IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2008-CP-~~01752~~1752-COA

GARY LEWIS APPELLANT

V.

STATE OF MISSISSIPPI APPELLEE

BRIEF FOR APPELLANT

BY: Gary Lewis

Gary Lewis, #K5706 (State)
1447 County Farm Road
Raymond, MS 39154

ORAL ARGUMENT NOT REQUESTED

PRO SE PRISONER BRIEF

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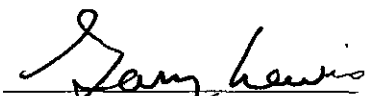
CERTIFICATE OF INTERESTED PERSONS

The undersigned Appellant, Gary Lewis, 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. Gary Lewis, Appellant pro se.
2. Honorable Jim Hood, and staff, Attorney General.
3. Honorable David Strong, Circuit Court Judge.
4. Honorable Dewitt Bates, Assistant District Attorney.

Respectfully Submitted,

BY: 

Gary Lewis, #K5706 (State)
1447 County Farm Road
Raymond, MS 39154

Appellant

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2008-CP-01732-COA

GARY LEWIS APPELLANT

V.

STATE OF MISSISSIPPI APPELLEE

STATEMENT OF CASE

The state filed an indictment against Appellant which charged that on April 16, 2003, I willfully, unlawfully, feloniously, and knowingly conspired to commit a crime and sell cocaine.

The Circuit Judge which was initially assigned to the case recused itself and assigned Judge Keith Starrett, another Circuit Judge from the same circuit court district.

Judge Starrett subsequently recused himself from another case which was a companion case to the same case in which he was assigned to in this case.

Judge Smith did not seek permission of the Supreme Court Justice to assign Judge Starrett to the case.

Judge Starrett and Judge Smith were judges in the same circuit court district and were close acquaintances and friends.

Judge Starrett presided over Appellant's case but found that he should not preside over another case which involved the same facts and circumstances as the current case.

Judge Smith did not follow the proper law and procedure in recusing from my case and appointing Judge Starrett.

Appellant discussed this with his attorney prior to any proceeding in any of the cases against Appellant but Appellant's attorney stated it did not matter and that they could do what they wanted to.

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 ad clearly an abuse of discretion.

STATEMENT OF INCARCERATION

The Appellant is presently incarcerated and is being housed in the Mississippi Department of Corrections and assigned to the Central Mississippi County Jail Facility in Raymond, Mississippi, in service of a 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 ISSUES

A.

Gary Lewis was subjected to a denial of due process of law where the trial court failed to advise Lewis of the right to appeal the sentence, which the court imposed, directly to the Supreme Court.

B.

Gary Lewis was denied due process of law where he was convicted of the offense in the indictment without having admitted all elements required to prove such crimes. Having never stated that he knowingly sold such drugs while knowing such actions to be illegal.

C.

Gary Lewis was denied fundamental due process of law the where Circuit Court disqualified itself from the case and appointed another judge of the disqualified judge's choosing where disqualified judge had no authority to choose a successor but where a Circuit Court was declared to be disqualified such duty of appointment was the sole authority of the Chief Justice of the Supreme Court.

D.

Lewis was denied his Sixth Amendment Right to effective Assistance of Counsel where defense counsel failed to bring out the issues stated herein and where, if raised, there would have been a different result.

SUMMARY OF ARGUMENT

The conviction and sentence entered in this case was rendered by a Court which was improperly sitting as a judicial body. Judge Starrett was improperly appointed to this case and in violation of state law since the trial judge which recused itself never presented the matter to the Chief Justice of the Mississippi Supreme Court to be assigned a judge in accord with Mississippi Code Ann. § 9-1-105(1). The conviction and sentence imposed by a Court which was improperly setting should be null and void as a matter of law.

ARGUMENT

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., Coleman v. State, 533 So.2d 1118, 1124 (Miss. 1988); Reynolds v. State, 521 So.2d 914, 917 (Miss. 1988).

