly and unequivocally understands that the prosecution is making no recommendation and that the defendant is at the mercy of the court. Never should the two be mixed, as would seem to have occurred in the present case.. These procedural protections are not unique. Several sister states and the federal counterpart have realized the fundamentally unfair position in which a defendant is placed when his "voluntary plea" is more in the form of a knowledgeable gamble and have rethought their positions on this issue. See Fed.R.Crim.Proc. (c); Cook v. State, 36 P.3d 710, 715, (Alaska Ct.App. 2001); Cal.Penal Code § 1192.5 (2006); State v. Littlejohn, 199 Conn. 631, 508 A.2d 1376, 1383 (1986); Orleman v. State, 527 So.2d 303, 304 (Fla. Dist.Ct.App. 1988); Fuller v. State, 159 Ga. App. 512, 284 S.E.2d 29, 30 (1981); State v. Barker, 476 N.W. 2d 624, 626 (Iowa Ct.App. 1991); Kennedy v. Commonwealth, 962 S.W. 2d 880, 882 (Ky.Ct.App. 1997); *State* v. Manchester, 545 So.2d 528, 529-530 (La. 1989); People v. Killebrew, 416 Mich. 189, 330 N.W. 2d. 334, 842-843 (1982); Hattemar v. State, 654 S.W.2d 652, 653 (Mo.Ct.App. 1983); State v. Marzolf, 79 N.J. 167, 398 A.2d 849, 860 (1979); Eller v. State, 92 N.W. 52, 582 P.2d 824, 826 (1978); Tex. Code Crim. Proc. art. 26.13 (2006).The federal rule which many state rules are patterned after, states, in part

> 5) Rejecting a Plea Agreement. If the court rejects a plea agreement containing provisions of the type specified in Rule 11(c)(1)(A) or (C), the court must do the following on the record and in open court (or, for good cause, in camera):

(A) inform the parties that the court rejects the plea agreement;

(B) advise the defendant personally that the court is not required to follow the plea agreement and give the defendant an opportunity to withdraw the plea; and

(C) advise the defendant personally that if the plea is not withdrawn, the court may dispose of the case less favorably toward the defendant than the plea agreement contemplated.

Withdrawing a Guilty or Nolo Contendere Plea. (d) A defendant may withdraw plea of guilty or nolo contendere:

(1) before the court accepts the plea, for any reason or no reason; or

(2) after the court accepts the plea, but before it imposes sentence if:

(A) the court rejects a plea agreement under Rule 11(c)(5); or

(B) the defendant can show a fair and just reason for requesting the withdrawal. Fed.R.Crim.Proc. 11(c)(5).

See: Dissenting opinion in Noel v. State, 943 So.2d 768 (Miss.App. 2006).

Clearly, from the law and the facts of this case, as clearly see in the record and the attachments to this motion, this Court should grant the relief requested. Appellant should be resentenced to the term initially recommended by the state or, in the alternative, Burrough should be permitted to withdraw his pleas of guilty and start anew.

The trial judge, of course, had the discretion to reject the plea recommendation, even if the parties had been in complete agreement as to the terms. However, the judge should not have had the discretion, based upon the fact that Burrough had not been informed by the Court that the Court had discretion as to what sentence to impose, both to reject the recommendation and to not allow Burrough and in dependent on-the-record opportunity to withdraw his plea which was based on his reasonable belief that he would be sentenced in accordance with the state's

recommendation. State v. Dixon, 449 So.2d 463 (La. 1984); State v. Thompson, 412 So.2d 1218 (La. 1982).

The Mississippi Rules of Criminal Procedure does not sanction nor does it permit dishonesty, subterfuge, or capriciousness by a court to entrap a defendant in a deal by granting the court unilateral power to alter a plea bargain without affording the defendant the right to abandon his plea. Justice and Justice requires nothing less than fair play and honesty on the part of the court. Society cannot be harmed by withdrawal of the plea by the defendant as he is not set free but instead must proceed to run the gauntlet of a trial with the attendant risk of the maximum punishment prescribed by statute. Indeed, as noted by the case law set out in from Mississippi and other states, as well as the federal courts, slate is "wiped clean of the defective plea negotiations" and all involved are restored to "the status quo immediately after the indictment." Tabula rasa means beginning all over again as if the plea process had never occurred at all. A pernicious mischief would result to the entire system of jurisprudence should the court adopt a dangerous "ends — justifies — the — means" approach to plea bargaining by permitting a court to depart from fairness and to alter a negotiated plea recommendations sua sponte without allowing a defendant the right to withdraw his plea. No litany of incantations about whether a plea had been knowingly and voluntarily entered can camouflage the essential spirit of honesty and fair play that the rules of criminal procedure requires of all the players: the State of Mississippi, the criminal accused, and the court. In the case sub judice, the State of Mississippi and the defendant entered into a plea recommendations whereby the State of Mississippi

agreed to recommend concurrent sentences for a sentence totaling 10 years' imprisonment. Without giving such recommendation even the attention of recognizing that it existed, the trial court elected to reject the State of Mississippi's recommendation and decided instead to increase the sentence to almost double as to that which had been recommended. Therefore, pursuant to the common law of fairness and the procedural protections in effect by the federal judicial system and other state's surrounding Mississippi, the trial court had a duty to permit the defendant to withdraw his pleas and to proceed to trial. This much the court repeatedly failed to do. The relief requested in this matter should be granted.

