

CASE NO. 2008-KA-00409-SCT  
IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

FERNANDO MARTINEZ PARKER  
APPELLANT /DEFENDANT

VS.

STATE OF MISSISSIPPI  
APPELLEE/PLAINTIFF

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APPEAL FROM THE CIRCUIT COURT OF  
COAHOMA COUNTY, MISSISSIPPI

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APPELLANT'S OPENING BRIEF

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II.

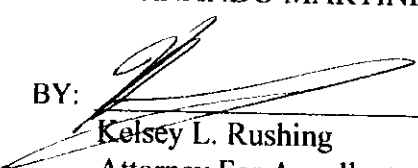
**CERTIFICATE OF INTERESTED PERSONS**

The undersigned certifies that the following listed persons have an interest 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. Fernando Martinez Parker, Appellant
2. Honorable Jim Hood, and staff, Attorney General
3. Honorable Larry O. Lewis, Circuit Court Judge
4. Honorable Kelsey L. Rushing, Appellant Attorney
5. Honorable Jennifer Musselwhite, Assistant District Attorney
6. Honorable Laurence Y. Mellen, District Attorney
7. Honorable Allen Shackelford, Defense Attorney at trial

Respectfully submitted,

FERNANDO MARTINEZ PARKER

BY: 

Kelsey L. Rushing  
Attorney For Appellant

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III.

STATEMENT OF THE ISSUES

ISSUE ONE

Defendant was provided with ineffective assistance of counsel at trial, as well as in pre-trial proceedings, in violation of the 6<sup>th</sup> Amendment to the United States Constitution.

ISSUE TWO:

The sentence imposed by the court of life without parole, pursuant to Miss. Code Ann. §97-3-19(g) constitutes an illegal sentence where the jury failed to make a determination of the elements required to impose such sentence.

ISSUE THREE:

The trial court erred in refusing to grant the Appellant's motion for directed verdict of acquittal at the close of the state's case, in refusing to grant Appellant's requested peremptory instruction and denying Appellant's Motion for Judgment Notwithstanding the Verdict as such verdict was contrary to law.

Appellant Fernando Martinez Parker is presently incarcerated and being housed in the Mississippi Department of Corrections at the Mississippi State Penitentiary in Parchman, Mississippi. Appellant has been continuously confined, in regards to such sentences, since the date of conviction and imposition of said sentences by the trial court.

#### STATEMENT OF INCARCERATION

#### IV.

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.

#### ISSUE SIX:

Appellant was subjected to double jeopardy where the crime of possession of a firearm on school property, as contained in Count I of the indictment, was used as an underlying offense to enhance the murder, as contained in Count II of the indictment, to capital murder so as to subject Appellant to life without parole and where Appellant was subsequently convicted of same possession of a firearm on school property, as contained in Count I of the indictment, and sentenced to a separate sentence.

#### ISSUE FIVE:

The trial Court erred in failing to order a competency hearing

#### ISSUE FOUR:

## STATEMENT OF CASE

This case arises from the conviction of Fernando Martinez Parker under a three (3) count indictment charging possession of a firearm on school property<sup>1</sup>, murder<sup>2</sup>, and aggravated

<sup>1</sup> § 97-37-17. Weapons possession on educational property

(1) The following definitions apply to this section:

- (a) "Educational property" shall mean any public or private school building or bus, public or private school campus, grounds, recreational area, athletic field, or other property owned, used or operated by any local school board, school, college or university board of trustees, or directors for the administration of any public or private educational institution or during a school related activity; provided however, that the term "educational property" shall not include any sixteenth section school land or lieu land on which is not located a school building, school campus, recreational area or athletic field.
- (b) "Student" shall mean a person enrolled in a public or private school, college or university, or a person who has been suspended or expelled within the last five (5) years from a public or private school, college or university, whether the person is an adult or a minor.
- (c) "Switchblade knife" shall mean a knife containing a blade or blades which open automatically by the release of a spring or a similar contrivance.
- (d) "Weapon" shall mean any device enumerated in subsection (2) or (4) of this section.