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 Gary Lewis was denied his Sixth Amendment right to effective assistance of counsel where his attorney, representing him during criminal charges of sales of cocaine failed to adequately represent Appellant by failing to object where trial court accepted plea and imposed sentence without determining that Appellant knew elements or charges and without advising Appellant of the right to appeal the sentence as such right was recognized and carved out by the case law determinations of the Mississippi Supreme Court with the full force and effect, and impact as would be applicable in the case of any other law.

In Jackson v. State, 815 So.2d 1196 (Miss. 2002), the Court held the following in regards to ineffective assistance of counsel:.

> Our standard of review for a claim of ineffective assistance of counsel is a two-part test: the defendant must prove, under the totality of the circumstances, that (1) his attorney's performance was deficient and (2) the deficiency deprived the defendant of a fair trial. Hiter v. State, 660 So.2d 961, 965 (Miss. 1995).
>
> Anyone claiming ineffective assistance of counsel has the burden of proving, not only that counsel's performance was deficient but also that he was prejudiced thereby. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Additionally, the defendant must show that there is a reasonable probability that, but for 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).

Lewis would point out that his attorney was grossly ineffective in allowing the initial judge assigned this case to disqualify himself and self appoint another judge from the same judicial district who was subsequently found to be ineligible to preside over another case which was a companion to the present case. Defense never objected to the illegal participation and actions of the court. The trial court's order denying the PCR fails to address this claim sufficiently. The court was without jurisdiction to take such actions which cause any sentence and conviction entered to be illegal. Lewis would assert that defense counsel was deficient and prejudicial in such actions where he clearly failed to protect the rights of Appellant and allowed Appellant to be sentenced by a court which had been disqualified in a case which was connected to this case and part of the same prosecution and investigation.

In Ward v. State, 935 So.2d 1047 (Miss. 2005), the Supreme Court held the following:

> Effective assistance of counsel contemplates counsel's familiarity with the law that controls his client's case. See Strickland v Washington 466 U.S. 6668, 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 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); 473 So. 2d 964, 969 (Miss. 1985) (explaining that the basic duties of criminal defense attorneys include the duty to advocate the defendant's case; remanding for consideration of claim of ineffectiveness where the defendant alleged that him attorney did not know the relevant law).

In the instant case, defense counsel failed to take action to prohibit the court from appointing a judge to sit who was also disqualified and where the court had no jurisdiction to make such an appointment. Miss. Code Ann § 9-1-105(1) provides the following:

> (1) Whenever any judicial officer is unwilling or unable to hear a case or unable to hold or attend any of the courts at the time and place required by law by reason of the physical disability or sickness of such judicial officer, by reason of the absence of such judicial officer from the state, by reason of the

> disqualification of such judicial officer pursuant to the provision of Section 165, Mississippi Constitution of 1890, or any provision of the Code of Judicial Conduct, or for any other reason, the Chief Justice of the Mississippi Supreme Court, with the advice and consent of a majority of the justices of the Mississippi Supreme Court, may appoint a person as a special judge to hear the case or attend and hold a court.

To successfully claim ineffective assistance of counsel, a 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).

The trial court never fully addressed this issue before denying post conviction relief in this case. This Court should not deny review in this issue and should dispose of this issue on the merits.

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

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

on the meaning of the constitutional requirement of effective assistance in the latter class of cases - that is, those presenting claims of "actual ineffectiveness." In giving meaning to the requirement, however, we must take its purpose - to ensure a fair trial - as the guide. The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result. The same principle applies to a capital sentencing proceeding such as that provided by Florida law. We need not consider the role of counsel in an ordinary sentencing, which may involve informal proceedings and standardless discretion in the sentencer, and hence may require a different approach to the definition of constitutionally effective assistance. A capital sentencing proceeding like the one involved in this case, however, is sufficiently like a trial in its adversarial format and in the existence of standards for decision, see Barclay [466 U.S. 668, 687] v. Florida, 463 U.S. 939, 952 -954 (1983); Bullington v. Missouri, 451 U.S. 430 (1981), that counsel's role in the proceeding is comparable to counsel's role at trial - to ensure that the adversarial testing process works to produce a just result under the standards governing decision. For purposes of describing counsel's duties, therefore, Florida's capital sentencing proceeding need not be distinguished from an ordinary trial.

