IN THE COURT OF APPEALS THE STATE OF MISSISSIPPI

KENTRIAL BELK **APPELLANT**

VS. **SUPREME COURT CAUSE NO. 2008-KP-00300-COA**

STATE OF MISSISSIPPI **APPELLEE**

BRIEF FOR APPELLANT

BY: Kentrial Belk

Kentrial Belk, #[redacted]
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23234 Highway 12 East
Lexington MS 39095

IN THE COURT OF APPEALS THE STATE OF MISSISSIPPI

KENTRIAL BELK **APPELLANT**

VS. **SUPREME COURT CAUSE NO. 2007-KP-02170-COA**

STATE OF MISSISSIPPI **APPELLEE**

CERTIFICATE OF INTERESTED PERSONS

The undersigned Appellant, Kentrial Belk, 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. Kentrial Belk, Appellant pro se.
2. Honorable Jim Hood, and staff, Attorney General.
3. Honorable Lee Howard, Circuit Court Judge.
4. Honorable, Forrest Allgood, Assistant District Attorney.

Respectfully Submitted,

BY: Kentrial Belk

Kentrial Belk, #T4833
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IN THE COURT OF APPEALS THE STATE OF MISSISSIPPI

KENTRIAL BELK **APPELLANT**

VS. **SUPREME COURT CAUSE NO. 2007-KP-02170-COA**

STATE OF MISSISSIPPI **APPELLEE**

BRIEF FOR APPELLANT

STATEMENT OF INCARCERATION

The Appellant is presently incarcerated and is being housed in the Mississippi Department of Corrections in service of a 10 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

Belk was sentenced by the Circuit Court of Clay County, Mississippi, on July 11, 2006, to a term of ten (10) years imprisonment, Such sentence was imposed by the court upon a plea of guilty, which was based upon ineffective assistance of counsel which resulted in Belk being convicted of a crime which was not supported by a valid indictment. Appellant was grossly misrepresented during the trial court proceedings.

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 summarily denial of the PCR should not suffice and should require a reversal.

STATEMENT OF FACTS

On October 5, 2005 a criminal indictment was filed against Appellant Belk charging him with the criminal offense of two counts of sale of a controlled substance in Clay County, Mississippi. Honorable Thad Buck represented Appellant and advised Appellant to plead guilty. Appellant entered such plea on the advice of his attorney without consulting the indictment to learn the indictment was factually defected where information had been added after the grand jury proceeding, the name Debra Cunningham. Defense counsel never mentioned this critical information to Appellant before advising a plea of guilty.

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 were without merit where the court did not conduct as evidentiary hearing and never stated any authority to demonstrate that Appellant need not be advised by the indictment of the element of who the state was alleging the drugs had been sold to.

STATEMENT OF THE CLAIMS

1. Belk raised his fundamental Federal and State Constitutional Right not to be tried for a felony without being indicted. Hennington v. State, 702 So.2d 403, 407 (Miss. 1997); MCA 99-39-5(1)(b); MS Art. III, 27; 5th Amendment, Hawthorne v. State, 751 So.2d 1090, 1094 (Miss. 1999); Burchfield v. State, 277 So.2d 623 (Miss. 1973), Durr v. State, 446 So.2d 1016 (Miss. 1984).

2. Belk states that the Mississippi Supreme Court has held "in order to be sufficient, the indictment must contain the essential elements of the offense with which the accused is charged, thereby, whether this indictment was fatally

defective is an issue of law and deserves a relatively Broad Standard Review...? Tucker v. Hinds County, 558 So.2d 869, 872 (Miss. 1990);

3. Belk states that his counsel was ineffective for failing to raise or file an motion to dismiss his original indictment because of the omission in the original indictment of an essential element of the crime of sale of cocaine. Sanderson v. State, 881 So.2d 878, 881 (Miss. Ct. App. 2004). Strickland v. Washington, (Failure to demur to the indictment does not constitute a waiver.) Copeland v. State, 423 So.2d 1383 (Miss. 1982); Brewer v. State, 351 So.2d 535 (Miss. 1977).

4. Belk states that the trial court committed plain error by allowing and proceeding under the amended indictment when there was no motion or order filed to allow such an alteration (writting in the individual name: "Debra Cunningham"). Such alteration of the indictment constituted an amendment to the indictment which required leave of the grand jury where adding a name to the indictment was an amendment of substance. Such an addition thereby amended the indictment and clearly reflected adding new information to meet an essential element for the crime of sale of cocaine which was not contained in the indictment returned by the grand jury. Such addition to the indictment played a major role in the decision by Belk to plead guilty. Such an amendment was illegal and should invalidate the plea of guilty since the amendment was the driving force behind

Belk's decision when advised by his attorney that the indictment was legal. Russel v. United State, 369 U.S. 749, 769-71, 82 S. Ct. 1038, 1050-51 (1962); Stirone v. United States, 361 U.S. 212, 215-16, 80 S. Ct. 270, 272-73 (1960); Towner v. State, 812 So.2d 1109 (Mississippi 2002).

5. Belk states that, under the language of the initial indictment, which stated no name of any person the alleged drugs were sole to, he is actually innocence of the crimes of sale of cocaine and sale of marihuana, as per original indicted, and if he is deprived of an opportunity to be heard on the merits, would the state's action run afoul to the due process clause of the U. S. constitution, and this would result in a fundamental miscarriage of justice?

