COPY

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2008-CP-01255-COA

GAIL LEE BURRIS — APPELLANT

V.

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR APPELLANT

BY: Gail Lee Burris

Gail Lee Burris., [redacted]
BCRCF
2792 Hwy. 8 West
Cleveland, Ms 38732

ORAL ARGUMENT NOT REQUESTED

PRO SE PRISONER BRIEF

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CERTIFICATE OF INTERESTED PERSONS

The undersigned Appellant, Gail lee Burris., 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. Gail Lee Burris, Appellant pro se.
2. Honorable Jim Hood, and staff, Attorney General.
3. Honorable Michael Eubanks, Circuit Court Judge.
4. Honorable Douglas Miller, Assistant District Attorney.

Respectfully Submitted,

BY: Gail Lee Burris

Gail Lee Burris, [redacted]
BCRCF
2792 Hwy. 8 West
Cleveland, Ms 38732

Appellant

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

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STATEMENT OF ISSUES

ISSUE ONE

Appellant Gail Lee Burris was denied effective assistance of counsel during the criminal proceedings where counsel advised appellant to plead guilty to an enhanced sentence which enhancement was based upon a prior misdemeanor conviction and sentence and where counsel was aware of such matters and also aware that a misdemeanor conviction and sentence was not sanctioned as a usable offense for a second and subsequent offense to enhance the sentence under Miss. Code Ann. §41-29-147.

ISSUE TWO:

The sentence imposed upon Gail Lee Burris constitutes a denial of due process of law where sentence was enhanced on basis of a prior misdemeanor offense where Miss. Code Ann. §47-29-147 does not contemplate a prior misdemeanor conviction and sentence as the subject of enhancement. The sentence imposed is excessive.

ISSUE THREE:

Appellant Gail Lee Burris was subjected to a denial of due process of law where the trial court failed to advise Burris of the correct law in regards to appealing a sentence rendered upon a plea of guilty to the Supreme Court. Appellant Burris was never told that, under applicable law,

his sentence could be appealed to the Supreme Court for direct review independent to the plea of guilty to the charge.

STATEMENT OF INCARCERATION

The Appellant is presently incarcerated and is being housed in the Mississippi Department of Corrections and assigned to the Bolivar County Correctional Facility in Cleveland, Mississippi, in service of the prison term imposed. Appellant has been continuously confined in regards to such sentence since date of conviction and imposition of sentence by trial court.

STATEMENT OF CASE

Gail Lee Burris was indicted on April 30, 2003, in the Circuit Court of the Lawrence County, Mississippi for the offense of Sale or Transfer of a Controlled Substance within 1500 Feet of a School.[1] (R. 27).

Burris had, on December 5, 2002, been indicted, along with Sabrinal Westly, in Lawrence County Circuit Court, for the offense of possession of less that 0.1 gram of cocaine. Appellant Burris was subsequently offered a plea agreement where Appellant Burris would plead guilty to a misdemeanor and the conviction would not be treated as a felony. Appellant Burris entered such plea and was sentenced to one (1) year in jail, (6) six months of said sentence was suspended. (C.P. 25). That Appellant Burris was sentenced to an enhanced term on the basis of such prior misdemeanor offense and Appellant Burris am not serving such sentence. That my attorney never mentioned this to me not objected to the enhancement. He was fully aware that the prior drug charge was treated and sentenced as a misdemeanor. Appellant Burris was sentenced to a term of

[1] The state indicted Burris for the present offense and charged him as having sold cocaine within 1,500 feet of a school. The indictment contained noting regarding being a second and subsequent drug offender on the basis of the misdemeanor conviction and sentence. Appellant Burris had no other drug offense to be used.

sixteen (16) years, as a second and subsequent offender, in this possession of cocaine charge. Four (4) years of such sentence was suspended. That the enhancement was based upon the prior misdemeanor conviction and sentence in cause No. K2002-169E. (C.P. 25)

STANDARD OF REVIEW

The correct standard of review in this appeal is the direct appeal standard where Appellant has appealed the sentence imposed upon him rather then the plea and conviction.

In the instant case the law dictates that the sentence of law where timeliness of sentence caused it to be fundamentally unfair and clearly an abuse of discretion. Incarceration imposed Miss. Code Ann. 47-7-34(2).

SUMMARY OF ARGUMENT

The plea of guilty entered in this case was an involuntary plea where such was entered by coercion and ill advice of counsel with our Appellant being made fully aware of the consequences of said plea.