III

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

A

As all the Federal Courts of Appeals have now held, the proper standard for attorney performance is that of reasonably effective assistance. See Trapnell v. United States, 725 F.2d, at 151-152. The Court indirectly recognized as much when it stated in McMann v. Richardson, supra, at 770, 771, that a guilty plea cannot be attacked as based on inadequate legal advice unless counsel was not "a reasonably competent attorney" and the advice was not "within the range of competence demanded of attorneys in criminal cases." See also Cuyler v. Sullivan, supra, at 344. When a convicted defendant [466 U.S. 668, 688] complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness. More specific guidelines are not appropriate. The Sixth Amendment refers

simply to "counsel," not specifying particular requirements of effective assistance. It relies instead on the legal profession's maintenance of standards sufficient to justify the law's presumption that counsel will fulfill the role in the adversary process that the Amendment envisions. See Richard 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 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 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 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). ~n ineffective assistance claim asserts the absence of one of the crucial assurances that the result of the proceeding is reliable, so finality concerns are somewhat weaker and the appropriate standard of prejudice should be somewhat lower. The result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome. Accordingly, the appropriate test for prejudice finds its roots in the test for materiality of exculpatory information not disclosed to the defense by the prosecution, United States v. Agurs, 427 U.S., at 104 , 112-113, and in the test for materiality of testimony made unavailable to the defense by Government deportation of a witness, United States v. Valenzuela-Bernal, supra, at 872-874. The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. In making the determination whether the specified errors resulted in the required prejudice, a court should presume, absent challenge to the judgment on grounds of evidentiary insufficiency, that the judge or jury acted according to law. [466 U.S. 668, 695] An assessment of the likelihood of a result more favorable to the defendant must exclude

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

V.

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.

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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 Gary Lewis has suffered a violation of his constitutional rights to effective assistance of counsel, in violation of the 6th Amendment to the United States Constitution. Defense counsel should have made the appropriate objections to the court's actions and moved the court to allow the Supreme Court Justice to appoint a special judge in accord with the law.

The Supreme Court has repeatedly held that an allegation that counsel for a defendant failed to advise him of the range of punishment to which he was subject to gives rise to a question of fact about the attorney's constitutional proficiency that is to be determined in the trial Court. See: Nelson v. State, 626 So.2d 121, 127 (Miss. 1993) [The failure to accurately advise Nelson of the possible consequences of a finding of guilt in the absence of a plea bargain ... may, of proven, be sufficient to meet the test in Strickland v. Washington See also: Alexander v. State, 605 So.2d 1170 (Miss. 1992). [Emphasizing that where a criminal defendant alleges that he pleaded guilty to a crime

without having been advised by his attorney of the applicable maximum and minimum sentences is a question of fact which raises concerns whether the attorney's conduct was deficient).

The 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 as being an illegal conviction and sentence entered by a court which had no legal jurisdiction.

B.

THE PLEA OF GUILTY MADE BY LEWIS IS INVALID

Lewis entered a plea of guilty to sale of cocaine. Such plea of guilty was made without Lewis fully admitting the elements or proof and without the trial court making Coleman aware that the sentence imposed on such offense could be appealed independently of the fact that a plea was entered.

The record should clearly show that during the plea colloquy Lewis did not admit to the required elements of law which must be admitted before a plea of guilty may be accepted. There was no admission by Lewis that he knowingly conspired or sold cocaine or that his actions were committed within the judicial district of the court. Based upon what Lewis would recall which occurred in the courtroom, Lewis would assert that he never clearly stated to the court that any such actions were committed while he know such actions to be violative of the law. The plea was not voluntary under these circumstances.

C.

