CASE NO. 2008-KA-00313-COA

COURT OF APPEALS OF THE STATE OF MISSISSIPPI

CHRISTOPHER KEON DRUMMOND
APPELLANT/Appellant

VS.

STATE OF MISSISSIPPI
APPELLEE/PLAINTIFF

APPEAL FROM THE CIRCUIT COURT OF FIRST JUDICIAL DISTRICT OF HARRISON COUNTY, MISSISSIPPI

APPELLANT'S OPENING BRIEF

ORAL ARGUMENT NOT REQUESTED

BY: Christopher Drummond

Christopher Drummond, #t4738
Unit 29-B
P. O. Box 1057
Parchman, Ms 38738

Appellant, pro se

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DISTRICT OF HARRISON COUNTY, MISSISSIPPI

ORAL ARGUMENT NOT REQUESTED

I.

STATEMENT REGARDING ORAL ARGUMENT

Appellant does not specifically request oral argument in this case as it is believed that the issues are capable of being adequately briefed by the parties. However, in the event the Court believes oral arguments would be helpful or beneficial to the Court then Appellant does not oppose oral argument and would in the court's discretion, as that counsel be appointed to deliver such oral argument for Appellant.

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II.

CERTIFICATE OF INTERESTED PERSONS

The undersigned Appellant, Christopher Drummond, certifies that the following listed persons have interested in the outcome of this case. The representation are made in order that the Justices of this Court may evaluate possible disqualification or recusal.

1. Appellant, Christopher Drummond Appellant pro se
2. Honorable Jim Hood, and staff, Attorney General
3. Honorable Stephen Simpson, Circuit Court Judge
4. Honorable Christopher Schmitt, Assistant District Attorney
5. Honorable Kirk Clark, Assistant District Attorney
6. Honorable Glen Rishel, Defense Attorney on Appeal

Respectfully submitted,

BY: Christopher Drummond

Christopher Drummond, #T4738
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Appellant pro se

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III.

STATEMENT OF THE ISSUES

ISSUE ONE

Whether verdict of Jury was against overwhelming weight of evidence.

ISSUE TWO:

Ineffective Assistance of Counsel At Trial, in violation of the Sixth Amendment to the United States Constitution

ISSUE THREE:

Whether trial court erred in allowing witness to testify to hearsay information. (Tr. 17)

ISSUE FOUR:

Whether Appellant was denied his constitution and statutory right to speedy trial.

ISSUE FIVE:

Whether Appellant suffered cumulative error which caused him to be deprived of his constitutional right to a fair trial in violation of the 5th and 14th Amendment to the United States Constitution.

IV.

STATEMENT OF INCARCERATION

The Appellant is presently incarcerated and is being housed in the Mississippi Department of Corrections at Lucedale, Mississippi, in service of the term imposed in this case. Appellant has been continuously confined, in regards to such sentence, since date of conviction and imposition by the trial court.

V.

STATEMENT OF CASE

This case involves a criminal conviction against Christopher Drummond (also referred to as, Appellant or Drummond) for a February 17, 2007 Aggravated Assault. Following that date, Drummond was subsequently arrested and indicted by a grand jury under a one count indictment filed May 1, 2007. Drummond was found guilty and sentenced to serve 20 years in the Mississippi Department of Corrections on December 13, 2007. (C.P. 33-34)

Drummond was indicted as the sole person who committed the offense. While there was evidence that Doris Ducksworth actually sit the crime up, Ducksworth was not charged and did, in fact, testify for the state.

Appellant Drummond perfected an appeal of the conviction and sentence of the Circuit Court of Scott County, Mississippi.

Appellant Drummond is now proceeding with the prosecution of his brief on appeal to this Court pro se.

I.

ARGUMENT

ISSUE ONE

Whether verdict of Jury was against overwhelming weight of evidence

The verdict of the jury was against the overwhelming weight of evidence and contrary to law, and the court should have granted Appellant's Motion to Dismiss or for Direct Verdict. Appellant Drummond defense at trial was actual innocence. Appellant Drummond moved for a directed verdict at the end of State presentation of evidence and at the close of State case due to the fact that the State failed to prove Appellant Drummond was guilty of the offense charged. The state failed to present adequate proof to allow the case to proceed to a jury. The presentation by the State demonstrates that the motion should have been granted. The state only presented the testimony of the Doris Duckworth as conclusive testimony that Appellant committed the crime. The victim did not identify Appellant and only knew Ms. Duckworth when Duckworth lured the victim from his home into the street to be shot.

