IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2008-CP-01546-COA

TIMOTH DIGGS — APPELLANT

VS.

STATE OF MISSISSIPPI — APPELLEE

Appeal From The Circuit Court of Lawrence County, Mississippi
Honorable Michael R. Eubanks, Circuit Judge presiding

BRIEF FOR APPELLANT

BY: Timothy Diggs

Timothy Diggs., #[redacted]
503 S. Main Street
Columbia, MS 39429

Appellant pro se

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CERTIFICATE OF INTERESTED PERSONS

The undersigned Appellant, Timothy Diggs, pro se, certifies that the following listed persons have an interest in the outcome of this case. The se representations are made in order that the Judges or Justices of this Court or the Court of Appeals may evaluate possible disqualifications or recusal:

1. Timothy Diggs, Appellant/Appellant;
2. Honorable Jim Hood, Atty. General, and his staff;
3. Honorable Clairborne McDonald, District Attorney, and his staff;
4. Honorable Michael R. Eubanks, Circuit Court Judge;

Respectfully submitted,

BY: Timothy Diggs

Timothy Diggs, [redacted]
503 S. Main Street
Columbia, MS 39429

CERTIFICATE OF INCARCERATION

COPY

Appellant, Timothy Diggs, is incarcerated at the Marion County Correctional Facility in the custody of the Marion County Sheriff Department and the State of Mississippi in service of the sentence in this case and have been continuously incarcerated since the imposition of the punishment in this case.

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BRIEF FOR APPELLANT

A. STATEMENT OF ISSUES ON APPEAL

1.

Appellant, Timothy Diggs has suffered a violation of his 5th and 14th Amendment rights under the United States Constitution as well as the Constitution of the State of Mississippi where he have been sentenced to a mandatory sentence without the benefit of earned time, without having been indicted for such offense which, upon indictment and conviction, required a mandatory sentence by law. There was no firearm or deadly weapon introduced in court to substantiate armed robbery under Miss. Code Ann. §97-3-79 and Miss. Code Ann. §47-5-139(1)(e).

2.

Appellant was subjected to a denial of due process of law where the trial court failed to advise Diggs of the correct law in regards to appeal of a sentence rendered upon an open plea of

guilty to obtain direct review of such sentence by the Court of Appeals and the Mississippi Supreme Court.

3.

Appellant Diggs was denied due process of law and subjected to ineffective assistance of counsel where defense counsel advised Diggs that if he failed to waive indictment and enter plea to information his defense counsel would make sure the trial be conducted before Judge Prichard who would impose a life sentence.

4.

Appellant Diggs was denied due process of law where he was convicted of the offense of armed robbery without having admitted a sufficient factual basis to demonstrate guilt of such armed robbery offense and where the appellant, in fact, advised the court that he never went into the store and he would take a polygraph to prove this.

FACTS

Appellant Diggs executed a waiver of indictment on April 21, 2005, in Cause No. K05-0008E. Such waiver charged Appellant with armed robbery but never set forth any statutory code identification of the offense or cause number of case.

Diggs was represented by Honorable Robert E. Evans of Monticello, Mississippi. Appellant's attorney never instructed Appellant Diggs that the sentence which was rendered under the information would require that it be served mandatory.

The information provided to Appellant by his attorney caused Appellant to believe that if he waived a formal indictment and proceeded to plead guilty that the sentence imposed would not be a mandatory sentence and would be served with full benefit of earned time credit for good conduct.

During the plea colloquy the trial court never advised that the sentence, or any portions thereof, would be served or was required to be served mandatory.

Appellant continued, throughout the plea process, to believe that his waiver of the indictment process would constitute a waiver by the state to seek or impose a mandatory sentence since such a sentence would require a formal indictment by the grand jury.

Appellant Diggs would assert that the trial court never instructed him that he had the right to appeal the legality of the sentence to the Supreme Court on direct appeal.