THE COURT WAS WITHOUT STATUTORY JURISDICTION TO APPOINT JUDGE FROM SAME DISTRICT WHICH CAUSES FUNDAMENTAL VIOLATION AND MAKES CONVICTION AND SENTENCE RENDERED ILLEGAL

The Circuit Court Judge initially assigned to this case entered an order, on the court's own motion, recusing itself and appointing a judge from the same judicial district to preside in the proceedings. Such actions were taken by the court on September 25, 2003. on October 8, 2003, Honorable Keith Starrett, the same judge who was appointed to this case by the initial circuit judge who entered an order disqualifying himself from the companion cases and moving the Supreme Court Chief Justice to appoint a special judge.

It is clear from the facts of this case that Judge Starrett, who recognized himself was not qualified to sit in another Cause No. 03-168-KB-KA, against this same defendant, was not qualified to sit in this case.

The law is clear that once a judge is disqualified to preside over a case, whether unwilling, unable because of sickness, disability, or any other reason, the Chief Justice of the Supreme Court has sole statutory authority to appoint a special judge to preside.

Miss. Code Ann. §9-1-105 provides the following requirements:

> § 9-1-105. Physical disability or sickness; absence of judicial officer from state, etc.; appointment of special judge to serve on emergency basis.
>
> (1) Whenever any judicial officer is unwilling or unable to hear a case or unable to hold or attend any of the courts at the time and place required by law by reason of the physical disability or sickness of such judicial officer, by reason of the absence of such judicial officer from the state, by reason of the disqualification of such judicial officer pursuant to the provision of Section 165, Mississippi Constitution of 1890, or any provision of the Code of Judicial Conduct, or for any other reason, the Chief Justice of the Mississippi Supreme Court, with the advice and consent of a majority of the justices of the Mississippi Supreme Court, may

appoint a person as a special judge to hear the case or attend and hold a court.

(2) Upon the request of the Chief Judge of the Court of Appeals or the senior judge of a chancery or circuit court district, or upon his own motion, the Chief Justice of the Mississippi Supreme Court, with the advice and consent of a majority of the justices of the Mississippi Supreme Court, shall have the authority to appoint a special judge to serve on a temporary basis in a circuit or chancery court in the event of an emergency or overcrowded docket. It shall be the duty of any special judge so appointed to assist the court to which he is assigned in the disposition of causes so pending in such court for whatever period of time is designated by the Chief Justice.

(3) When a vacancy exists for any of the reasons enumerated in Section 9-1-103, the vacancy has not been filled within seven (7) days by an appointment by the Governor, and there is a pending cause or are pending causes in the court where the vacancy exists that in the interests of justice and in the orderly dispatch of the court's business require the appointment of a special judge, the Chief Justice of the Supreme Court, with the advice and consent of a majority of the justices of the Mississippi Supreme Court, may appoint a qualified person as a special judge to fill the vacancy until the Governor makes his appointment and such appointee has taken the oath of office.

(4) If the Chief Justice pursuant to this section shall make an appointment within the authority vested in the Governor by reason of Section 165, Mississippi Constitution of 1890, the Governor may at his election appoint a person to so serve. In the event that the Governor makes such an appointment, any appointment made by the Chief Justice pursuant to this section shall be void and of no further force or effect from the date of the Governor's appointment.

(5) When a judicial officer is unwilling or unable to hear a case or unable or unwilling to hold court for a period of time not to exceed two (2) weeks, the trial judge or judges of the affected district or county and other trial judges may agree among themselves regarding the appointment of a person for such case or such limited period of time. The trial judges shall submit a notice to the Chief Justice of the Supreme Court informing him of their appointment. If the Chief Justice does not appoint another person to serve as special judge within seven (7) days after receipt of such notice, the person designated in such order shall be deemed appointed.

(6) A person appointed to serve as a special judge may be any currently sitting or retired chancery, circuit or county court judge, Court of Appeals judge or Supreme Court Justice, or any other person possessing the qualifications of the judicial office for which the appointment is made; provided, however, that a judge or justice who was retired from service at the polls shall not be eligible for appointment as a special judge in the

district in which he served prior to his defeat.