CLAIM I

The systemic concerns of both Fairness and Efficiency require that if a defendant/petitioner allege that his present Sentence is Illegal, this defendant/petitioner (Belk) is not subject to the State's Time Bar. Weaver v. State, 785 So.2d 1058, 1087 (Miss. 2001) Errors affecting Fundamental Constitutional Rights may be excepted from Procedural Bars which would otherwise Prohibit their consideration. Gray v. State, 819 So.2d 542, 544 (Miss. 2002); Ivy v. State 731 So.2d 601, 602 (Miss. 1999); Luckett v. State, 582 So.2d 428, 43 (Miss. 1991). Belk states that he's entitle to have his claims considered on

the merits because the right to be free from an Illegal Sentence has been found to be Fundamental.

Another contrary indication is that the Post-Conviction Relief Status likely are unnecessary to attack an Illegal Sentence. Correction of an improper Sentence is a Fundamental Constitutional Right (5th Amendment) and cannot be restricted by the Successive Motion or Statute of Limitation Bar Rules of the Post-Conviction Relief Status. Sneed, 722 at 1257 Id. If such a Claim is allowed to proceed regardless of specific prohibitions in the Post-Conviction Statutes, then arguable Belk's Right to bring a claim is independent of whatever might be said Statutorily abut Procedure.

Through the Post-Conviction Relief Motion, Belk has a "Procedure, limited in nature, to review those objections, defenses, claims, questions, issues or Errors (Insufficient Indictment) which in practical reality could not be or should not have been raised at trial or on direct appeal." MCA §99-39-3(2)(Rev. 2000). What Belk is attempting, point out to this court is that the indictment in this case was illegally amended to add the name Debra Cunningham. The grand jury never authorized the indictment to be amended. No order to amend was requested nor granted by this court. Belk avers that the Fundamental Constitutional issue here concerns the indictment. (See Exhibit- A)

(The Mississippi Constitution states that "no person shall, for any indictable offense, be proceeded against criminally by information....." Miss. Const. Art. III, 27. Belk contends that his indictment was substantially defective, as for the offense of sale of controlled substance, because the absence of the name Debra Cunningham in the indictment charging sale of controlled substance results in the addition of an element which, when absent as in the initial version of the indictment, would qualify the indictment as being a void instrument on the charge of sales of a controlled substance. Gray v. State, 819 So.2d 542, 544 (Miss. 2002). Therefore, Belk argues that his Conviction and Sentence are Illegal as he was prosecuted by an indictment which was illegally amended by the state without complying with law. Adding Debra Cunningham's name to the indictment was an essential element and constituted substance.

The Mississippi Supreme Court has held that in order to be sufficient, the indictment must contain the essential elements of the crime with which the accused is charged." Hennington v. State, 702 So.2d 403, 407 (Miss. 1997). The indictment is Fundamental, and Belk argues that his indictment was defected; this claim over comes the Successive Motion Bar. Gray, Supra., Simmons v. State, 784 So.2d 985 (Miss. 2001).

Finally, in conclusion of this initial ground, the real question before this court and one which this court must consider is, when fundamental constitutional

rights are at sake, such as the indictment, would Belk be entitled to an evidentiary hearing. Belk should be entitled to such to determine where and when was the indictment amended altered by the state and why defense counsel never objected to such amendment. There is a constitutional right, not to be tried for a felony without being properly indicted for that felony? MCA §99-39-5(1)(b); MS Art. III, 27; 5th Amendment.) (The trial court, in all due respect, did indeed lack jurisdiction to convict or impose said sentence, due to Belk's fatally defective indictment.) See Exhibit A. (This court in reviewing Belk's claim is required to open the gates and Rule on the merits of Belk's following claims. Smith v. State, 725 So.2d 922, 927 (Miss. 1998); (Quick v. State, 569 So.2d 1197 (Miss. 1990).

CLAIM II

It is a well-established principle of Law that in order for an indictment to be sufficient, it must contain the essential elements of the crime charged. May v. State, 209 Miss. 579, 584, 47 So.2d 887 (Miss. 1950). Mississippi Code Annotated 41-29-139defines sale of cocaine as follows:

> § 41-29-139. Prohibited acts; penalties.
>
> > (a) Except as authorized by this article, it is unlawful for any person knowingly or intentionally: (1) To sell, barter, transfer, manufacture, distribute, dispense or possess with intent to sell, barter, transfer, manufacture, distribute or dispense, a controlled substance.

Belk contends that since his original typed indictment omitted the name "Debra Cunningham", an essential element of the crime of sale of cocaine and sale of marijuana, the indictment was insufficient when the state attempted to rectify the error by merely writing in the required name with a pen. Such written notation to the indictment was not initialed by the person making the change, as it should have been, and was made after the grand jury had already heard the evidence, returned the indictment, and adjourned. (It is a well-settled principle that the Supreme Court is the "ultimate expositor of the law of the State". UHS-Qualicare, Inc., v. Gulf Coast Community Hospital Inc., 525 So.2d 746, 754 (Miss. 1987). Therefore, this Court conducts Se Novo Review on questions of Law. Tucker v. Hinds County, 558 So.2d 869, 872 (Miss. 1990). So, the question of whether Belk's indictment is fatally defective is an issue of Law and deserves a relatively Broad Standard of Review by this Court!!!)

Belk contends that in the case of Hawthorne v. State, 751 So.2d 1090, 1094 (Miss. 1999), the second Count of Hawthorne's indictment was titled "Aggravated Assault", but defined the charge as follows:

> "willfully, unlawfully, knowingly, and feloniously and purposely cause or attempts to cause bodily injury to another, Virgis Tucker, with his fist, by striking her in violation of MCA 97-3-7(2)(1972) ..." (emphasis added).

and the State in this case, Hawthorne, recognizing what they deemed to be a clerical error, made a Motion to the Trial Court to Amend the indictment to add the Word "Serious" as a Modifier of bodily injury. (This Mississippi Supreme Court Rule in this Hawthorne case that it was improper to add an essential element to an indictment. The State failed to include each essential element of the offense in Hawtorne's indictment. The defected was therefore substantive and could not be cured by Amendment; Hawthorne's conviction was Reversed. Belk argues that his conviction and sentence should be Reversed also, as to the precedent in the Hawthorne case.)