Had the trial Court made Appellant Diggs aware of this right he would have perfected a direct appeal of the sentence, and it's illegality, to the Mississippi Supreme Court he would have perfected an appeal of the sentence.

Appellant would assert that the trial court had no jurisdiction to proceed to entry of a guilty plea and sentencing stage where there was no indictment and no waiver of the indictment which would pass constitutional muster. Any actions which the trial court conducted was therefore illegal, especially the sentencing, and was subject to a direct appeal. Had Appellant been made aware of such then an appeal would have followed.

ARGUMENT

1.

Timothy Diggs was charged by criminal information, with the offense of armed robbery. The prosecution elected to allow Diggs to waive a formal indictment and to proceed to plead guilty under the information. The court accepted the plea and sentenced Appellant to a term of 30 years imprisonment with 20 years suspended and 10 years to serve. The Circuit Court Judge never indicated nor advised Diggs that he had the right to seek a direct review of the severe sentence by the Court of Appeal and the Mississippi Supreme Court.

Diggs' conviction was entered upon the plea of guilty to information. Diggs would assert that such plea to information has no authority to deprive Diggs of earned time accumulation which would permit Diggs to be released from the service of the first 10 years early. Berry would assert that:

a) The information failed to appraise Diggs that he was subject to a sentence which required that the first 10 years be served mandatory and he was, therefore, not appraised of the consequences of any such plea to the information, nor the effects of the waiver.

b) Miss. Code Ann. §99-19-3 provides the following:

> A person indicted for a criminal offense shall not be convicted thereof, unless by confession of his guilt in open court or by admitting the truth of the jury accepted and recorded in court. A person charged with an offense shall not be punished, therefore, unless legally convicted thereof in a court having jurisdiction of the cause and of the person.

This section clearly requires an indictment before any jurisdiction and conviction may be legal. Article 3, Section 27, of the Constitution of the State of Mississippi was amended in November, 1978, to authorize proceedings against a appellant charged with a felony by information. . . . where a appellant is represented by counsel and by sworn statement waives indictment. Jefferson v. State, 556 So. 2d 1016 (Miss 1989). The information filed against Diggs in this case provides no notice that the charge of armed robbery, upon conviction, subjects the appellant to a term of imprisonment without any possibility for earned time nor parole. Any waiver made by Diggs, without having been made aware of all the consequences of the charge, would not be a valid waiver. Diggs was not adequately or constitutionally informed. Moreover, the information fails to provide or identify the statute in which it is sought under. Appellant should have been entitled to notice of this critical information before any waiver or a plea of guilty to such offense can be valid. The failures of the information in this regard should cause the sentence rendered to be without the effect of Miss. Code Ann. §97-3-79 and Miss. Code Ann. §47-5-139 (1) (e). In the alternative, the

waiver and every proceeding which occurred thereafter should be held invalid and void. Additionally, the conviction and sentence conflicts with Miss. Code Ann §99-19-3 which should prevent petitioner's punishment unless the conviction was the result of a valid and informed waiver or by an indictment and legal conviction.

VI.

APPELLANT WAS DEPRIVED OF DUE PROCESS OF LAW WHERE TRIAL COURT FAILED TO ADVISE APPELLANT OF THE RIGHT TO APPEAL THE SENTENCE

The trial court failed to advise Diggs that he had the right to appeal the actions of the Court in the sentence it arrived at in regards to the plea. Even upon a plea of guilty the law would allow Diggs a direct appeal of the sentence imposed. The trial court judge made fundamental error where the Court failed to advise Diggs of this avenue of review and challenge of the sentence in regards to the plea of guilty. The law is clear that a appellant who pleads guilty has a right to a directly appeal the sentence to the Supreme Court. Trotter v. State, 554 So. 2d 313, 86 A.L.R.4th 327 (Miss. 1989). While the trial court was very careful to find that appellant waived his right to directly appeal the conviction where he entered a plea of guilty, the court never touched upon the issue of whether appellant waived his right to appeal the sentence on the ground that it was illegal or beyond the court's authority to impose. Trotter v. State, 554 So. 2d 313 (Miss. 1989)