The prosecution built it's case against Drummond upon the testimony of Ducksworth, a person who should have been charged with conspiracy. Evidence presented at trial demonstrated that Duckworth was a drug user who had a motive to acquire the missing drugs. While Duckworth testified that she did not use drugs, evidence by other witnesses proved that she did.

ISSUE TWO

Ineffective Assistance of Counsel At Trial, in violation of the Sixth Amendment to the United States Constitution

To prevail on an ineffective assistance of counsel claim the complaining party must satisfy the well-established two prong test. First the party must show that counsel's performance was objectively deficient. Then the party must show that, but for counsel's deficient performance, there is a reasonable probability that the result of the trial would have been different. Gilliard v. State, 462 So.2d 710, 714 (Miss. 1985).

Drummond was subjected to ineffective assistance of counsel. 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 reconsideration of claim of ineffectiveness where the Appellant alleged that his attorney did not know the relevant law.

This Court should conclude that here counsel rendered ineffective assistance of counsel and that such ineffectiveness prejudices Appellant's conviction in such a way as to mandate a reversal of conviction as well as the sentence imposed. Defense counsel was charged with knowing the law and being familiar with the record and evidence.

In Jackson v. State, 815 So. 2d 1196 (Miss. 2002), the Supreme 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) his 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). This review is highly deferential to the attorney, with a strong presumption that the attorney's conduct fell within the wide range of reasonable professional assistance. Id. at 965. With respect to the overall performance of the attorney, "counsel's choice of whether or not to file certain motions, call witnesses, ask certain questions, or make certain objections fall within the ambit of trial strategy" and cannot give rise to an ineffective assistance of counsel claim. Cole v. State, 666 So.2d 767, 777 (Miss.1995).

> [7] [8] [9] ¶ 9. 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 his attorney's errors, he would have received a different result in the trial court. Nicolaou v. State, 612 So.2d 1080, 1086 (Miss.1992). Finally, the court must then determine whether counsel's performance was both deficient and prejudicial based upon the totality of the circumstances. Carney v. State, 525 So.2d 776, 780 (Miss.1988).

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; Gillard v. State, 462 So.2d 710, 714 (Miss. 1985). The Appellant must show that there is a reasonable probability that for his 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. 688, 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 his plurality opinion in United States v. Decoster, 199 U.S. App. D.C. 359, 371, 374-375, 624 F.2d 196, 208, 211-212 (en banc), cert. denied, 444 U.S. 944 (1979), and adopted by the State of Florida in Knight v. State, 394 So.2d, at 1001, a standard that requires a showing that specified deficient conduct of counsel was likely to have affected the outcome of the proceeding. 693 F.2d, at 1261-1262. For these reasons, we granted certiorari to consider the standards by which to judge a contention that the Constitution requires that a criminal judgment be overturned because of the actual ineffective assistance of counsel. 462 U.S. 1105 (1983). We agree with the Court of Appeals that the exhaustion rule requiring dismissal of mixed petitions, though to be strictly enforced, is not jurisdictional. See Rose v. Lundy, 455 U.S., at 515 -520. We therefore address the merits of the constitutional issue.
>
> II
>
> In a long line of cases that includes Powell v. Alabama, 287 U.S. 45 (1932), Drummond v. Zerbst, 304 U.S. 458 (1938), and Gideon v. Wainwright, 372 U.S. 335 (1963), this Court has recognized that the Sixth Amendment right to counsel exists, and is needed, in order to protect the fundamental right to a fair trial. The Constitution guarantees a fair trial through [466 U.S. 668, 685] the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment, including the Counsel Clause: "In all criminal prosecutions,

the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence." Thus, a fair trial is one in which evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding. The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel's skill and knowledge is necessary to accord defendants the "ample opportunity to meet the case of the prosecution" to which they are entitled. Adams v. United States ex rel. McCann, 317 U.S. 269, 275 , 276 (1942); see Powell v. Alabama, supra, at 68-69.