(The Supreme Court has held that "in order to be sufficient, the indictment must contain the essential element of the crime with which the accused is charged. Hennington v. State, 702 So.2d 403, 407 (Miss. 1997)).

> It is Fundamental... that an indictment, to be effective as such, must set forth the constituent element of a criminal offense; if the facts alleged do not constitute such an offense within the terms and meaning of the Laws on which the accusation if based, or if the facts alleged may all be true and yet constitute no offense, the indictment is insufficient... Every material fact and essential ingredient of the offense-- Every essential element of the offense-- must be alleged with precision and certainty, or, as has been stated, Every fact which is an element in a Prima Facie Case of guilty must be stated in the indictment. Hennington, Supra.

All the authorities are to the effect that an indictment, to be sufficient upon which a Conviction may stand, must set forth the constituent element of a criminal offense. Each and every material fact and essential ingredient of the offense must be with precision and certainly set forth.... Burchfield v. State, 277 So.2d 623, 625 (Miss. 1973); Durr v. State, 446 So.2d 1016 (Miss. 1984).) Belk states that his indictment was insufficient because of the omission of an essential element, the name Debra Cunningham who was the alleged person Belk sold drugs to. The indictment was illegally amended to include this name.

(After an indictment has been returned, its charges may not be broadened through amendment-- whether it be by physical alteration, jury instructions, or Bill of Particulars-- except by Grand Jury. Russell v. United States, 369 U.S. 749, 769-71, 82 S.Ct. 1038, 1050-51 (1962); Stirone v. United, 361 U.S. 212, 215-16, 80 S.Ct. 270, 272-73 (1960). Simply correcting an obvious clerical error or eliminating surplusage form the text of the indictment may be Harmless Error, but amending the indictment through jury instructions because of the omission of an essential element the name of an individual which must be included in the indictment, constitutes per se Reversible Error. Stirone 80 S. Ct. at 274. The constructive of the defected indictment was Error and could never be acceptable as Harmless Error, because it violated Belks Fifth Amendment Right to be tried only for the offense for which he was under

indictment, and also violated Belk's Sixth Amendment Procedural Due Process Right to sufficient notice of the specific charges against him. (See Exhibit- A & B).)

(In conclusion of this ground, the Trial Court had no opportunity to Rule on this issue, as it was not presented at any point during the guilty plea hearing this fact is stated for the sake of fairness to the Trial Court; legally, however, Belk's failure to demur to the indictment does not constitute a Waiver. Copeland v. State, 423 So.2d 1333 (Miss. 1982); Brewer v. State, 351 So.2d 535 (Miss. 1977). Because the omission in the indictment of an essential element of the crime charged s not Waived by failure to demur. Towner v. State, 812 So.2d 1109 (Miss. 2002).)

CLAIM III

Belk states that his counsel was ineffective for failing to raise or file an motion to dismiss his original indictment because of the omission in the original indictment of an essential element of the crime of sale of cocaine. Sanderson v. State, 881 So.2d 878, 881 (Miss. Ct. App. 2004). Strickland v. Washington, (Failure to demur to the indictment does not constitute a waiver.) Copeland v. State, 423 So.2d 1383 (Miss. 1982); Brewer v. State, 351 So.2d 535 (Miss. 1977). In Jackson v. State,815 So.2d 1196 (Miss. 2002), the Supreme Court held the following in regards to ineffective assistance of counsel:.

In Hiter v. State, *660 So.2d 961, 965 (Miss. 1995), the Supreme Court held that:* 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. *This review is highly deferential to the attorney, with a* strong presumption that the attorney's conduct fell within the wide range of reasonable professional assistance. *Id. at 965. With respect to the overall performance of the attorney, "counsel's choice of whether or not to file certain motions, call witnesses, ask certain questions, or make certain objections fall within the ambit of trial strategy" and cannot give rise to an ineffective assistance of counsel claim.* Cole v. State, *666 So.2d 767, 777 (Miss. 1995).*

The law is clear that 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).*

Belk would assert that the following instances demonstrate that he suffered ineffective assistance of counsel during his trial. First, Belk would assert that his trial counsel advised allowed him to plea guilty to an indictment which counsel plainly knew had been altered and amended, outside the jurisdiction of the Court and the grand jury, by the state writing in the name of Debra Cunningham, as the individual who Belk had allegedly sold drugs, too. This insufficient defective indictment was never brought to the attention of the trial court before or though out this guilty plea hearing.

Belk's attorney did not address the issue when he was confronted with it by Belk before the guilty plea proceedings. Defense counsel should have better presented Belk's case and should have advised Belk that the indictment had been changed by the state without authorization. Moreover, defense counsel should have filed a motion to the trial court reflecting this action by the state and moved the court to dismiss the proceedings.