The true and genuine issue in this instance is whether the trial court should have told Diggs that he had the right to appeal the sentence imposed by the court, not the plea, to the Court of Appeals the same as if he was appealing from an actual trial and conviction. The trial court failed to advise Diggs of this right. Diggs would assert that the Supreme Court in Trotter recognized that an appeal from a sentence imposed upon a plea of guilty may be taken to the

Court of Appeals, or the Supreme Court, as if it were a sentence rendered from a trial and verdict. An appeal from a sentence is not analogous to an appeal from a conviction or from the plea itself. Since the Supreme Court made this a right to be enjoyed by the appellant who enters a guilty plea, then this right should be revealed to the appellant at the time the sentence is imposed the same as it would be revealed to one who is found guilty by a jury and receives knowledge of his right to an appeal. The court has recognized this right in a number of other decisions since Trotter. Diggs should have been told this by the trial Court in order to make his decision to enter a plea guilty and before such plea should be considered a knowing and voluntary act. Being made aware of all rights associated with a plea of guilty is a prerequisite to a CONSTITUTIONAL PLEA. Certainly Diggs should have not been told half the story and left to guess the parts which was not said.

It is true that Mississippi Code Annotated section 99-35-101 (Rev. 2007) states that: "Any person convicted of an offense in a circuit court may appeal to the supreme court, provided, however, an appeal from the circuit court to the supreme court shall not be allowed in any case where the appellant enters a plea of guilty." It is just as true that, while section 99-35-101 prevents a appellant from appealing his guilty plea itself, a appellant may pursue a direct appeal asserting the illegality of the sentence imposed pursuant to his guilty plea. *Jennings v. State*, 896 So. 2d 374, 377 (¶16) (Miss. Ct. App. 2004). Appellant Diggs here that have received an illegal sentence from which he would have appealed had he possessed the requisite knowledge of such a right to appeal. Given this, Diggs have substantially shown a violation of a fundamental right that would except this issue from the procedural bar. *See id.* at 377 This Court should grant relief from the judgment of conviction and sentence.

The trial court's order denying the PCR held that "(I)t is this Court opinion that there were no errors in petitioner's sentencing and that the thirty (30) year sentence imposed for the offense of armed robbery was valid and legal." (R. 47) The trial court clearly says this but, if the record filed with the Supreme Court in this case is correct, the trial court never looked at the transcript of the sentencing to make such determination as to the legality of the sentence and what transpired during the sentencing proceedings. The trial court cannot even be sure of what advice was provided to Appellant during the sentencing when the record on appeal is completely deplete of any sentencing transcript of May 13, 2005, the date in which the trial court designated as to when sentence would be imposed. (Tr. 68-69)

VOLUNTARINESS OF PLEA

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., Gladney 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 [1] 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

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1 While the Mississippi Supreme Court specified "Inmates at the Mississippi State Penitentiary", it is clear that this decision would apply to any inmate confined within or without the State of Mississippi who has been subjected to a Mississippi conviction and sentence which they desire to attack collaterally.

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.

INEFFECTIVE ASSISTANCE OF COUNSEL

Appellant Timothy Diggs was denied him Sixth Amendment right to effective assistance of counsel where his attorney, representing him during the plea and sentencing proceedings, advised Diggs to plead guilty to armed rubbery or the state would go to trial and impose a life sentence. Defense Counsel had no right to give such advise or make such Predicament. Counsel's advice in this respect amounted to coercion. Defense Counsel applied pressure to appellant to plead guilty through appealing to petitioner's family to persuade appellant to plead guilty. Such action's violate the Sixth Amendment to the United States constitution More over, such action denied counsel transformed into and agent of the prosecutor by acting to cause appellant to plead guilty. This court should find that the plea was involuntary when made under the facts set out here and in the attached affidavits.