ARGUMENT

In order to succeed in a post-conviction motion under Mississippi law, a appellant must show that the adjudication of a claim in a Mississippi court resulted in a conviction or sentence that was obtained in violation of the Constitution or laws of the United States. Miss. Code §99-39-1, et seq. The Constitution, as the framework from which all Federal law springs, must not be violated as applied to the Appellant.

MEMORANDUM OF LAW IN SUPPORT

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., Sappington 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. A sentence may be challenged for legality by post conviction or by direct appeal.

ISSUE ONE

INEFFECTIVE ASSISTANCE OF COUNSEL

Appellant Burris was denied his Sixth Amendment right to effective assistance of counsel where his attorney, representing him during the plea and sentencing proceedings, advised Burris to plead guilty to the charge without first having objected to or challenged the sentence enhancement which was based solely upon a misdemeanor conviction and sentence in Criminal Cause No. K2002-169E.[2] Defense counsel was fully aware that a misdemeanor offense cannot be used to enhance under Miss. Code Ann. §41-29-147.[3]

[2] Burris was previously indicted in Cause No. K02-169E for possession of less than .01 gram of cocaine where he was allowed to enter a plea of guilty to a misdemeanor and sentenced to a term of 1 year in the county jail with 6 months suspended. Said sentence was imposed on December 14, 2005. See Exhibit "C" attached hereto

[3] §41-29-147 Second and subsequent offenses. Except as otherwise provided in §41-29-142, any person convicted

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

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

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 him client's case. *See* **Strickland v. Washington**, *466 U.S. 668, 689 (1984) (noting that counsel has a duty to bring to bear such skill and knowledge as will render the trial reliable); see also* **Herring v. Estelle**, *491 F.2d 125, 128 (5th Cir. 1974) (stating that a lawyer who is not familiar with the facts and law relevant to the client's case cannot meet the constitutionally required level of effective assistance of counsel in the course of entering a guilty plea as analyzed under a test identical to the first prong of the* **Strickland** *analysis);* **Leatherwood v. State**, *473 So. 2d 964, 969 (Miss. 1985) (explaining that the*

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of a second or subsequent offense under this article may be imprisoned for a term up to twice the term otherwise authorized, fined an amount to twice that otherwise authorized, or both.

For purposes of this section, an offense is considered a second of subsequent offense, if prior to his conviction of the offense, the offender has at any time been convicted under this article or under a statute of the United States or of any state relating to narcotic drug marijuana, depressant, stimulant or hallucinogenic drugs..

basic duties of criminal defense attorneys include the duty to advocate the defendant's case; remanding for consideration of claim of ineffectiveness where the defendant alleged that him attorney did not know the relevant law).

In the instant case, defense counsel failed properly represent Sappington effectively by failing to investigate the indictment or object to the fact that the indictment was an illegal instrument.

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 him attorney's errors, defendant would have received a different result. Nicolaou v. State, 612 So.2d 1080, 1086 (Miss. 1992); Ahmad v. State, 603 So.2d 843, 848 (Miss. 1992).

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

> In assessing attorney performance, all the Federal Courts of Appeals and all but a few state courts have now adopted the "reasonably effective assistance" standard in one formulation or another. See Trapnell v. United States, 725 F.2d 149, 151-152 (CA2 1983); App. B to Brief for United States in United States v. 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 him 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.
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> II
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> 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 him favor, and to have the

Assistance of Counsel for him defence." Thus, a fair trial is one in which evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding. The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel's skill and knowledge is necessary to accord defendants the "ample opportunity to meet the case of the prosecution" to which they are entitled. Adams v. United States ex rel. McCann, 317 U.S. 269, 275 , 276 (1942); see Powell v. Alabama, supra, at 68-69.

Because of the vital importance of counsel's assistance, this Court has held that, with certain exceptions, a person accused of a federal or state crime has the right to have counsel appointed if retained counsel cannot be obtained. See Argersinger v. Hamlin, 407 U.S. 25 (1972); Gideon v. Wainwright, supra; Johnson v. Zerbst, supra. That a person who happens to be a lawyer is present at trial alongside the accused, however, is not enough to satisfy the constitutional command. The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results. An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair. [466 U.S. 668, 686] For that reason, the Court has recognized that "the right to counsel is the right to the effective assistance of counsel." McMann v. Richardson, 397 U.S. 759, 771 , n. 14 (1970). Government violates the right to effective assistance when it interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense. See, e. g., Geders v. United States, 425 U.S. 80 (1976) (bar on attorney-client consultation during overnight recess); 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 Michel v. Louisiana, supra, at 101. There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way. See Goodpaster, [466 U.S. 668, 690] The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases, 58 N. Y. U. L. Rev. 299, 343 (1983). The availability of intrusive post-trial inquiry into attorney performance or of detailed guidelines for its evaluation would encourage the proliferation of ineffectiveness challenges. Criminal trials resolved unfavorably to the defendant would increasingly