Because of the vital importance of counsel's assistance, this Court has held that, with certain exceptions, a person accused of a federal or state crime has the right to have counsel appointed if retained counsel cannot be obtained. See Argersinger v. Hamlin, 407 U.S. 25 (1972); Gideon v. Wainwright, supra; Drummond 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 Appellant'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 Michel

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 Appellant'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 Appellant'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 Appellant'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 his lawyer's performance." Cuyler v. Sullivan, supra, at 350, 348 (footnote omitted). [466 U.S. 668, 693] Conflict of interest claims aside, actual ineffectiveness claims alleging a deficiency in attorney performance are subject to a general requirement

that the 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. Drummond, 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).

Defense counsel, during the State's direct examination of Larry Moffett, the victim of the crime, failed to object when the state was attempting to elicit hearsay testimony from Moffett regarding Moffett telling the Police who shot him and where the alleged shooter lived. Moffett initially testified to the court as follows:

A. You know, and that's when someone, you know, the guy jumped out the van run over to the car.

Q. Can you describe the person that got out of the van?

A. It was night.

Q. Okay. Let me ask you this, do you know whether it was a male or a female?

A. It was a male.

Q. Do you know whether he was black or white?

A. He was black.

Q. A black male. Do you recall anything about what he was wearing?

A. I didn't pay any attention because by the time I turned around, you know.

Q. Okay. Did you have an occasion to see or be able to tell if it was a young person or old person?

A. I think the guy was kind of young.

Q. Okay. Would you recognize him and know who it was?

A. No. I couldn't -- you know, I couldn't -- as of right now, I couldn't recognize him.

Q. About how long did this take? How quick or how slow did this scenario take?

A. Okay. By the time the guy jumped out of the van and walked around, he said I took something from him. Before I could say anything, you know he had shot me. (Tr. 14-15)

ISSUE THREE:

Whether trial court erred in allowing witness to testify to hearsay information. (Tr. 17)

Moffett's testimony at trial demonstrate that he could not identify the person who shot him on the right of the shooting and could not identify that person at trial. However, the prosecution, not accepting Moffett's testimony attempted to impeach his own witness by the following actions.

Q. Okay. Do you recall being on the scene when you were shot and giving any kind of information to the policemen who first arrived there about who a possible suspect might be?

A. All I remember saying that I got shot.

Q. Do you recall giving any information about where the suspect might have lived?

MR. RISHEL: Your Honor, could we object to the leading questions.

THE COURT: Overruled.

BY MR. SCHMIDT:

Q. If you recall, Mr. Moffett. If you don't recall, that's okay.

A. No, I don't recall.

Q. You don't remember?

A. What was the question again, sir?

Q. I was asking you if you remember telling the policeman anything about where the person responsible for your shooting you had lived, where he stayed.

A. I think I said something about he stayed on Stewart Avenue I think.

Q. Did you know the person that shot you?

A. I've heard of his name, you know, but, no, I've never seen the boy before in my life.

Q. As far as at the time you got shot --

A. Did I know who did it?

Q. Yes, sir.

A. No, I couldn't tell.

Q. Today if you saw any faces, would you know who the person was?

A. Right now, sir, I couldn't even tell you, you know what I mean, to be honest with you, I couldn't tell you who it was, you know, ***because she said who shot me***. But I never seen the boy before in my life.[1]

Q. I want to ask if your answers just reflect what you know from your own observations and not what anybody else has told you. As of today, you don't know the actual person who shot you, do you?

A. No, sir.

---

[1] The trial court should not have allow the witness to testify to this hearsay testimony. The witness was actually telling the Jury what he had been told to say by Doris Ducksworth.

Q. Okay. Do you recall looking at some photographs later on in the hospital? Excuse me, recall looking at some photographs and being asked if anybody in there was the person responsible?

A. Yeah, I recall that, but, you know.

Q. At that time could you find the person?

A. I couldn't. No. I was delirious. I couldn't. (Tr. 16018)

While the defense attorney objected to the state attempting to impeach it's own witness, there was not an objection when the state attempted and elicited hearsay testimony from the witness and the witness stated in his testimony that he was only testifying to what she had told him. Such action clearly constitutes ineffective assistance of counsel when counsel allowed this hearsay testimony to come before the jury without the state having first put on the witness who actually gave Moffett the statements to present, Doris Duckworth or Doris Price.