Next, Belk's would assert that his attorney's failure to seek out and interview defense witnesses in preparation for an actual trial represents ineffective assistance since it demonstrates that defense counsel had no intentions of defending Belk at trial but sought a plea of guilty to an invalid indictment from the very start. Defense counsel never provided Belk with any discovery materials of who the state intended to call at trial. An attorney is ineffective when he fails to

perform any pretrial 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 the instant case now before this Court, Belk would assert that his counsel's actions of allowing the plea proceedings to proceed without This court should find deficiency of counsel as well as prejudice to the defendant unless the record can show that Belk was told about the unauthorized amendment and waived this right and elected to proceed with the plea after being fully advised of the defect. The record contains no such evidence and this court should find that Belk suffered ineffective assistance of counsel. Defense counsel should have filed a demurr to the indictment at the commencement of the proceedings where the indictment was returned with charging the name of the person who was alleged to have purchased the drugs and where the indictment was subsequently changed and altered by the state. This Court therefore cannot hold here as it held in Jackson v. State because defendant has proven prejudice since had counsel acted appropriately before or during the proceedings there would have been a different result as to who was on trial.

In Ward v. State, ___ So.2d ___ (Miss. 1998) (96-CA-00067), the Supreme Court held the following:

> Effective assistance of counsel contemplates counsel's familiarity with the law that controls his client's case. *See* **Strickland v. Washington**, *466 U.S. 668, 689 (1984) (noting that counsel has a duty to bring to bear such skill and knowledge as will render the trial reliable); see also* **Herring v. Estelle**, *491 F.2d 125, 128 (5th Cir. 1974) (stating that a lawyer who is not familiar with the facts and law relevant to the client's case cannot meet the constitutionally required level of effective assistance of counsel in the course of entering a guilty plea as analyzed under a test identical to the first prong of the* **Strickland** *analysis);* **Leatherwood v. State**, *473 So. 2d 964, 969 (Miss. 1985) (explaining that the basic duties of criminal defense attorneys include the duty to advocate the defendant's case; remanding for consideration of claim of ineffectiveness where the defendant alleged that his attorney did not know the relevant law).*

In the instant case, Belk's defense counsel failed to point out the defective indictment and failed to establish on record at the plea proceedings that the indictment had been altered. The state, without challenge, was allowed to proceed with such defective indictment against a defendant being represented by counsel and entitled to the full benefits of effective assistance of counsel under the 6th Amendment to the United States Constitution.

To successfully claim ineffective assistance of counsel, the defendant must meet the two-prong test set forth in Strickland v. Washington, 466 U.S. 668, 687 (1984). This test has also been recognized and adopted by the Mississippi Supreme Court. Alexander v. State, 605 So.2d 1170, 1173 (Miss. 1992); Knight v. State, 577 So.2d 840, 841 (Miss. 1991); Barnes v. State, 577 So.2d 840, 841

(Miss. 1991); McQuarter v. State, 574 So.2d 685, 687 (Miss. 1990); Waldrop v. State, 506 So.2d 273, 275 (Miss. 1987), aff'd after remand, 544 So.2d 834 (Miss. 1989); Stringer v. State, 454 So.2d 468, 476 (Miss. 1984), cert. denied, 469 U.S. 1230 (1985).

The Mississippi Supreme Court visited this issue in the decision of Smith v. State, 631 So.2d 778, 782 (Miss. 1984). The Strickland test requires a showing of (1) deficiency of counsel's performance which is, (2) sufficient to constitute prejudice to the defense. McQuarter 506 So.2d at 687. The burden to demonstrate the two prongs is on the defendant. Id; Leatherwood v. State, 473 So.2d 964, 968 (Miss. 1994), *reversed in part, affirmed in part*, 539 So.2d 1378 (Miss. 1989), and he faces a strong rebuttable presumption that counsel's performance falls within the broad spectrum of reasonable professional assistance. McQuarter, 574 So.2d at 687; Waldrop, 506 So.2d at 275; Gilliard v. State, 462 So.2d 710, 714 (Miss. 1985). The defendant must show that there is a reasonable probability that for his attorney's errors, defendant would have received a different result. Nicolaou v. State, 612 So.2d 1080, 1086 (Miss. 1992); Ahmad v. State, 603 So.2d 843, 848 (Miss. 1992).

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

> In assessing attorney performance, all the Federal

Courts of Appeals and all but a few state courts have now adopted the "reasonably effective assistance" standard in one formulation or another. See Trapnell v. United States, 725 F.2d 149, 151-152 (CA2 1983); App. B to Brief for United States in United States v. Cronic, O. T. 1983, No. 82-660, pp. 3a-6a; Sarno, [466 U.S. 668, 684] Modern Status of Rules and Standards in State Courts as to Adequacy of Defense Counsel's Representation of Criminal Client, 2 A. L. R. 4th 99-157, 7-10 (1980). Yet this Court has not had occasion squarely to decide whether that is the proper standard. With respect to the prejudice that a defendant must show from deficient attorney performance, the lower courts have adopted tests that purport to differ in more than formulation. See App. C to Brief for United States in United States v. Cronic, supra, at 7a-10a; Sarno, supra, at 83-99, 6. In particular, the Court of Appeals in this case expressly rejected the prejudice standard articulated by Judge Leventhal in his plurality opinion in United States v. Decoster, 199 U.S. App. D.C. 359, 371, 374-375, 624 F.2d 196, 208, 211-212 (en banc), cert. denied, 444 U.S. 944 (1979), and adopted by the State of Florida in Knight v. State, 394 So.2d, at 1001, a standard that requires a showing that specified deficient conduct of counsel was likely to have affected the outcome of the proceeding. 693 F.2d, at 1261-1262. For these reasons, we granted certiorari to consider the standards by which to judge a contention that the Constitution requires that a criminal judgment be overturned because of the actual ineffective assistance of counsel. 462 U.S. 1105 (1983). We agree with the Court of Appeals that the exhaustion rule requiring dismissal of mixed petitions, though to be strictly enforced, is not jurisdictional. See Rose v. Lundy, 455 U.S., at 515 -520. We therefore address the merits of the constitutional issue.