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

B

An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment. Cf. United States v. Morrison, 449 U.S. 361, 364 -365 (1981). The purpose of the Sixth Amendment guarantee of counsel is to ensure [466 U.S. 668, 692] that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding. Accordingly, any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution. In certain Sixth Amendment contexts, prejudice is presumed. Actual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice. So are various kinds of state interference with counsel's assistance. See United States v. 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 him 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. States v United. 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 idiosyncracies 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 factfinder would have had a reasonable doubt respecting guilt. When a defendant challenges a death sentence such as the one at issue in this case, the question is whether there is a reasonable probability that, absent the errors, the sentencer - including an appellate court, to the extent it independently reweighs the evidence - would have concluded that the balance of aggravating and mitigating circumstances did not warrant death. In making this determination, a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury. Some of the factual findings will have been unaffected by the errors, and factual findings that were affected will have been affected in different ways. Some errors will have had a pervasive effect on the inferences to [466 U.S. 668, 696] be drawn from the evidence, altering the entire evidentiary picture, and some will have had an isolated, trivial effect. Moreover, a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support. Taking the unaffected findings as a given, and taking due account of the effect of the errors on the remaining findings, a court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors.

IV

A number of practical considerations are important for the application of the standards we have outlined. Most important, in adjudicating a claim of actual ineffectiveness of counsel, a court should keep in mind that the principles we have stated do not establish mechanical rules. Although those principles should guide the process of decision, the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. In every case the court should be concerned with whether, despite the strong presumption of reliability, the result

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

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

Under the standards set forth above in Strickland, and by a demonstration in the record and the facts set forth in support of the claims, it is clear that Appellant Gail Lee Burris has suffered a violation of him constitutional rights to effective assistance of counsel, in violation of the 6th Amendment to the United States Constitution. Defense counsel should have adequately investigated the indictment and made appropriate objections to the state's use of a misdemeanor prior conviction and sentence to enhance the proceeding and current offense and sentence. The conviction and sentence used by the state was one which had been reduced to a misdemeanor by

the court and had been sentenced accordingly. It was plain error which counsel should have readily recognized in the use of these charges.

ISSUE TWO

THE SENTENCE IMPOSED UPON GAIL LEE BURRIS CONSTITUTES A DENIAL OF DUE PROCESS OF LAW WHERE SUCH SENTENCE WAS ENHANCED ON THE BASIS OF A PRIOR MISDEMEANOR OFFENSE WHEN MISS. CODE ANN. §41-29-147 DOES NOT CONTEMPLATE A PRIOR MISDEMEANOR CONVICTION AND SENTENCE AS THE SUBJECT OF ENHANCEMENT. THE SENTENCE IMPOSED IS CONSTITUTIONALLY EXCESSIVE AND CONSTITUTES PLAIN ERROR.

Miss. Code Ann. §41-29-147 only allows a sentence to be enhanced on the basis of "a second or subsequent offense under this article." A misdemeanor offense do not fall "under this article" since Miss. Code Ann. §41-29-147 only sanctions a felony. It follows that use of a misdemeanor to require a person to be imprisoned for a term up to twice the term otherwise authorized, fined an amount up to twice that otherwise authorized, or both, would not be appropriate under Miss. Code Ann. §41-29-147. The law also states that:. "For purposes of this section, an offense is considered a second or subsequent offense, if, prior to his conviction of the offense, the offender has at any time been convicted under this article or under any statute of the United States or of any state relating to narcotic drugs, marihuana, depressant, stimulant or hallucinogenic drugs." Again, Miss. Code Ann. §41-29-147 do not sanction a misdemeanor as being an offense to warrant the prior drug offense.

The use of such offense to sentence appellant to an enhanced term should be found by this Court to be illegal and the denial of due process of law.