On cross examination Moffett again testified that he did not know who shot him and that he was unaware of any black male living on Stewart Avenue where he had moved furniture. (Tr. 23) Defense counsel never attempted to impeach Moffett with his prior testimony that he had testified Doris told him what to tell the Police as to who shot him. (Tr. 23)

ISSUE FOUR

Whether Appellant was denied his constitution and statutory right to speedy trial.

Appellant Drummond was arrested and charged with this offense on July 14, 2006 (Tr. 105) Appellant Drummond was indicted May 1, 2007.(cp. 6) Appellant Drummond waived arraignment on August 6, 2007. (cp. 8). Drummond trial began on December 12, 2007. (Tr. 1) Drummond trial in order to get certain witnesses in a position which would force them to testify

for the state, i.e., Doris Ducksworth, Melissa Darr. Both witnesses testified favorable to the state after having criminal matters hanging in the balance.

"Miss Code Ann. §99-17-1 provides: Unless good cause be shown, and a continuance duly granted by the court, all offense for which indictments are presented to the court shall be tried no later than (270) days after accused has been arraigned."

Appellant Durmmond waived arraignment which actions triggered the running of the clock for statutory speedy trial purposes. Miss. Code Ann §99-17-1. In Perry v. State, 419 So.2d 194 (Miss. 1992), the court stated the constitutional right to a speedy trial, unlike the statutory right under §99-17-1, attaches at the time of a formal indictment or information, or when a person has been arrested. In short, the constitutional right to a speedy trial attaches when a person has been accused. Beavers v. State, 498 So.2d 788, 789-90 (Miss. 1986); Bailey v. State, 463 So.2d 1059, 1062 (Miss. 1985). Appellant Drummond's constitutional speedy trial right commenced on May 30, 2006, the date he was arrested. (Tr. 105)

Where a defendant's rights to a speedy trial has attached, the balancing test set out in Barker v. Wingo, 407 U.S. 514, 92 S. Ct. 2181, 33L.Ed2d 101 (1972) must be applied to determine whether that right has been denied. The Baker court identified for factors which are to be considered in making such a determination:

(1) the length of delay;

(2) the reason for delay;

(3) Whether Appellant has asserted his right to a speedy trial; and

(4) Whether Appellant has been prejudiced by the delay.

No one of these factors is in itself, dispositive. Rather, they must be considered together, in light of all the circumstances. Baker, 407 U.S. at 533, 92 S.Ct. at 2193.

LENGTH OF DELAY

This factor, according to the Barker Court, "is to some extent a triggering mechanism. Appellant Drummond was arrested May 30, 2006 and his trial began December 12, 2007. This delay, more than one (1) year is itself prejudicial and establish Appellant Drummond right to a speedy trial was violated. This is enough to warrant t close examination of the other Barker factors. In Bailey v. State, supra, 463 So2d at 1062, this court found delay of 298 days to be a substantial enough period of time to require a balancing of all Barker factors. In Beavers v. State, supra, 498 So2d at 790, this court found a delay of 423 days was sufficient to require reversal" in the absence of the other Barker factors pointing in favor of the prosecution (or in the absence of the Appellant position on the other Barker factors being weak)." See U.S. v. Greer, 655 F2d 5153 (1981), this court found delay of 357 days is long enough to trigger the requirement of inquiry into the other Barker factors.

REASON FOR DELAY

The state knowingly delayed Appellant Drummond's trial which was set for December 12, 2007. At that trial Melissa Durr and Doris Ducksworth, both convicted felons, testified against Appellant. The trial was delayed by the state in order to accomplish and secure this testimony which was prejudicial to Appellant. In Perry v. State, supra, this court stated:

> In the case at bar, the prosecution provided no excuse for the delay. Where the Appellant has not caused the delay and where prosecution has declined to show good cause for the delay, we must weigh this factor against prosecution. It is the burden of the state to see that a Appellant receives a speedy trial. 419 So2d at 199. Accord Vickery v. State, 535 So2d 1371, 1375 (Miss. 1988); Beavers v. State,

supra 498 Sp2d at 791; Bailey v. State, supra, 463, So2d at 1062. See also Burgess v. State, 473 So2d 432 (Miss. 1985).