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 appellant must prove, under the totality of the circumstances, that (1) him attorney's performance was deficient and (2) the deficiency deprived the appellant of a fair trial. *Hiter v. State, 660 So. 2d 961, 965 (Miss. 1995).*

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

Diggs claims that the following instances demonstrate that he suffered ineffective assistance of counsel during his pre-plea proceedings. First, defense counsel never informed Diggs that only the jury could impose a life sentence and that the judge, even if Diggs was convicted, could not impose life without a recommendation from the jury . The advice by counsel to plead guilty was simply rendered blindly and without any insight of what the consequences of such plea would cause. Defense Counsel was grossly ineffective and had she been functioning as the counsels which the constitution requires then Diggs would only stand convicted of simple accessory after the fact of armed robbery today. Defense Counsel's actions has caused Diggs grave consequences.

Defense counsel never sought to interview defense witnesses in preparation for the actual trial. This clearly demonstrates ineffective assistance. Defense Counsel failed to interview the co-defendant. Had this happened then counsel would have known that petitioner's involvement in the crime was at a minimum. There is a number of cases holding that 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 Ward v. State, ___ So.2d ___ (Miss. 1998) (96-CA-00067), the Supreme Court held the following:

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

In the instant case, defense counsel failed to know the law in regards to armed robbery and accessory after the fact of armed robbery as well as failed to advise Diggs of the law. Either way, it is ineffective assistance of counsel.

To successfully claim ineffective assistance of counsel, the appellant must meet the two-prong test set forth in Strickland v. Washington, 466 U.S. 668, 687 (1984). This test has also been recognized and adopted by the Mississippi Supreme Court. Alexander v. State, 605 So.2d 1170, 1173 (Miss. 1992); Knight v. State, 577 So.2d 840, 841 (Miss. 1991); Barnes v. State, 577 So.2d 840, 841 (Miss. 1991); McQuarter v. State, 574 So.2d 685, 687 (Miss. 1990); Waldrop v. State, 506 So.2d 273, 275 (Miss. 1987), aff'd after remand, 544 So.2d 834 (Miss. 1989); Stringer v. State, 454 So.2d 468, 476 (Miss. 1984), cert. denied, 469 U.S. 1230 (1985).

The Mississippi Supreme Court 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 appellant. Id; Leatherwood v. State, 473 So.2d 964, 968 (Miss. 1994) *reversed in part, affirmed in part*, 539 So.2d 1378 (Miss. 1989), and he faces a strong rebuttable presumption that counsel's performance falls within the broad spectrum of reasonable professional assistance. McQuarter, 574 So.2d at 687; Waldrop, 506 So.2d at 275; Gilliard v. State, 462 So.2d 710, 714 (Miss. 1985). The appellant must show that there is a reasonable probability that for him attorney's errors, appellant would have received a different result. Nicolaou v. State, 612 So.2d 1080, 1086 (Miss. 1992); Ahmad v. State, 603 So.2d 843, 848 (Miss. 1992).