- (2) It shall be a felony for any person to possess or carry, whether openly or concealed, any gun, rifle, pistol or other firearm of any kind, or any dynamite cartridge, bomb, grenade, mine or powerful explosive on educational property. However, this subsection does not apply to a BB gun, air rifle or air pistol. Any person violating this subsection shall be guilty of a felony and, upon conviction thereof, shall be fined not more than Five Thousand Dollars (\$5,000.00), or committed to the custody of the State Department of Corrections for not more than three (3) years, or both.
- (3) It shall be a felony for any person to cause, encourage or aid a minor who is less than eighteen (18) years old to possess or carry, whether openly or concealed, any gun, rifle, pistol or other firearm of any kind, or any dynamite cartridge, bomb, grenade, mine or powerful explosive on educational property. However, this subsection does not apply to a BB gun, air rifle or air pistol. Any person violating this subsection shall be guilty of a felony and, upon conviction thereof, shall be fined not more than Five Thousand Dollars (\$5,000.00), or committed to the custody of the State Department of Corrections for not more than three (3) years, or both.

- (4) It shall be a misdemeanor for any person to possess or carry, whether openly or concealed, any BB gun, air rifle, air pistol, bowie knife, dirk, dagger, slingshot, leaded cane, switchblade, knife, blackjack, metallic knuckles, razors and razor blades (except solely for personal shaving), and any sharp-pointed or edged instrument except instructional supplies, unaltered nail files and clips used solely for preparation of food, instruction and maintenance on educational property. Any person violating this subsection shall be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than One Thousand Dollars (\$1,000.00), or be imprisoned not exceeding six (6) months, or both.

- (5) It shall be a misdemeanor for any person to cause, encourage or aid a minor who is less than eighteen (18) years old to possess or carry, whether openly or concealed, any BB gun, air rifle, air pistol, bowie knife, dirk, dagger, slingshot, leaded cane, switchblade, knife, blackjack, metallic knuckles, razors and razor blades (except solely for personal shaving) and any sharp-pointed or edged instrument except instructional supplies, unaltered nail files and clips used solely for preparation of food, instruction and maintenance on educational property. Any person violating this subsection shall be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than One Thousand Dollars (\$1,000.00), or be imprisoned not exceeding six (6) months, or both.

- (6) It shall not be a violation of this section for any person to possess or carry, whether openly or concealed, any gun, rifle, pistol or other firearm of any kind on educational property if:

- (a) The person is not a student attending school on any educational property;



(a) A weapon used solely for educational or school-sanctioned ceremonial purposes, or used in a school-approved program conducted under the supervision of an adult whose supervision has been approved by the school authority;

(b) Armed forces personnel of the United States, officers and soldiers of the militia and National Guard, law enforcement personnel, any private police employed by an educational institution, State Militia or Emergency Management Corps and any guard or patrolman in a state or municipal institution, when acting in the discharge of their official duties;

(c) Home schools as defined in the compulsory school attendance law, Section 37-13-91;

(d) Competitors while participating in organized shooting events;

(8) All schools shall post in public view a copy of the provisions of this section.

(b)(7)(C)-3-7(2)(b)

(2) A person is guilty of aggravated assault if he (a) attempts to cause or purposely or knowingly causes bodily injury to another with a deadly weapon or other means likely to produce death or serious bodily harm; and, upon conviction, he shall be punished by imprisonment in the county jail for not more than one (1) year or in the Penitentiary for not more than twenty (20) years. Provided, however, a person convicted of aggravated assault (a) upon a statewide elected official, law enforcement officer, fireman, emergency medical personnel, public health personnel, social worker employed by the Department of Human Services or another agency, superintendent, principal, teacher or other instructional personnel, school attendance officer, school bus driver, or a judge of a circuit, chancery, county, justice or youth court or a judge of the Court of Appeals or a justice of the Supreme Court, district attorney, legal assistant to a district attorney, county prosecutor, municipal prosecutor, court reporter employed by a court, court administrator, clerk or deputy clerk of the court, or public defender, while such statewide elected official, judge or justice, law enforcement officer, fireman, emergency medical personnel, public health personnel, social worker, superintendent, principal, teacher or other instructional personnel, school attendance officer, school bus driver, district attorney, legal assistant to a district attorney, county prosecutor, municipal prosecutor, court reporter employed by a court, court administrator, clerk or deputy clerk of the court, or public defender is acting within the scope of his duty, office or employment, or (b) upon a legislator while the Legislature is in regular or extraordinary session or while otherwise acting within the scope of his duty, office or employment, shall be punished by a fine of not more than Five Thousand Dollars (\$5,000.00) or by imprisonment for not more than thirty (30) years, or both.