Drummond's arrest came on May 30, 2006. Drummond waived arraignment on August 2, 2007. Trial was set for October 15, 2007. (C.P. 5)

The record affirmatively demonstrated that approximately 677 days expired between the time of McClendon's initial arrest until his trial. The record does not show that any of this time can be attributed to McClendon.

DEFENDANT'S ASSERTION OF HIS RIGHT TO SPEEDY TRIAL

Appellant Drummond did not assert his right to a speedy trial. However, Drummond had no duty to being himself to trial and no obligation to assert such right. Appellant Drummond did not waive his right to a speedy trial.

PREJUDICE TO DEFENDANT

In order to prevail on a motion to dismiss the charges against him for failure to provide a speedy trial, a defendant is not required to affirmatively show prejudice; however, "an absence of prejudice weighs against a finding of a violation" of constitutional rights. *Murray v. State*, 967 So. 2d 1222, 1232 (¶30) (Miss. 2007) (quoting *Atterberry v. State*, 667 So. 2d 622, 627 (Miss. 1995)). Prejudice may arise from a denial of liberty or actual prejudice in defending against charges brought by the State, and of these two forms of prejudice, actual prejudice is given more weight. *Id.* In this case, both types of prejudice should weigh in favor of McClendon.

No matter what the reason why McClendon was incarcerated while awaiting trial, he was definitely incarcerated. McClendon was unable to effectively prepare his defense and participate in the consultation of witnesses and other pretrial activity.

In weighing actual prejudice, the *Barker* Court expressly cautioned courts to note the potential defense advantage of delay, stating:

> Delay is not an uncommon defense tactic. As the time between the commission of the crime and trial lengthens, witnesses may become unavailable or their memories may fade. If the witnesses support the prosecution, its case will be weakened, sometimes seriously so. And it is the prosecution which carries the burden of proof. Thus, unlike the right to counsel or the right to be free from compelled self-incrimination, deprivation of the right to speedy trial does not *per se* prejudice the accused's ability to defend himself.

Barker, 407 U.S. at 521.

While this is the law regard the prejudice prong of the test, McClendon was prejudiced in this instant because of the delay. This Court should weight the prejudice factor of Barker in favor of McClendon where McClendon has prevailed on the length of delay. In this case there was a passage of time. McClendon was in jail during this period of time. Being in jail put McClendon at the mercy of his prison attendants.

This Court should reverse the verdict and find plain error was committed when the state failed to adhere to McClendon's motion for speedy trial.

ISSUE FIVE

Appellant suffered cumulative error which caused him to be deprived of his constitutional right to a a fair trial violation of the 5th and 14th Amendments to the United States Constitution.

Appellant asserts that even in the event this Honorable Court hold that each of the aforesaid claims raised, standing alone, does not constitute cause to grant relief, the cumulative effect of each acted to deprive Appellant Drummond of his constitutional right to a fair trial, as guaranteed to him under the Sixth and Fourteenth Amendments to the United States Constitution, and Article 3, Sections 14 and 26 of our Mississippi Constitution. Rainer v. State, 473 So.2d 172, 174 (Miss. 1985); Williams v. State, 445 So.2d 798, 814 (Miss. 1984).

In cases similar as the one presented here, the Supreme Court has not hesitated in reversing other defendants convictions and ordering a new trial, for "(a) fair trial is, after all, the reasons we have our system of justice; it is a paramount distinction between free and totalitarian societies." Drummond v. State, 476 So.2d 1195 (Miss. 1985), cited with approval in Fisher v. State, 481 So.2d 283 (Miss. 1985).

> *"It is one of the crowning glories of our law that, no matter how guilty one may be, no matter how atrocious his crime, nor how certain his doom when brought to trial anywhere, he shall, nevertheless, have the same fair and impartial trial accorded to the most innocent Appellant. Those safeguards crystallized into the constitution and laws of the land as the result of centuries of experience, must be, by the courts, sacredly upheld as well as in the case of the guiltiest as of the most innocent Appellant answering at the bar of his country. And it ought to be a reflection always potent in the public mind, that where the crime is atrocious, condemnations is sure, when all these safeguards are accorded the Appellant, and therefore the more atrocious the crime, the less need is there for any infringement of these safeguards." Tennison v. State, 79 Miss. 708, 713, 31 So. 421, 422 (1902), cited and quoted with approval in Drummond v. State, supra.*