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 appellant 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 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 appellant be first defense witness); Ferguson v. Georgia, 365 U.S. 570, 593 -596 (1961) (bar on direct examination of appellant). Counsel, however, can also deprive a appellant 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 appellant 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 appellant by the Sixth Amendment. Second, the appellant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the appellant of a fair trial, a trial whose result is reliable. Unless a appellant 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 appellant [466 U.S. 668, 688] complains of the ineffectiveness of counsel's assistance, the appellant 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 appellant entails certain basic duties. Counsel's function is to assist the appellant, 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 appellant derive the overarching duty to advocate the defendant's cause and the more particular duties to consult with the appellant on important decisions and to keep the appellant 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 appellant. 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 appellant 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 appellant 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 appellant 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 appellant 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 appellant and on information supplied by the appellant. 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 appellant has said, the need for further investigation may be considerably diminished or eliminated altogether. And when a appellant 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 appellant 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 appellant 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 appellant 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 appellant 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 appellant shows that particular errors of counsel were unreasonable, therefore, the appellant must show that they actually had an adverse effect on the defense. It is not enough for the appellant 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 appellant 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 appellant 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 appellant must exclude the possibility of arbitrariness, whimsy, caprice, "nullification," and the like. A appellant has no entitlement to the luck of a lawless decisionmaker, even if a lawless decision cannot be reviewed. The assessment of prejudice should proceed on the assumption that the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision. It should not depend on the idiosyncrasies of the particular decisionmaker, such as unusual propensities toward harshness or leniency. Although these factors may actually have entered into counsel's selection of strategies and, to that limited extent, may thus affect the performance inquiry, they are irrelevant to the prejudice inquiry. Thus, evidence about the actual process of decision, if not part of the record of the proceeding under review, and evidence about, for example, a particular judge's sentencing practices, should not be considered in the prejudice determination. The governing legal standard plays a critical role in defining the question to be asked in assessing the prejudice from counsel's errors. When a appellant 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 appellant 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 appellant 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 appellant 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 appellant 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 Timothy Diggs has suffered a violation of his constitutional rights to effective assistance of counsel under the 6th Amendment to the United States Constitution. Defense counsel should have made Diggs aware of the law and

should have gave Diggs the right to make an intelligent decision as to whether he would waive his constitutional right to appeal. The decision cannot be intelligent where Diggs was not provided with all the relevant information regarding the full scope of the sentence which would be imposed and that the sentence which the court was contemplating could technically keep him under the authority and jurisdiction of the Mississippi Department of Corrections longer then the actual 30 years sentence initially imposed by the court. This fact, coupled with the fact that counsel failed to investigate and interview the witnesses which could and would have supported mitigating circumstances that Diggs told the court he never entered the store during the time of the alleged robbery would have been reasonable doubt for a jury. This Court should recognize such violation and grant post conviction relief to Timothy Diggs who is entitled to a new trial and to have effective assistance of counsel during such trial.

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

This Court should conclude that here counsel rendered ineffective assistance of counsel and that such ineffectiveness prejudices Petitioner's guilty plea in such a way as to mandate a

reversal of the plea as well as the sentence imposed. This Court should reverse that case to the trial Court and direct that an evidentiary hearing be conducted in regards to this case.

THE PLEA OF GUILTY WAS NOT VOLUNTARY WHERE APPELLANT ADVISED THE COURT ON THE RECORD THAT HE NEVER ENTERED THE STORE WHICH WAS ALLEGED TO HAVE BEEN ROBBED.

Appellant Diggs was denied due process of law where he was convicted of the offense of armed robbery without having admitted a sufficient factual basis to demonstrate guilt of such armed robbery offense and where the Appellant, in fact, advised the trial court that he never went into the store and he would take a polygraph to prove this. The record which was filed by the Circuit Clerk demonstrates that Diggs never actually pleaded guilty and admitted to the elements required for the offense of armed robbery. In fact, on May 13, 2005, Diggs appeared before Judge Richard I. Prichard in Lamar County, Mississippi, for sentencing, where Judge Prichard, in hearing the information from Appellant that he did not actually commit the crime and never entered the store which was alleged to have been robbed, refused to impose a sentence upon Appellant. Appellant has attempted to have that transcript and proceedings of the May 13, 2005, hearing in Lamar County, Mississippi, before Judge Prichard, made a part of the record on appeal. Such attempt to supplement the record on appeal in this case has been unsuccessful where this Court dismissed the last motion to supplement as being moot since the trial court had filed a transcript only in regards to the first motion which was a duplicate of what had been filed from Lawrence County, Mississippi, and had no relevance to the Lamar County, Mississippi, hearing proceedings conducted on May 13, 2005.