Department of Corrections. (R. pp. 45-47).<sup>4</sup> Being aggrieved from the convictions and sentences, Appellant filed Notice of Appeal on March 6, 2009 and this appeal is proceeding accordingly.

## VI.

### SUMMARY OF ARGUMENTS

The Appellant was denied effective assistance of counsel in violation of his Sixth Amendment Right under the Constitution of the United States and the Constitution of the State of Mississippi. Appellant was represented at trial by Honorable Allen Shackelford, an attorney of Clarksdale, Mississippi. The record demonstrates numerous inconsistencies, deficiencies, and gross violations in the representation of Appellant during the pretrial proceedings, trial proceedings, and sentencing proceedings. Defense counsel never objected to the sentence of life without parole under an indictment which failed to meet the requirements of capital murder; defense counsel never objected to the trial court's treatment of such indictment and never raised the issue of double jeopardy. It is Appellants assertion that it was counsels responsibility to adequately investigate, to raise those issues set out in this brief, and to file a motion for new trial under appropriate claims where the jury returned a verdict of guilty on each count of the indictment. Thus, the case against the Appellant hinged on the testimony of the States purported experts. This critical errors committed by counsel resulted in a great prejudice to the Appellant, resulting in his convictions and sentence of life imprisonment without any possibility of parole.

Appellant asserts that his Sixth Amendment right to effective assistance of Counsel was violated because his attorney failed to render adequate and competence. Defense counsel never presented to the Court that capital murder was not alleged in the indictment and that a sentence of life without parole was not applicable. Moreover, defense counsel never pointed out to the trial court that applying a sentence of life without parole, which would only be a punishment applicable to capital murder, would be an illegal sentence and would create a double jeopardy issue where Appellant was also charged, by separate count, with possession of a firearm on school property. Additionally, defense counsel never raised a viable claim of competency which was available to the defendant and never presented the issue to the trial judge.

**APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES AND THE CONSTITUTION OF STATE OF MISSISSIPPI.**

**ISSUE ONE**

**ARGUMENT**

**VIII.**

Other facts will be stated throughout the briefing of the claims presented herein.

deliberated nor determined sentence in this case.

parole being the applicable punishment in the event of a finding of guilty. The trial jury never

The indictment did not charge capital murder and made no allegation or notice of life without

Appellant was represented at trial by Honorable Allen Shackelford of Clarksdale, Mississippi.

charging him with possession of a firearm on school property, murder, and aggravated assault.

Fernando Parker was indicted on November 30, 2004 in a multiple count indictment

**STATEMENT OF FACTS**

**VII.**

A claim for ineffective assistance of counsel is judged by the standard set forth in Strickland v. Washington, 466 U.S. 668, 688 (1984) and adopted by Mississippi Supreme Court in Stringer v. State, 454 So.2d 468 (Miss. 1984). The two inquiries which must be made under the Strickland standard are "(1) whether counsel's performance was deficient, and, if so (2) whether the deficient performance was prejudicial to the defendant in the sense that our confidence in the correctness of the outcome is undermined." Neal v. State, 525 So.2d 1279, 1281 (Miss. 1987) (citing Strickland v. Washington, 466 U.S. 668, 688 (1984)). Counsel's representation is deficient if the errors are so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. Strickland v. Washington, 466 U.S., at 687, The deficient performance is prejudicial to the defendant if counsel's errors are so serious as to deprive the defendant of a fair trial. Id. When applying the Strickland standard, there is a string presumption that counsel's conduct falls within the wide range of reasonable professional assistance. Strickland, 466 U.S. at 689; Schmitt v. State, 560 So.2d 148, 154 (Miss. 1990). "To overcome this presumption, (t)he 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, Schmitt, 550 So.2d at 154 (quoting Strickland, 466 U.S. at 694; Nicolaou v. State 612 So.2d 1080; 1086 (Miss. 1992). The defendant has the burden to satisfy both prongs of the test. Edwards v. State, 615 So.2d 590, 596 (Miss. 1993). If either part of the test, deficient performance or prejudice, is not satisfied then the claim must fail.

In the present case, the Appellant asserts that his attorney failed to defend him against the double jeopardy actions of the trial court and failed to defend when the trial court imposed a sentence of life without parole where there was no authority to impose such sentence under the

charges of the indictment filed in this case.<sup>5</sup> First, Appellant would point out that the deficiency of defense counsel, Shackelford, resulting in the greatest prejudice was his failure to preserve the claims here by filing a motion for new trial or objection to the imposition of the sentence imposed by the trial court.