The importance to which the Honorable Mississippi Supreme Court has jealously guarded and accused right to a fair trial and fair judicial process is further reflected in Cruthirds v. State, 2 So.2d 154 (Miss. 1941)

> *"The storm of opposition, brute force and hate which is sweeping across a large part of the universe has levered to the ground the temple of justice in many countries, and even in our own it has been shaken and broken in places, yet we may fervently hope that when the storm shall have spent its fury there will remain undisputed, as one of the foundational pillars of that temple, the right of all men, whether rich or poor, strong or weak, guilty or innocent, to a fair trial, orderly and impartial trial in the courts of the land. Id. at 146. ,*

The case sub judice falls within the perimeters of that described in Scarbrough v. State, 37 So.2d 748 (Miss. 1948):

> *"This is not one of those case for the application of the rule that a conviction will be affirmed unless it appears that another jury could reasonably reach a different verdict upon a proper trial then that returned on the former one, but rather it is a case where the constitutional right of an accused to a fair and impartial trial has been violated. When that is done, the Appellant is entitled to another trial regardless to the fact that the evidence on the first trial may have shown him to be guilty beyond every reasonable doubt. The law guarantees this to one accused of crime, and until he has had a fair an impartial trial within the meaning of the Constitution and the laws of the State, he is not to be deprived of his liberty by a sentence in the state penitentiary." Id. At 750.*

Since the right to a fair trial is a fundamental and essential right, under the form of our government, Drummond v. State, supra, there shall be no procedural bar to these assignments of error, which collectively denied Appellant Drummond his constitutional fundamental right to a fair trial, being raised for the first time in a post-conviction setting. Gallion, 469 So.2d 1247 (Miss. 1985).

Appellant Drummond did not receive a fair trial in this case when the trial judge order Appellant to be represented by an attorney whom he advised the judge he did not wanted to be represented by; when the trial judge did not allow Appellant to be represented by himself; when the trail judge ordered that Appellant be restrained throughout the trial and before the jury merely because the Appellant appeared to be shaking and the court reporter had made a complaint to the sheriff. Drummond had a right to appear nervous when his trial date had been moved up, the trial court refused to allow him a continuous to retain new counsel and the trial court refused to allow

him to dismiss the attorney whom he had retained. This would be sufficient to cause any sane person to appear nervous and was not essential grounds to restrain the Appellant before the jury.

This Court should reverse and render this case on the basis that the trial court deprived Appellant of his fundamental right to due process of law and a fair trial in forcing Appellant to proceed to trial with an attorney whom he had previously fired and in forcing Appellant to proceed to trial in cuffs and shackles.

Under the standards set forth above in Strickland, and by a demonstration of the record and the facts set forth in support of the claims in this case, it is clear that Drummond has suffered in violation of his constitutional rights to effective assistance of counsel, in violation of the 6th Amendment to the United States Constitution. This Court should reverse and remand for a new trial on this claim.

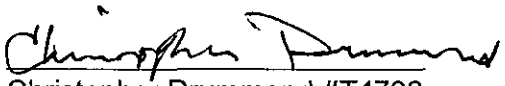
This Court should reverse and render this case on the basis that the trial court deprived Appellant of his fundamental right to due process of law and a fair trial in forcing Appellant to proceed to trial with an attorney whom he had previously fired and in forcing Appellant to proceed to trial in cuffs and shackles.

CONCLUSION

For the reasons and authority cited herein, Appellant Drummond submits that his conviction and sentence should be reversed rendered. In the alternative, Appellant Drummond's Conviction and sentence should be reversed to the trial court with instructions that a new trial be

granted consistent with the laws of the State of Mississippi. .

Respectfully submitted,

By: 

Christopher Drummond #T4738
Unit 29-B
Parchman MS 38738

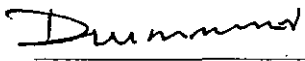
CERTIFICATE OF SERVICE

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

Honorable Jim Hood	Honorable Jack Thames	Honorable Marcus Gordon
Attorney General	Asst. District Attorney	Circuit Court Judge
P. O. Box 220	P. O. Box 603	P. O. Box 220
Jackson, MS 39205	Philadelphia, MS 39350	Decatur, MS 39327

This, the 24 day of October, 2008.

Respectfully submitted,

By: 

Christopher Drummond #T4738
Unit 29-B
Parchman MS 38738