While it is the Appellant's duty to make the record contain the documents and information which is required to demonstrate the issues of the appeal. Stuckey v. Puckett, 633

So.2d 978 (Miss. 1993), Appellant cannot perform that duty when his motions to have the record supplemented is practically ignored. In Stucky, the Supreme Court stated that: "We have stated on many occasions that each case must be decided by the facts shown in the record, not assertions in the brief. Facts asserted to exist must and ought to be definitely proved and placed before us by a record certified by law, otherwise, we cannot know them. *Britt v.* State, 520 So.2d 1377, 1379 (Miss.1988)." In the instant case Appellant made every diligent attempt to make the record show the transcript of the proceedings before Judge Prichard in Lamar County, which would have demonstrated the claims which Appellant make regarding his sentence being improper. The motion filed with this Court requesting that the record be supplemented with the relevant proceedings provide as follows:

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI
NO.2008-CP-01546-COA

TIMOTHY WAYNE DIGGS **APPELLANT**

V.

STATE OF MISSISSIPPI **APPELLEE**

APPELLANT'S SECOND MOTION
TO SUPPLEMENT AND EXPAND RECORD ON APPEAL

COMES NOW Appellant, Timothy Wayne Diggs, Appellant, pro se, and moves this Court to enter an order directing that the record on appeal be supplemented to include the following:

1. Transcript of the May 13, 2005, sentencing proceedings in criminal cause No. K05-0008E which proceedings were conducted before Honorable Richard I. Prichard in Lamar County, Mississippi pursuant to the Court ordering Appellant be transferred from

Lawrence County, Mississippi, to Lamar County, Mississippi for hearing. Said transcript consist of proceedings of such May 13, 2005 hearing where Appellant made an appearance and was addressed by the court for sentencing.

2. That Appellant needs such record to present his issue regarding the sentencing of the court where the issues on appeal to this court contains issues of sentencing and where the record on appeal, even after being supplemented by order of this court, fails to contain the record of the sentencing conducted by the court in Lamar County, Mississippi. See Exhibit "A' attached to show the hearing was set.

3. This court previously ordered the record to be expanded to include the transcript of plea and sentencing proceedings where the trial court only supplemented the record with an April 21, 2005 plea proceeding transcript without the May 13, 2005 proceeding as previously requested and ordered.

That Appellant designated all letters, orders, discovery, agreements, affidavits, statements, transcripts or any other clerks papers contained in the cause" as to be filed with the clerk on this court as the record on appeal. Said transcript of the May 13, 2005 sentencing falls within the category of being contained in this cause.

Appellant would assert to this court that it is Appellant's duty to assure that the record on Appeal contains all portions of the transcript in which his claims will be supportive of his claims and the issues and arguments raised. Appellant would urge this court to grant this

motion and enter an order directing the record to be supplemented on appeal to include the transcripts for May 13, 2005 hearing which was conducted in Lamar County, Mississippi.

Respectfully submitted,

Timothy Wayne Diggs, #112983

CERTIFICATE OF SERVICE

This is to certify that I, Timothy Wayne Diggs, have this day mailed, via day mailed, via U. S. Postal Service, first class postage prepaid, a true and correct copy of the above and foregoing APPELLANT'S SECOND MOTION TO SUPPLEMENT RECORD ON APPEAL by the United States Postal Service, first class postage prepaid, to Honorable Jim Hood, Attorney General, P.O. BOX 220, Jackson, MS 39205

ON THIS, the ___ day of February 2009.

Timothy Wayne Diggs, #112983
MWCF
503 South Main Street
Columbia, MS 39429

This Court denied Appellant's motion as being moot where it had previously granted the initial motion to supplement and the trial Court had filed a record in regards to such motion. However, the Appellant pointed out in his second motion that the record filed in the initial motion was not the transcript of the May 13, 2005 hearing before Judge Prichard which hearing had been referred to in the actual transcript file by Lawrence County at page 68-69. The second motion was supported by a copy of the transcript pages showing that a Lamar County hearing had been conducted.