II

In a long line of cases that includes Powell v. Alabama, 287 U.S. 45 (1932), Johnson v. Zerbst, 304 U.S. 458 (1938), and Gideon v. Wainwright, 372 U.S. 335 (1963), this Court has recognized that the Sixth Amendment right to counsel exists, and is needed, in order to protect the fundamental right to a fair trial. The Constitution guarantees a fair trial through [466 U.S. 668, 685] the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment, including the Counsel Clause: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense." Thus, a fair trial is one in which evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding. The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel's skill and knowledge is necessary to accord defendants the "ample

opportunity to meet the case of the prosecution" to which they are entitled. Adams v. United States ex rel. McCann, 317 U.S. 269, 275 , 276 (1942); see Powell v. Alabama, supra, at 68-69.

Because of the vital importance of counsel's assistance, this Court has held that, with certain exceptions, a person accused of a federal or state crime has the right to have counsel appointed if retained counsel cannot be obtained. See Argersinger v. Hamlin, 407 U.S. 25 (1972); Gideon v. Wainwright, supra; Johnson v. Zerbst, supra. That a person who happens to be a lawyer is present at trial alongside the accused, however, is not enough to satisfy the constitutional command. The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results. An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair. [466 U.S. 668, 686] For that reason, the Court has recognized that "the right to counsel is the right to the effective assistance of counsel." McMann v. Richardson, 397 U.S. 759, 771 , n. 14 (1970). Government violates the right to effective assistance when it interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense. See, e. g., Geders v. United States, 425 U.S. 80 (1976) (bar on attorney-client consultation during overnight recess); Herring v. New York, 422 U.S. 853 (1975) (bar on summation at bench trial); Brooks v. Tennessee, 406 U.S. 605, 612 -613 (1972) (requirement that defendant be first defense witness); Ferguson v. Georgia, 365 U.S. 570, 593 -596 (1961) (bar on direct examination of defendant). Counsel, however, can also deprive a defendant of the right to effective assistance, simply by failing to render "adequate legal assistance," Cuyler v. Sullivan, 446 U.S., at 344 . Id. at 345-350 (actual conflict of interest adversely affecting lawyer's performance renders assistance ineffective). The Court has not elaborated on the meaning of the constitutional requirement of effective assistance in the latter class of cases - that is, those presenting claims of "actual ineffectiveness." In giving meaning to the requirement, however, we must take its purpose - to ensure a fair trial - as the guide. The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result. The same principle applies to a capital sentencing proceeding such as that provided by Florida law. We need not consider the role of counsel in an ordinary sentencing, which may involve informal proceedings and standardless discretion in the sentence, and hence may require a different approach to the definition of constitutionally effective assistance. A capital sentencing proceeding like the one involved in this case, however, is sufficiently like a trial in its adversarial format and in the existence of standards for decision, see Barclay [466 U.S. 668, 687] v. Florida, 463 U.S. 939, 952 -954 (1983); Bullington v. Missouri, 451 U.S. 430 (1981), that counsel's role in the proceeding is comparable to counsel's role at trial - to ensure that the adversarial testing process works to produce a just

result under the standards governing decision. For purposes of describing counsel's duties, therefore, Florida's capital sentencing proceeding need not be distinguished from an ordinary trial.

III

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

A

As all the Federal Courts of Appeals have now held, the proper standard for attorney performance is that of reasonably effective assistance. See Trapnell v. United States, 725 F.2d, at 151-152. The Court indirectly recognized as much when it stated in McMann v. Richardson, supra, at 770, 771, that a guilty plea cannot be attacked as based on inadequate legal advice unless counsel was not "a reasonably competent attorney" and the advice was not "within the range of competence demanded of attorneys in criminal cases." See also Cuyler v. Sullivan, supra, at 344. When a convicted defendant [466 U.S. 668, 688] complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness. More specific guidelines are not appropriate. The Sixth Amendment refers simply to "counsel," not specifying particular requirements of effective assistance. It relies instead on the legal profession's maintenance of standards sufficient to justify the law's presumption that counsel will fulfill the role in the adversary process that the Amendment envisions. See Michael v. Louisiana, 350 U.S. 91, 100 -101 (1955). The proper measure of attorney performance remains simply reasonableness under prevailing professional norms. Representation of a criminal defendant entails certain basic duties. Counsel's function is to assist the defendant, and hence counsel owes the client a duty of loyalty, a duty to avoid conflicts of interest. See Cuyler v. Sullivan, supra, at 346. From counsel's function as assistant to the defendant derive the overarching duty to advocate the defendant's cause and the more particular duties to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution. Counsel also has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process. See Powell v. Alabama, 287 U.S., at 68 -69. These basic duties neither exhaustively define the obligations of counsel nor form a checklist for judicial evaluation of attorney performance.

In any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances. Prevailing norms of practice as reflected in American Bar Association standards and the like, e. g., ABA Standards for Criminal Justice 4-1.1 to 4-8.6 (2d ed. 1980) ("The Defense Function"), are guides to determining what is reasonable, but they are only guides. No particular set of detailed rules for counsel's conduct can satisfactorily take [466 U.S. 668, 689] account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Any such set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions. See United States v. Decoster, 199 U.S. App. D.C., at 371, 624 F.2d, at 208. Indeed, the existence of detailed guidelines for representation could distract counsel from the overriding mission of vigorous advocacy of the defendant's cause. Moreover, the purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation, although that is a goal of considerable importance to the legal system. The purpose is simply to ensure that criminal defendants receive a fair trial. Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. Cf. Engle v. Isaac, 456 U.S. 107, 133 -134 (1982). A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy." See Michel v. Louisiana, supra, at 101. There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way. See Goodpaster, [466 U.S. 668, 690] The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases, 58 N. Y. U. L. Rev. 299, 343 (1983). The availability of intrusive post-trial inquiry into attorney performance or of detailed guidelines for its evaluation would encourage the proliferation of ineffectiveness challenges. Criminal trials resolved unfavorably to the defendant would increasingly come to be followed by a second trial, this one of counsel's unsuccessful defense. Counsel's performance and even willingness to serve could be adversely affected. Intensive scrutiny of counsel and rigid requirements for acceptable assistance could dampen the ardor and impair the independence of defense counsel, discourage the acceptance of assigned cases, and undermine the trust between attorney and client. Thus, a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time