In denying this claim, the trial court relied upon the decision rendered by the Court of Appeals of the State of Mississippi in Alexander v. State, 875 So.2d 261 (Miss. Ct. App. 2004),

While the trial court asserts that the Court of Appeals "has upheld sentences where previous misdemeanor convictions were used to classify a defendant as a second and subsequent offender," the decision recognized by the trial court was one which there was no issue to be determined. In Alexander, Alexander's counsel stated in the record that he was fully aware that the trial court could use misdemeanors to enhance his (Alexander's) sentence under the law, but that he did not think this was a proper case to use the enhancement statute." Alexander v. State, 875 So.2d 261, 272 (Miss. Ct. App. 2004). Thus, this question was not an issue in Alexander and was therefore never determined by the Court of Appeals. The Court of Appeals merely quoted the claim and quoted what counsel had argued. By this argument, the claim was waived. The issue is therefore an open one which has not been squarely confronted and determined by the Supreme Court of the State of Mississippi.

The record contains precise evidence that Gail Lee Burris was never convicted of any felony regarding drugs, which would enhance him to be a habitual drug offender. During the plea colloquy that following facts were presented.

BY THE COURT:

Q. Okay. Now, Gail Lee, let me ask you this, You've listed that you were convicted of altering a VIN number and possession of a firearm, convicted felon. Are those the only two felonies you've ever been convicted of?

A. THE DEFENDANT GAIL LEE BURRIS: Yes, sir. (C.P. 69)

The indictment filed in this case charges that Burris "did willfully, unlawfully, feloniously and knowingly sell or transfer Cocaine, a Schedule II Controlled Substance, in the amount of 0.8 grams of Cocaine, within 1500 feet of Rod Paige Middle School, contrary to and in violation of Section 41-29-139(a)(1) of the Mississippi Code of 1972, as a mended; further the

defendant is in violation under the enhance penalties under Section 41-29-142(1) of the Mississippi Code of 1972, as amended; ..... (C.P. 27) The record reflects that there was no amendment to this indictment.

The trial court, on May 9, 2006. sentence Burris for "the crime of POSSESSION OF A SCHEDULED II CONTROLLED SUBSTANCE (COCAINE - 0.8 GRAMS) SECOND AND SUBSEQUENT OFFENDER, in violation of Mississippi Code Sections 41-29-139(c)(1)(B) and 41-29-147." (C.P. 28) The record is totally silent on what the charge was as to which the trial court based it's second and subsequent offender sentencing status upon.. Initially, Burris had been charged with an enhancement because of being 1500 feet of a school under sa sales charge. The trail court did specifically find that Burris was charged with the possession and second and subsequent offender status by way of an indictment returned by the Grand Jury of Lawrence County, Mississippi. (C.P. 28) The record, which was designated by Appellant to contain all the Clerk's papers, (C.P. 83) , does not support this.

During the plea colloquy the Court stated:

Q. All right. Now, y'all understand -- and Gail, I think, if I'm not mistaken, you were arraigned on November 5, 2005, and that charge at that time was sale or transfer of a controlled substance within 1,500 feet of a school. And the state had enhanced it to habitual offender.[4] But to the whole charge, you entered a plea of not guilty, on November 5, 2005. So you know what being arraigned is. You've been arraigned on the charge.

[4] There is no enhancement in the indictment and no amendment of the indictment in the record. The trial court obviously was clearly incorrect in this entry.

Now my understanding, and it's in your petition, is that the state is going to reduce this charge to possession of cocaine .8 grams or greater, but as a second and subsequent offender. Is that your understanding? (C.P. 49)[5]

A. THE DEFENDANT GAIL LEE BURRIS: Yes, sir. (C.P. 49)

The problem is that there was no indictment contained in the record to demonstrate that Burris was actually indicted, as the trial court stated in the sentencing order, as second and subsequent offender. Moreover, the trial court contradicted it's sentencing order by asserting during the plea colloquy that the State had reduced the charge from sales within 1,500 feet of a school as a habitual offender to possession of .8 grams of cocaine as a second and subsequent offender. To accomplish this, the state would have had to totally alter and amend the charge as well as the corresponding enhancement provisions and statutes. Neither of the felonies which Burris had admitted he had been previously convicted of amounted to a drug offense. The state would have had to enlist the use of the misdemeanor charge as being the enhancement to the second and subsequent drug offense. (C. P. 25)[6]