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 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). 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).

Anyone claiming ineffective assistance of counsel has the burden of proving, not only that counsel's performance was deficient but also that he was prejudiced thereby. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Additionally, the defendant must show that there is a reasonable probability that, but for his attorney's errors, he would have received a different result in the trial court. Nicolaou v. State, 612 So.2d 1080, 1086 (Miss.1992). Finally, the court must then determine whether counsel's performance was both deficient and prejudicial based upon the totality of the circumstances. Carney v. State, 525 So.2d 776, 780 (Miss.1988).

Again, in the instant case now before this Court, Appellant Parker would assert that there is absolutely no question that his attorney was deficient. As a matter of law, the Court had no authority to impose a sentence of life without parole for a charge and conviction of simple murder. The first prong of the test outlined in Strickland v. Washington, 466 U.S. 688, 687 (1984), is readily satisfied. This Court should find that Appellant was provided with ineffective assistance of counsel.

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<sup>5</sup> The indictment only charged Appellant wit murder and not capital murder. (C.P. 3-4)

In Ward v. State, 708 So.2d 11 (Miss. 1998) (96-CA-00067), the Supreme Court held the following:

Effective assistance of counsel contemplates counsel's familiarity with the law that controls his client's case. See Strickland v. Washington, 466 U.S. 668, 689, 104 S.Ct. 2052, 2065, 80 L.Ed.2d 674 (1984) (noting that counsel has a duty to bring to bear such skill and knowledge as will render the trial reliable); see also Herring v. Estelle, 491 F.2d 125, 128 (5th Cir.1974) (stating that a lawyer who is not familiar with the facts and law relevant to the client's case cannot meet the constitutionally required level of effective assistance of counsel in the course of entering a guilty plea as analyzed under a test identical to the first prong of the Strickland analysis); Leatherwood v. State, 473 So.2d 964, 969 (Miss.1985) (explaining that the basic duties of criminal defense attorneys include the duty to advocate the defendant's case; remanding for consideration of claim of ineffectiveness where the defendant alleged that his attorney did not know the relevant law).

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

The Mississippi Supreme Court visited this issue in the decision of Smith v. State, 631 So.2d 778, 782 (Miss. 1984). The Strickland test requires a showing of (1) deficiency of counsel's performance which is, (2) sufficient to constitute prejudice to the defense. Id. 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; Gillard v. State, 462 So.2d 710, 714 (Miss. 1985).

The defendant must show that there is a reasonable probability that for his attorney's errors, defendant would have received a different result. Nicolaou v. State, 612 So.2d 1080, 1086 (Miss. 1992); Ahmad v. State, 603 So.2d 843, 848 (Miss. 1992).

In Strickland v. Washington, 466 U.S. 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 defendant must show from deficient attorney performance, the lower courts have adopted tests that purport to differ in more than formulation. See App. C to Brief for United States in United States v. Cronic, supra, at 7a-10a; Sarno, supra, at 83-99, 6. In particular, the Court of Appeals in this case expressly rejected the prejudice standard articulated by Judge Leventhal in his plurality opinion in United States v. Decoster, 199 U.S. App. D.C. 359, 371, 374-375, 624 F.2d 196, 208, 211-212 (en banc), cert. denied, 444 U.S. 944 (1979), and adopted by the State of Florida in Knight v. State, 394 So.2d, at 1001, a standard that requires a showing that specified deficient conduct of counsel was likely to have affected the outcome of the proceeding. 693 F.2d, at 1261-1262. For these reasons, we granted certiorari to consider the standards by which to judge a contention that the Constitution requires that a criminal judgment be overturned because of the actual ineffective assistance of counsel. 462 U.S. 1105 (1983). We agree with the Court of Appeals that the exhaustion rule requiring dismissal of mixed petitions, though to be strictly enforced, is not jurisdictional. See Rose v. Lundy, 455 U.S., at 515-520. We therefore address the merits of the constitutional issue.