of counsel's conduct. A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. In making that determination, the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case. At the same time, the court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. These standards require no special amplification in order to define counsel's duty to investigate, the duty at issue in this case. As the Court of Appeals concluded, strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchangeable; and strategic [466 U.S. 668, 691] choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments. The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. In particular, what investigation decisions are reasonable depends critically on such information. For example, when the facts that support a certain potential line of defense are generally known to counsel because of what the defendant has said, the need for further investigation may be considerably diminished or eliminated altogether. And when a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable. In short, inquiry into counsel's conversations with the defendant may be critical to a proper assessment of counsel's investigation decisions, just as it may be critical to a proper assessment of counsel's other litigation decisions. See United States v. Decoster, supra, at 372-373, 624 F.2d, at 209-210.

B

An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment. Cf. United States v. Morrison, 449 U.S. 361, 364 -365 (1981). The purpose of the Sixth Amendment guarantee of counsel is to ensure [466 U.S. 668, 692] that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding. Accordingly, any deficiencies in counsel's

performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution. In certain Sixth Amendment contexts, prejudice is presumed. Actual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice. So are various kinds of state interference with counsel's assistance. See United States v. Cronic, ante, at 659, and n. 25. Prejudice in these circumstances is so likely that case-by-case inquiry into prejudice is not worth the cost. Ante, at 658. Moreover, such circumstances involve impairments of the Sixth Amendment right that are easy to identify and, for that reason and because the prosecution is directly responsible, easy for the government to prevent. One type of actual ineffectiveness claim warrants a similar, though more limited, presumption of prejudice. In Cuyler v. Sullivan, 446 U.S., at 345 -350, the Court held that prejudice is presumed when counsel is burdened by an actual conflict of interest. In those circumstances, counsel breaches the duty of loyalty, perhaps the most basic of counsel's duties. Moreover, it is difficult to measure the precise effect on the defense of representation corrupted by conflicting interests. Given the obligation of counsel to avoid conflicts of interest and the ability of trial courts to make early inquiry in certain situations likely to give rise to conflicts, see, e. g., Fed. Rule Crim. Proc. 44(c), it is reasonable for the criminal justice system to maintain a fairly rigid rule of presumed prejudice for conflicts of interest. Even so, the rule is not quite the per se rule of prejudice that exists for the Sixth Amendment claims mentioned above. Prejudice is presumed only if the defendant demonstrates that counsel "actively represented conflicting interests" and that "an actual conflict of interest adversely affected his lawyer's performance." Cuyler v. Sullivan, supra, at 350, 348 (footnote omitted). [466 U.S. 668, 693] Conflict of interest claims aside, actual ineffectiveness claims alleging a deficiency in attorney performance are subject to a general requirement that the defendant affirmatively prove prejudice. The government is not responsible for, and hence not able to prevent, attorney errors that will result in reversal of a conviction or sentence. Attorney errors come in an infinite variety and are as likely to be utterly harmless in a particular case as they are to be prejudicial. They cannot be classified according to likelihood of causing prejudice. Nor can they be defined with sufficient precision to inform defense attorneys correctly just what conduct to avoid. Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another. Even if a defendant shows that particular errors of counsel were unreasonable, therefore, the defendant must show that they actually had an adverse effect on the defense. It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding. Virtually every act or omission of counsel would meet that test, cf. United States v. Valenzuela-Bernal, 458 U.S. 858, 866 -867 (1982), and not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding. Respondent suggests requiring a showing that the errors "impaired the presentation of the defense." Brief for Respondent 58. That standard, however, provides

no workable principle. Since any error, if it is indeed an error, "impairs" the presentation of the defense, the proposed standard is inadequate because it provides no way of deciding what impairments are sufficiently serious to warrant setting aside the outcome of the proceeding. On the other hand, we believe that a defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case. This outcome-determinative standard has several strengths. It defines the relevant inquiry in a way familiar to courts, though the inquiry, as is inevitable, is anything but precise. The standard also reflects the profound importance of finality in criminal proceedings. [466 U.S. 668, 694] Moreover, it comports with the widely used standard for assessing motions for new trial based on newly discovered evidence. See Brief for United States as Amicus Curiae 19-20, and nn. 10, 11. Nevertheless, the standard is not quite appropriate. Even when the specified attorney error results in the omission of certain evidence, the newly discovered evidence standard is not an apt source from which to draw a prejudice standard for ineffectiveness claims. The high standard for newly discovered evidence claims presupposes that all the essential elements of a presumptully accurate and fair proceeding were present in the proceeding whose result is challenged. Cf. United States v. Johnson, 327 U.S. 106, 112 (1946). An ineffective assistance claim asserts the absence of one of the crucial assurances that the result of the proceeding is reliable, so finality concerns are somewhat weaker and the appropriate standard of prejudice should be somewhat lower. The result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome. Accordingly, the appropriate test for prejudice finds its roots in the test for materiality of exculpatory information not disclosed to the defense by the prosecution, United States v. Agurs, 427 U.S., at 104 , 112-113, and in the test for materiality of testimony made unavailable to the defense by Government deportation of a witness, United States v. Valenzuela-Bernal, supra, at 872-874. The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.
In making the determination whether the specified errors resulted in the required prejudice, a court should presume, absent challenge to the judgment on grounds of evidentiary insufficiency, that the judge or jury acted according to law. [466 U.S. 668, 695] An assessment of the likelihood of a result more favorable to the defendant must exclude the possibility of arbitrariness, whimsy, caprice, "nullification," and the like. A defendant has no entitlement to the luck of a lawless decision maker, even if a lawless decision cannot be reviewed. The assessment of prejudice should proceed on the assumption that the decision maker is reasonably, conscientiously, and impartially applying the standards that govern the decision. It should not depend on the idiosyncrasies of the particular decision maker, such as unusual propensities toward harshness or leniency. Although these factors may actually have entered