D.

CUMULATIVE ERROR

The trial Court erred in failing to find that Appellant was subjected to cumulative error and that the cumulative effect of each acted to deprived Christopher Burrough 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); Brooks v. State, 445 So.2d 798, 814 (Miss. 1984). Bourrough's counsel was ineffective for failure to act or bring such violations to the court's attention.

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 Scarbrough 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 his 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 Christopher Burrough 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 Burrough 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.

INEFFECTIVE ASSISTANCE OF COUNSEL

Appellant Christopher Burrough was denied his Sixth Amendment right to effective assistance of counsel where his attorney, representing him during the plea and sentencing proceedings, advised him to plead guilty such an illegal term while knowing that post-release supervision under Miss. Code Ann. §47-7-33. Miller v. State, 875 So 2d 194, 200 (Miss. 2004). Even in the face of Miller, which had not been decided at that time, an indefinite and two phase sentence should not be permissible. This is especially applicable in an armed robbery conviction where the sentence imposed to be served must be mandatory for the first ten years with a minimum term of three years to be imposed.

In. Jackson v. State, 815 So.2d 1196 (Miss. 2002), 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).

Burrough claims that the following instances demonstrate that he suffered ineffective assistance of counsel during the pre-plea proceedings. First, defense counsel never informed Burrough of the fact that he would not be granted post- conviction release or even that the court may sentenced the same as a habitutal offender or that his sentence may be illegal; counsel never objected to such term of the sentence.

In Ward v. State, 708 So.2d 11 (Miss. 1998), 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).*

In the instant case, defense counsel failed to know the law in regards to armed robbery and MCA §47-7-34 and MCA §47-7-33. As a result defense, counsel failed to correctly advise Burrough of the law regarding sentence.

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 Supreme Court of Mississippi 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 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 Micheal v. Louisiana, supra, at 101. There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way. See Goodpaster, [466 U.S. 668, 690] The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases, 58 N. Y. U. L. Rev. 299, 343 (1983). The availability of intrusive post-trial inquiry into attorney performance or of detailed guidelines for its evaluation would encourage the proliferation of ineffectiveness challenges. Criminal trials resolved unfavorably to the defendant would increasingly come to be followed by a second trial, this one of counsel's unsuccessful defense. Counsel's performance and even willingness to serve could be adversely affected. Intensive scrutiny of counsel and rigid requirements for acceptable assistance could dampen the ardor and impair the independence of defense counsel, discourage the acceptance of assigned cases, and undermine the trust between attorney and client. Thus, a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. In making that determination, the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case. At the same time, the court should recognize

that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. These standards require no special amplification in order to define counsel's duty to investigate, the duty at issue in this case. As the Court of Appeals concluded, strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually 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. 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 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 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 sentence - 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).

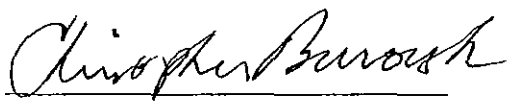
Under the standards set forth above in Strickland, and by a demonstration of the record and the facts set forth in support of the claims in this case, it is clear that Christopher Burrough has suffered a violation of his constitutional rights to effective assistance of counsel, in violation of the 6th Amendment to the United States Constitution. Defense counsel should have made never objected to illegal procedures which the trial court followed. The trial court, in effect, enhanced Appellant's sentence on the basis of hearsay information which the Court heard from a police officer, not from evidence presented at a criminal trial. Moreover, the trial court should not have acted to enhance the recommended sentence which the state had secured by Burrough's guilty plea. Finally, the trial court should not have allowed the state to lead Burrough to enter a plea of guilty on it's word that it would recommend one sentence and then, after recommending such sentence, sought to have the Court enhance the sentence without allowing the Appellant the opportunity to take back the plea and proceed anew. The state should not have been allowed to renege in this way. Defense counsel never entered any objection to the Court's actions in this instance.

This Court should conclude that here counsel rendered ineffective assistance of counsel and that such ineffectiveness prejudiced Petitioner's guilty pleas in such a way as to mandate vacation of such pleas as well as the sentence imposed. This Court should **reverse and remand this case to the trial court for an evidentiary hearing.**

CONCLUSION

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

Respectfully submitted,

By: 

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above and foregoing Brief for Appellant have been served, by United States Postal service, upon: Honorable Jim Hood, Attorney General, P. O. Box 220, Jackson, Mississippi 39205; Honorable Clarence E. Morgan, III, Circuit Court Judge, P. O. Box 721, Kosciusko, MS 39090; Honorable Clyde Hill, Assistant District Attorney, P. O. Box 1262, Grenada, MS 38902.

This, the 11 day of August, 2008.

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