## II

In a long line of cases that includes Powell v. Alabama, 287 U.S. 45 (1932), Johnson v. Zerbst, 304 U.S. 458 (1938), and Gideon v. Wainwright, 372 U.S. 335 (1963), this Court has recognized that the Sixth Amendment right to counsel exists, and is needed, in order to protect the fundamental right to a fair trial. The Constitution guarantees a fair trial through [466 U.S. 668, 685] the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment, including the Counsel Clause: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public

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

Because of the vital importance of counsel's assistance, this Court has held that, with certain exceptions, a person accused of a federal or state crime has the right to have counsel appointed if retained counsel cannot be obtained. See

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



in the 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 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 defendant entails certain basic duties. Counsel's function is to assist the defendant, and hence counsel owes the client a duty of loyalty, a duty to avoid conflicts of interest. See *Cuyler v. Sullivan*, supra, at 346. From counsel's function as assistant to the defendant derive the overarching duty to advocate the defendant's cause and the more particular duties to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution. Counsel also has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process. See *Powell v. Alabama*, 287 U.S., at 68-69. These basic duties neither exhaustively define the obligations of counsel nor form a checklist for judicial evaluation of attorney performance. In any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances. Prevailing norms of practice as reflected in American Bar Association standards and the like, e. g., ABA Standards for Criminal Justice 4-1.1 to 4-8.6 (2d ed. 1980) ("The Defense Function"), are guides to determining what is reasonable, but they are only guides. No particular set of detailed rules for counsel's conduct can satisfactorily take [466 U.S. 668, 689] account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Any such set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions. See *United States v. Decoster*, 199 U.S. App. D.C., at 371, 624 F.2d, at 208. Indeed, the existence of detailed guidelines for representation could distract counsel from the overriding mission of vigorous advocacy of the defendant's cause. Moreover, the purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation, although that is a goal of considerable importance to the legal system. The purpose is simply to ensure that criminal defendants receive a fair trial. Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. Cf. *Engle v. Isaac*, 456 U.S. 107, 133-134 (1982). A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy." See *Michel v. Louisiana*, supra, at 101. There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way. See *Goodpastor*, [466 U.S. 668, 690] *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N. Y. U. L. Rev. 299, 343

(1983). The availability of intrusive post-trial inquiry into attorney performance or of detailed guidelines for its evaluation would encourage the proliferation of ineffectiveness challenges. Criminal trials resolved unfavorably to the defendant would increasingly come to be followed by a second trial, this one of counsel's unsuccessful defense. Counsel's performance and even willingness to serve could be adversely affected. Intensive scrutiny of counsel and rigid requirements for acceptable assistance could dampen the ardor and impair the independence of defense counsel, discourage the acceptance of assigned cases, and undermine the trust between attorney and client. Thus, a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. In making that determination, the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case. At the same time, the court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. These standards require no special amplification in order to define counsel's duty to investigate, the duty at issue in this case. As the Court of Appeals concluded, strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic [466 U.S. 668, 691] choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffective 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. Cronin, ante, at 659, and n. 25. Prejudice in these circumstances is so likely that case-by-case inquiry into prejudice is not worth the cost. Ante, at 658. Moreover, such circumstances involve impairments of the Sixth Amendment right that are easy to identify and, for that reason and because the prosecution is directly responsible, easy for the government to prevent.

One type of actual ineffectiveness claim warrants a similar, though more limited, presumption of prejudice. In Cuyler v. Sullivan, 446 U.S., at 345-350, the Court held that prejudice is presumed when counsel is burdened by an actual conflict of interest. In those circumstances, counsel breaches the duty of loyalty, perhaps the most basic of counsel's duties. Moreover, it is difficult to measure the precise effect on the defense of representation corrupted by conflicting interests. Given the obligation of counsel to avoid conflicts of interest and the ability of trial courts to make early inquiry in certain situations likely to give rise to conflicts, see, e. g., Fed. Rule Crim. Proc. 44(c), it is reasonable for the criminal justice system to maintain a fairly rigid rule of presumed prejudice for conflicts of interest. Even so, the rule is not quite the per se rule of prejudice that exists for the Sixth Amendment claims mentioned above. Prejudice is presumed only if the defendant demonstrates that counsel "actively represented conflicting interests" and that "an actual conflict of interest adversely affected his lawyer's performance." Cuyler v. Sullivan, supra, at 350, 348 (footnote omitted). [466 U.S. 668, 693] Conflict of interest claims aside, actual ineffectiveness claims alleging a deficiency in attorney performance are subject to a general requirement that the defendant affirmatively prove prejudice. The government is not responsible for, and hence not able to prevent, attorney errors that will result in reversal of conviction or sentence. Attorney errors come in an infinite variety and are as likely to be utterly harmless in a particular case as they are to be prejudicial. They cannot be classified according to likelihood of causing prejudice. Nor can they be defined with sufficient precision to inform defense attorneys correctly just what conduct to