into counsel's selection of strategies and, to that limited extent, may thus affect the performance inquiry, they are irrelevant to the prejudice inquiry. Thus, evidence about the actual process of decision, if not part of the record of the proceeding under review, and evidence about, for example, a particular judge's sentencing practices, should not be considered in the prejudice determination. The governing legal standard plays a critical role in defining the question to be asked in assessing the prejudice from counsel's errors. When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt. When a defendant challenges a death sentence such as the one at issue in this case, the question is whether there is a reasonable probability that, absent the errors, the sentencer - including an appellate court, to the extent it independently reweighs the evidence - would have concluded that the balance of aggravating and mitigating circumstances did not warrant death. In making this determination, a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury. Some of the factual findings will have been unaffected by the errors, and factual findings that were affected will have been affected in different ways. Some errors will have had a pervasive effect on the inferences to [466 U.S. 668, 696] be drawn from the evidence, altering the entire evidentiary picture, and some will have had an isolated, trivial effect. Moreover, a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support. Taking the unaffected findings as a given, and taking due account of the effect of the errors on the remaining findings, a court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors.

IV

A number of practical considerations are important for the application of the standards we have outlined. Most important, in adjudicating a claim of actual ineffectiveness of counsel, a court should keep in mind that the principles we have stated do not establish mechanical rules. Although those principles should guide the process of decision, the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. In every case the court should be concerned with whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results. To the extent that this has already been the guiding inquiry in the lower courts, the standards articulated today do not require reconsideration of ineffectiveness claims rejected under different standards. Cf. Trapnell v. United States, 725 F.2d, at 153 (in several years of applying "farce and mockery" standard along with "reasonable competence" standard, court "never found that the result of a case hinged on the choice of a particular standard"). In particular, the minor differences in the

> lower courts' precise formulations of the performance standard are insignificant: the different [466 U.S. 668, 697] formulations are mere variations of the overarching reasonableness standard. With regard to the prejudice inquiry, only the strict outcome-determinative test, among the standards articulated in the lower courts, imposes a heavier burden on defendants than the tests laid down today. The difference, however, should alter the merit of an ineffectiveness claim only in the rarest case. Although we have discussed the performance component of an ineffectiveness claim prior to the prejudice component, there is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one. In particular, a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed. Courts should strive to ensure that ineffectiveness claims not become so burdensome to defense counsel that the entire criminal justice system suffers as a result.

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

Under the standards set forth above in Strickland, and by a demonstration of the record and the facts set forth in support of the claims, it is clear that Belk 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 failed to object to the validity of the indictment. Moreover, counsel failed to raise such claim before the trial court before allowing and advising Belk to plead guilty.

CLAIM IV

(The Mississippi Supreme Court defined "Plain Error" as error that affects the Substantive Rights of a defendant. Grubb v. State, 584 So.2d 786, 789 (Miss.

1991); "the Plain Error Doctrine" has been construed to include anything that "seriously affects the Fairness, integrity or Public reputation of judicial Proceedings"...." Porter v. State, 749 So.2d 250 , 260-61 (36)(Miss. 1999)(quoting U.S. v. Olano, 507 U.S. 725, 732-35, 113 S.Ct. 1770 (1993)). Mississippi Rule of Evidence 103 (d) authorizes a Court to address "Plain Error" affecting substantial rights although they were not brought to the attention of the Court." According to the Mississippi Supreme Court, the reviewing Court may address issues as Plain Errors "When the Trial Court has impacted upon a Fundamental State Constitutional Right of the defendant." Berry v. State, 728 So.2d 568, 571 (Miss. 1999)(quoting Sandes v. State, 678 So.2d 663, 670 (Miss. 1996). This "Plain Error" Rule "reflects a policy to administer the Law Fairly and Justly and protects Belk "when (1) he had failed to protect his Appeal and (2) when his substantial rights (Defected Indictment) are affected. "MCA 99-39-5(1)(b); MS Art. III, 27; 5th Amendment.

In conclusion of this Ground It is very clear that, from the beginning, the people of Mississippi have ordained that they not be prosecuted for felonies except upon the indictment by a Grand Jury. It has been the Law since 1858 that the Court has No Power to Amend an Indictment as to the matter of substance without the concurrence of the Grand Jury by whom it was found. McGuire v. State, 35 Miss. 366 (1858); Miller v. State, 53 Miss. 403 (1876); Peebles v. State, 55 Miss.