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[5] Again, there is no amendment to the indictment nor any order reducing the charge contained in the record. All clerk's papers were designated to be sent to the Supreme Court as a part of the record in this case. (C.P. 83) In Order to be sentenced as a second and subsequent habitual offender it must be contained in the indictment rendered by the grand jury or by a duly entered order of the Court on a motion to amend the indictment. Williams v. State, 766 So.2d 815 (Miss. App. 2000); URCCC 7.09. This conclusion is especially true where such an amendment would be one of substance, rather then form, as in this case. The facts would be materially altered where the charge would be changed from sales of cocaine within 1,500 feet of a school to possession of cocaine as a second and subsequent offender. Where the state seek an enhanced punishment it must be made a part of the indictment or the indictment would be defective. Swift v. State, 815 So.2d 1230 (Miss. App. 2001)

[6] Appellant attached this information to his post conviction relief motion as an exhibit and which matter was before the trial court at the time it rendered the order denying the PCR. (C. P. 25)

In Sheffield v, City of Pass Christian, 556 So.2d 1052 (Miss. 1990), the Mississippi Supreme Court established the procedures for admitting prior misdemeanor convictions to enhance subsequent sentences.

> The presumption of regularity of judgment shall be sufficient to meet the original burden of proof. After the judgments of conviction are introduced, the burden shifts to the defendant to show any infringement of his rights or irregularity of procedure upon which he relies .... If the defendant presents evidence, through his testimony or other affirmative evidence, which refutes the presumption of regularity, the burden falls to the Commonwealth to prove that the underlying judgments were entered in a manner which did, in fact, protect the rights of the defendant. A silent record simply will not suffice.

The Supreme Court adopted this procedure from a holding by a Kentucky case, Ratliff v. Commonwealth, 719 S.W.2d 445, 451 (Ky.Ct.App. 1986).

In the instant case the record is totally silent regarding the entry of the prior misdemeanor judgment. The Supreme Court's procedure requires that the record demonstrate regularity. The state must introduce the judgment of conviction in order to substantiate it's claim of second and subsequent offender. Such proof is not in the record here and the Appellant designated all the papers which were in the Clerks file in this case.

The law is clear that a defendant cannot be sentenced to the penitentiary as a habitual offender or a second and subsequent offender upon conviction of a misdemeanor conviction. Miss. Code Ann. Section 99-19-81; Miss. Code Ann. Section 99-19-83; Miss. Code Ann Section 41-29-147. It should follow that a prior misdemeanor offense should play no role in the determination of any term of sentence which a defendant must serve in the penitentiary.

This issue has not been squarely confronted and decided by the Mississippi Supreme Court on the direct question of whether a court may enhance a penitentiary habitual offender second and subsequent offender sentence on the sole basis of a prior misdemeanor conviction.

While the Court has clearly answered the question of a silent record on the prior misdemeanor offense, there is no direct answer on the latter question. This Court should vacate the trial court's findings on this issue and should remand the matter to the trial court for resentencing or for an evidentiary hearing on the question.

ISSUE THREE

APPELLANT WAS SUBJECTED TO A DENIAL OF DUE PROCESS OF LAW WHERE THE TRIAL COURT FAILED TO ADVISE BURRIS OF THE CORRECT LAW IN REGARDS TO APPEALING A SENTENCE RENDERED UPON A PLEA OF GUILTY TO THE SUPREME COURT. APPELLANT BURRIS WAS NEVER TOLD THAT, UNDER APPLICABLE LAW, HIS SENTENCE COULD BE APPEALED TO THE SUPREME COURT FOR DIRECT REVIEW INDEPENDENT TO THE PLEA OF GUILTY TO THE CHARGE.

The trial court failed to advise Gail Lee Burris that he had th right to directly appeal the actions of the Court in arriving at the sentence enhancement associated with the actual plea of guilty to the principle offense. Even upon a plea of guilty the law would allowed Burris a direct appeal of the sentence imposed. The trial court judge made fundamental error where the Court failed to advise Burris 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 Burris with the information regarding perfecting a direct appeal the sentence to the Supreme Court in view of the controversy surrounding the manner in which the court arrived at the sentence enhancement and the misdemeanor status is the prior conviction and sentence. A defendant is not barred from directly appealing the sentence itself by having pleaded guilty to the

CERTIFICATE OF SERVICE

This is to certify that I, Gail Lee Burris, have this date served a true and correct copy to the above and foregoing Brief for Appellant, by United States Postal service, first class postage prepaid, upon Honorable R. I. Prichard, Circuit Court Judge, Lawrence County Courthouse, Columbia, Mississippi 39429; Honorable Claiborne McDonald, District Attorney, 3 Justice Court Bldg., 500 Courthouse square, Columbia, Ms 39429; Honorable Jim Hood, P. O. Box 220, Jackson, MS 39205.

This, the 19 day of January 2009.

Respectfully submitted,

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