avoid. Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another. Even if a defendant shows that particular errors of counsel were unreasonable, therefore, the defendant must show that they actually had an adverse effect on the defense. It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding. Virtually every act or omission of counsel would meet that test, cf. United States v. Valenzuela-Bernal, 458 U.S. 858, 866-867 (1982), and not every error the conceivably could have influenced the outcome undermines the reliability of the result of the proceeding. Respondent suggests requiring a showing that the errors "impaired the presentation of the defense." Brief for Respondent 58. That standard, however, provides no workable principle. Since any error, if it is indeed an error, "impairs" the presentation of the defense, the proposed standard is inadequate because it provides no way of deciding what impairments are sufficiently serious to warrant setting aside the outcome of the proceeding. On the other hand, we believe that a defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case. This outcome-determinative standard has several strengths. It defines the relevant inquiry in a way familiar to courts, though the inquiry, as is inevitable, is anything but precise. The standard also reflects the profound importance of finality in criminal proceedings. [466 U.S. 668, 694] Moreover, it comports with the widely used standard for assessing motions for new trial based on newly discovered evidence. See Brief for United States as Amicus Curiae 19-20, and nn. 10, 11. Nevertheless, the standard is not quite appropriate. Even when the specified attorney error results in the omission of certain evidence, the newly discovered evidence standard is not an apt source from which to draw a prejudice standard for ineffectiveness claims. The high standard for newly discovered evidence claims presupposes that all the essential elements of a presumptively accurate and fair proceeding were present in the proceeding whose result is challenged. Cf. United States v. Johnson, 327 U.S. 106, 112 (1946). An ineffective assistance claim asserts 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 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 defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt. When a defendant challenges a death sentence such as the one at issue in this case, the question is whether there is a reasonable probability that, absent the errors, the sentence - 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.

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 in this case, it is clear that Fernando Parker has

suffered in violation of her constitutional rights to effective assistance of counsel, in violation of the 6th Amendment to the United States Constitution.

Consequently, based on the deficiencies outlined above, the Appellant's sentence should be reversed on the basis that Parker was not charged with capital murder and that defense counsel was ineffective in failing to raise the issue

## ISSUE TWO

### THE JURY FAILED TO RENDER FINDINGS ON ELEMENTS OF SENTENCE AND, THEREFORE, DENIED APPELLANT A JURY TRIAL ON SUCH ISSUES.

Appellant asserts that the trial court abused its discretion when it imposed a sentence of life without parole absent a finding by the jury on those elements which the law requires before imposing such punishment under Miss. Code Ann. §97-3-19(g). In imposing the sentence under Count II, murder, the court found as follows: "As far as Count II, the murder charge, that is statutory so the sentence is life without probation or parole." (Tr. 241-242) In reaching the decision of guilt on Count II of the indictment, the jury found the following: "We, the jury, find the defendant guilty of murder as charged in Count II." (C.P. 55) The jury never considered the punishment phase of the charge which the law dictates to have been capital murder which Miss. Code Ann. Sec. 97-3-19(g) defines as *Murder which is perpetrated on educational property as defined in Section 97-37-17.*

When the prosecution chose to proceed with the charge as being a murder perpetrated on educational property, the prosecution charged capital murder. In Bishop v. State, 812 So.2d 934 (Miss. 2002), this Court found the statutory requirement of a jury for sentencing in capital cases could be waived, even though the defendant exercised the right to a jury trial during the guilt phase. In the instant case, however, the defendant never waived his right to the jury in imposition

of the sentence. While the death penalty was not made an issue in this case by the state, it was not removed because of a waiver or agreement by the defendant.

Parker would assert here that he was improperly sentenced by the trial judge to life without parole, as Miss. Code Ann. Section 99-19-101 (Rev. 2000) provides for sentencing only by a jury in capital cases. Section 99-19-101(1) states:

Upon conviction or adjudication of guilt of a defendant of capital murder or other capital offense, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death, life imprisonment without eligibility for parole, or life imprisonment. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a jury to determine the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose or may be conducted before the trial judge sitting without a jury if both the State of Mississippi and the defendant agree *hereto in writing*. In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence, and shall include matters relating to any of the aggravating or mitigating circumstances. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitutions of the United States or of the State of Mississippi. The state and the defendant and/or his counsel shall be permitted to present arguments for or against the sentence of death.