434 (1877).) It is refreshing to be able to cite authorities from the last century, and , indeed, from the annotations under the Constitutional Section and to experience the rare and unusual assurance that, in some ways, the Law changes slowly or not at all. Van Norman v. State, 365 So.2d 644 (Miss. 1978). These cases clearly support the Rule above quoted that the state can prosecute only on the indictment returned by the Grand Jury and that the Court has no authority to Modify or Amend the indictment in any material respect.) Quick, 569 at 1199. Belk states that the Grand Jury returned his indictment with the omission of an essential element, the name of the individual Belk was accused of selling drugs to Exhibit "A". The state, nor the court, had no authority to add that omitted language without the approval of the grand jury. This was "Plain Error". Simpson, Hawthorne, Quick, Grubb, Porter, Supra. The State must concede this point since it is clear from the face of the existing State Court Records. (See Exhibit-A)

CLAIM V

Belk avers that he is Actually Innocence of the conviction and sentence imposed upon him by the trial court. "In order to be Actually Innocent of a sale of cocaine and sale of marijuana conviction/sentence, Belk must show that but for the Fundamental constitutional error (fatally defected indictment), he would not have been lawfully or legally eligible for the conviction/sentence he received." Smith v. Collins, 977 F.2d 951, 959 (5th Cir. 1992). (See Exhibit A & B).

Assuming, without deciding, that the Actual Innocence exception can extend, in the abstract, to non-capital sentencing procedures' the United States Fifth Circuit Court of Appeals are convinced that Actual Innocence in a non-capital sentencing case can be no less stringent than a simple demonstration of prejudice. Sawyer v. Whitley, 505 U.S. 333, 112 S.Ct. 2514, 2522. In Sawyer, the Supreme Court framed the inquiry as whether absent the constitutional error, (lack of jurisdiction in Belk's case), "no reasonable juror would have found the petitioner (Belk) eligible for the death penalty under the applicable Law." Id. 505 U.S. at---, 112 at 2517. The fifth circuit courts concluded that the focus on the legal eligibility of the petitioner for the sentence received would be dispositive in non-capital sentencing cases also. Thus, assuming the "Actual Innocence" exception is available in a non-capital sentencing case, for Belk to demonstrate actual innocence of the sentence imposed, he would have to show that. Smith, 977 at 959. The Records are clear, as to Belk's defected indictment, therefore, the Trial Court indeed lack jurisdiction, according to Mississippi Law, to convict or sentence Belk. Quick, Supra., MCA 99-39-5(1)(b); MS Constitution Art. III, 27. With these facts from the Records, Belk has shown that he would not have been Legally Eligible for the sentence/conviction he received.

The Mississippi Constitution states that "(n)o person shall, for any indictment offense, be proceeded against criminally information..." Miss. Const.

Art. III, 27. Belk contends that the state failed to abide by it's constitutional requirement of an indictment by a grand jury. Gray, Supra. Belk's indictment was Fatally Defected as to the charges of aggravated assault by the omission of the name of the alleged person whom Belk sold drugs to. Notice of this offense is not the issue. It would be hard to argue that Belk was unaware that he was charged with sale of drugs. However, the charge is not complete unless the grand jury know of the name of the alleged person in the indictment. It is a hurdle, one on which the state occasionally trips as is shown in the various precedents. Hawthorne, Peterson, Quick, Supra., Griffin v. State, 540 So.2d 17, 19 (Miss. 1989). The hurdle requires careful attention to detail, but essential element of sale of cocaine and sale of marijuana in Belk's indictment. The defect in the indictment could not be cured by the actions of the state without seeking the approval of the grand jury. Belk avers that the court should never have sustained the conviction on the basis of such indictment. Hawthorne 751 at 1095. This Was Fatal Error. Stirone, 703 F.2d at 423.

In Stirone, the Supreme Court stated:

> The right to have the Grand Jury make the charge on its own Judgment is a substantial right which cannot be taken away with or without Court Amendment... (W)e cannot know whether the Grand Jury would have included in its indictment (an additional charge) (an additional name ("Debra Cunningham"))... Yet because of the Court's admission of evidence and under its charge this might have been the basis upon which the Trial

> Jury convicted petitioner (Belk). If so, he was convicted on a charge the Grand Jury never made against him. This Constitutes Reversible Error.

Belk further contends that but for the Fundamental Constitutional Error (An uncharged Offense), he would not have been Legally Eligible for the Sentence/Conviction he received. Sawyer v. Whitley, 505 U.S. 333,339-42, 112 S. Ct. 2514, 2519-20 (1992); Smith v. Collins, Supra. (See Exhibit A & B).

Now in conclusion of this ground, what is at stake for an accused facing Death or Imprisonment demands the utmost solicitude of which Courts (395 U.S. 244) are capable in canvassing the matter with the accused to make sure his Trial does not "Seriously affects the Fairness, Integrity or Public Reputation of Judicial Proceedings. When the Trial Judge discharges that function, he leaves a Record adequate for any review that may be later sought, Gardner v. Louisiana, 368 U.S. 157, 173, 82 S.Ct. 248, 256; Spect v. Patterson, 386 U.S. 605, 610, 87 S.Ct. 1209, 1212, and forestalls the spin-off of collateral proceedings that seek to probe murky memories. The Records are clear as to Belk's Defected Indictment and as to the "Plain Error" created by the alteration and amendment of the indictment without approval of the court or the grand jury. The indictment should not have been changed nor altered in any fashion or form after having been returned by the grand jury. Miller v. State, 53 Miss. 403 (1876); Van Norman v. State, 365 So.2d 644 (Miss. 1978). These Cases Clearly support the Rule (Ms Const. Art. III, 27) that

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 Lee Howard, Circuit Court Judge, P. O. Box 1344, Starkville, Mississippi 39760; Honorable Forrest Allgood, District Attorney, P. O. Box 1044, Columbus, Mississippi 39703

This, the 20 day of August, 2008.

Respectfully submitted,

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