(7) Except as otherwise provided in subsection (2) of this section, the need for an appointment pursuant to this section may be certified to the Chief Justice of the Mississippi Supreme Court by any attorney in good standing or other officer of the court.

(8) The order appointing a person as a special judge pursuant to this section shall describe as specifically as possible the duration of the appointment.

(9) A special judge appointed pursuant to this section shall take the oath of office, if necessary, and shall, for the duration of his appointment, enjoy the full power and authority of the office to which he is appointed.

(10) Any currently sitting justice or judge appointed as a special judge under this section shall receive no additional compensation for his or her service as special judge. Any other person appointed as a special judge hereunder shall, for the period of his service, receive compensation from the state for each day's service a sum equal to 1/260 of the current salary in effect for the judicial office; provided, however, that no retired chancery, circuit or county court judge, retired Court of Appeals judge or any retired Supreme Court Justice appointed as a special judge pursuant to this section may, during any fiscal year, receive compensation in excess of twenty-five percent (25%) of the current salary in effect for a chancery or circuit court judge. Any person appointed as a special judge shall be reimbursed for travel expenses incurred in the performance of the official duties to which he may be appointed hereunder in the same manner as other public officials and employees as provided by Section 25-3-41, Mississippi Code of 1972.

(11) If any person appointed as such special judge is receiving retirement benefits by virtue of the provisions of the Public Employees' Retirement Law of 1952, appearing as Sections 25-11-1 through 25-11-139, Mississippi Code of 1972, such benefits shall not be reduced in any sum whatsoever because of such service, nor shall any sum be deducted as contributions toward retirement under said law.

12) The Supreme Court shall have authority to prescribe rules and regulations reasonably necessary to implement and give effect to the provisions of this section.

(13) Nothing in this section shall abrogate the right of attorneys engaged in a case to agree upon a member of the bar to preside in a case pursuant to Section 165 of the Mississippi Constitution of 1890.

(14) The Supreme Court shall prepare the necessary payroll for special judges appointed pursuant to this section and shall submit such payroll to the Department of Finance and Administration.

> (15) Special judges appointed pursuant to this section shall direct requests for reimbursement for travel expenses authorized pursuant to this section to the Supreme Court and the Supreme Court shall submit such requests to the Department of Finance and Administration. The Supreme Court shall have the power to adopt rules and regulations regarding the administration of travel expenses authorized pursuant to this section.

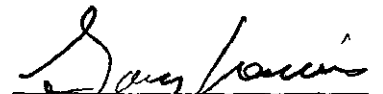
The trial court's actions in appointing Judge Starrett were illegal. The PCR motion should have been granted on this claim. Moreover, any sentence and convictions rendered by Judge Starrett, who was presiding illegally, are illegal. Judge Starrett confirmed that he was not qualified to participate in such proceedings when he recused himself from a companion case which was part of the same prosecutions, investigations, and set of circumstances. The state's position was that such cases were part of an organization which was conducting drug activity. All such cases were connected.

This court should find that the sentences imposed upon Lewis were illegal where the court was illegally assigned to such case and was also not qualified to proceed. This court should vacate the conviction and sentence.

CONCLUSION

Lewis respectfully submits that based on the authorities cited herein and in support of his brief, that this Court should reverse and remand this case or reverse and render the conviction.

Respectfully submitted:

BY: 

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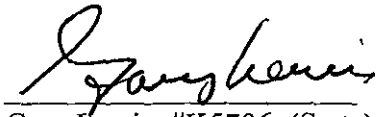
CERTIFICATE OF SERVICE

This is to certify that I, Gary Lewis, have this date served a true and correct copy of the above and foregoing Brief for Appellant, by United States Postal service, first class postage prepaid, to: Honorable Jim Hood, Attorney General, P. O. Box 220, Jackson, MS 39205; Honorable Dewitt Bates, Jr. District Attorney, 284 E. Bay Street, Magnolia, MS 39652; Honorable David Strong, Circuit Court Judge, P. O. Box 1387, McComb, MS 39649.

This, the 28, day of October, 2009.

BY: 

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