Appellant would assert to this Court that the second motion filed requesting that the record be supplemented was not a moot motion where the record had not been properly supplemented by the trial Court. Moreover, the trial Court had purposely not filed the transcript of the Lamar County proceedings which transcript record would substantiate the claims presented by Appellant in this post conviction proceeding and in this appeal. Appellant would point out to this Court that he have a right to have the record contain all relevant transcripts which he designate. Appellant, being incarcerated, exhausted every procedure in which was available to him to have the record contain the evidence which would prove his case. The Court never actually ruled upon or made any finding as to the contents of the second motion other then to assert that the motion was moot.

Appellant filed a motion in the trial court seeking the transcript of the May 13, 2005 hearing before the trial court rendered it's Order denying the PCR. (R. 51) The motion was mailed to the Court on July 17, 2005, but was not filed by the Clerk until September 4, 2005, the same date the trial court filed it's Order denying the PCR. (R. 53) The trial Court never mentioned or commented in regards to the Appellant's Motion for Leave to Invoke Discovery Pursuant to MCA Sec 99-39-15. The law is clear that when Appellant filed his motion with the trial court: (1) The original motion, together with all the files, records, transcripts and correspondence relating to the judgment under attack, shall be examined promptly by the judge to whom it is assigned.

the trial court is required to review and consider all records

Appellant would urge that this Court should reverse and remand this case to the trial court so that appeal record may be completed or that an evidentiary hearing be conducted since the record which Appellant seeks here will demonstrate that Judge Prichard found that he could not accept the plea or sentence Appellant upon the facts asserted to the Court by Appellant on May 13, 2005, in Lamar County, Mississippi in regards to this case. Miss. Code Ann. Sec. 99-39-11(1). The trial court never examined the transcript of the May 13, 2005 hearing because such transcript is not part of the

record filed by the Circuit Court. However, as pointed out in the record filed, at page 68 and 69 of the transcript filed May 3, 2005, there was a hearing conducted on May 13, 2005. According to the record, that hearing was for the purpose of sentencing. The transcript filed in this case contains nothing regarding sentencing. Much of Appellant's claims in the post conviction motion regards sentencing and should not have been decided by the Court without having reviewed the record of the sentencing. Miss. Code Ann. Sec. 99-39-11(1) makes it mandatory that the Court review all records and transcripts at the time the PCR is reviewed. There is no exceptions under law.

The trial court held that "(I)t is this Court opinion that there were no errors in petitioner's sentencing and that the thirty (30) year sentence imposed for the offense of armed robbery was valid and legal." (R. 47) The trial court clearly says this but, if the record filed with the Supreme Court in this case is correct, never looked at the transcript to make the determination as to the legality of the sentence and what transpired during the sentencing proceedings.

CONCLUSION

Based upon the facts contained in the record and the presentation contained in this brief, Appellant would urge this Honorable Court to reverse and remand this case to the trial court to the plea to be withdrawn and that additional proceedings be conducted consistent with the claims set out in the brief herein and the record. In the alternative, this case should be reversed and remanded on the basis that the record on appeal has not been made complete after Appellant has

diligently taken every action to secure the record of all proceedings.

COPY

Respectfully submitted,

BY: Timothy Diggs

Timothy Diggs, #[redacted]
503 South Main Street
Columbia, MS 39429

CERTIFCATE OF SERVICE

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

Honorable Jim Hood
Attorney General
P. O. Box 220
Jackson, MS 39205

Honorable Clairborne McDonald
District Attorney
500 Courthouse Square, Suite 3
Columbia, Ms 39429

Honorable Michael R. Eubanks
Circuit Court Judge
P. O. Box 488
Purvis, MS 39475

This, the 27 day of March, 2009.

BY: Timothy Diggs

Timothy Diggs, [redacted]
503 South Main Street
Columbia, MS 39429