The trial court clearly did not proceed in accord with the statute in imposing sentence in this case. Additionally, even through under the Mississippi Department of Corrections procedure, a sentence of life with parole would have been converted to life without parole under Miss. Code Ann. Section 47-7-3(1)(f), the imposition of such sentence by the trial court creates classification restrictions upon Appellant which the Mississippi Department of Corrections apply by it's policy to prevent Appellant from being placed in a facility other than a maximum security facility. Moreover, absent the "without parole" language being placed in the sentence by the Court,



Parker may possibly be eligible for early release at some point in the future. Appellant would assert that where the trial court did not convene a jury to conduct the sentencing phrase in this case then the trial judge should have imposed no sentence other than life imprisonment. Miss. Code Ann. Sec. 97-3-19.

### ISSUE THREE

#### THE TRIAL COURT ERRED IN REFUSING TO GRANT APPELLANT'S MOTION FOR A DIRECTED VERDICT CLOSING OF THE STATE'S CASE IN CHIEF.

At the closing of the State's case in chief, Appellant's Counsel moved for a directed verdict of acquittal. (Tr 145) The trial court, after allowing the state to respond, denied such motion while finding that the state minimally presented a prima facie case against Appellant. (Tr. 146) The standard of review for a trial court's denial of a motion for directed verdict, peremptory instruction or judgment notwithstanding the verdict is identical. Hawthorne v. State, 835 So.2d 14, 21 (Miss. 2003) (citing Coleman v. State, 697 So.2d 777, 787 (Miss. 1997). These motions challenge the legal sufficiency of the evidence. Hawthorne at 21 (citing McClain v. State, 625 So.2d 774, 778 (Miss. 1993)).

In Wets. v. State, this Court stated "Our concern here is whether the evidence in the record is sufficient to sustain a finding adverse to Wets on each element of the offense of murder." Wets v. State, 503 So.2d 803, 808 (Miss. 1981) ). The Court continued "...we must with respect to each element of the offense, consider all of the evidence- not just the evidence which supports the case for the prosecution-in the light most favorable to the verdict." (citing Harvest on v. State, 493 So.2d 365, 370 (Miss. 1986). This concluded that "We may reverse only where;

with respect to one or more of the elements of the offense charged, the evidence so considered is such that reasonable and fair-minded jurors could only find the *accused not guilty*."

Here, the state never actually presented proof of each of the elements required for the multiple charges made against Appellant. The state dictated in the record that Buck, Justin Moore and Jarvis Moore had testified against Appellant in the murder case. However, each of these witnesses had an interest in Appellant being convicted. From the state's dictation and response to Appellant motion, the trial court concluded that the state had only minimally made a prima facie case against Appellant. (Tr. 146)

The Appellant argues that the State's proof failed to establish sufficient evidence to support the verdict. That is, the evidence presented at trial failed to establish the necessary elements of the statutory crime of murder, aggravated assault, or possession of a firearm on school property, under which the Appellant was indicted, Miss. Code Ann §97-3-19(2)(1).

Specifically, Appellant's counsel argued in his motion for a directed verdict that the State failed to prove "first essential elements of the crime of murder" (CR339). Additionally, the State, failed to prove "corpus delicti". (CR339). Although the trial court overruled Appellant's motion for a directed verdict, peremptory instruction and motion for a new trial, it is, nevertheless, Appellant's contention that there was insufficient evidence presented at trial that the *Appellant committed the crimes* for which she was indicted. Thus, the essential element of intent required did not meet the *high standard of proof as stated in the trial court's instruction to the jury, i.e., "beyond a reasonable doubt, and to the exclusion of every reasonable hypothesis* consistent with

innocence".<sup>6</sup> Likewise, ipso facto, there was insufficient evidence to prove that the Appellant acted willfully and with malice aforethought.

The evidence was "legally insufficient to establish anything more than a probability of guilty and did not invest mere circumstances with the force of truth." *Steele v. State*, 544 So.2d 802, at 809 (Miss. 1988). Consequently, the conviction and sentence should be reversed and the Appellant granted a new trial.

#### ISSUE FOUR

### THE TRIAL COURT ERRED IN FAILING TO ORDER A COMPETENCY HEARING

The facts of this case and the charges made within the indictment, alleges that Appellant committed murder on the basis that the murder was perpetrated on educational property. The trial testimony indicated that a question of competency of the defendant, at the time of the alleged crime, was an issue. The trial court never raised an issue of, or confirmed, Appellant's competency as the law requires.<sup>7</sup>

<sup>6</sup> While the law required that the trial court grant an instruction on the standard of built "beyond a reasonable doubt and to the exclusion of every reasonable hypothesis consistent with innocence", the trial court refused this instruction. (C. P. 26) This point will be the basis of a separate claim in this brief.

<sup>7</sup> Rule 9.06 COMPETENCY TO STAND TRIAL

If before or during trial the court, of its own motion or upon motion of an attorney, has reasonable ground to believe that the defendant is incompetent to stand trial, the court shall order the defendant to submit to a mental examination by some competent psychiatrist selected by the court in accordance with § 99-13-11 of the Mississippi Code Annotated of 1972.

After the examination the court shall conduct a hearing to determine if the defendant is competent to stand trial. After hearing all the evidence, the court shall weigh the evidence and make a determination of whether the defendant is competent to stand trial. If the court finds that the defendant is competent to stand trial, then the court shall make the finding a matter of record and the case will then proceed to trial. If the court finds that the defendant is incompetent to stand trial, then the court shall commit the defendant to the Mississippi State Hospital or other appropriate mental health facility. The order of commitment shall require that the defendant be examined and a written report be furnished to the court every four calendar months, stating:

A. Whether there is a substantial probability that the defendant will become mentally competent to stand trial within the foreseeable future; and

B. Whether progress toward that goal is being made.

## ISSUE FIVE

### DOUBLE JEOPARDY

Appellant would argue that the charge in count one encompassed the charge in count II and the trial court should have granted a directed verdict because the

*Edwards v. State*, 737 So.2d 275, 321 (Miss. 1999).

In *Edwards*, the defendant was charged with two counts of capital murder while engaged in the commission of an armed robbery, and he was charged with one count of armed robbery. *Id.* at 284. On appeal, the Supreme Court reversed the armed-robbery conviction, since the "armed robbery was the underlying felony in the capital murder charges." *Id.* The Court held it was double jeopardy to convict the defendant of capital murder with armed robbery as the underlying offense as well as armed robbery. *Id.*

In the instant case we know Appellant was charged with murder, however the court treated the conviction as capital murder, when it stated: "As far as count II, the murder charge, that is statutory so the sentence is life without parole." The law is clear on this issue as it defines the charge:

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The defendant's attorney, as the defendant's representative, shall not waive any hearing authorized by this rule, but is authorized to consent, on behalf of the defendant, to necessary surgical or medical treatment and procedures. If at any time during such commitment, the court decides, after a hearing, that the defendant is competent to stand trial, it shall enter its order so finding and declaring the defendant competent to stand trial, after which the court shall proceed to trial.

If at any time during such commitment, the proper official at the Mississippi State Hospital or other appropriate mental health facility shall consider that the defendant is competent to stand trial, such official shall promptly notify the court of that effect in writing, and place the defendant in the custody of the sheriff. The court shall then proceed to conduct a hearing on the competency of the defendant to stand trial. If the court finds the defendant is not competent to stand trial, it shall order the defendant committed as provided above. If the court finds the defendant is competent to stand trial, then the case shall proceed to trial.

If within a reasonable period of time after commitment under the provisions of this rule, there is neither a determination that there is substantial probability that the defendant will become mentally competent to stand trial nor progress toward that goal, the judge shall order that civil proceedings as provided in § 41-21-61 to 41-21-107 of the Mississippi Code of 1972 be instituted.

Said proceedings shall proceed notwithstanding that the defendant has criminal charges pending against him/her. The defendant shall remain in custody until determination of the civil proceedings.

(2) The killing of a human being without the authority of law by any means or in any manner shall be capital murder in the following cases:

(g) *Murder which is perpetrated on educational property as defined in Section 97-37-17;*

Miss. Code Ann. Sec. 97-3-19(2)(g).

To confirm that the Court treated the conviction as capital murder, as opposed to murder,

Miss. Code Ann Sec. 97-3-21 defines the sentences for each such offense as follows:

**§ 97-3-21. Homicide; penalty for murder or capital murder.**

Every person who shall be convicted of murder shall be sentenced by the court to imprisonment for life in the State Penitentiary

Every person who shall be convicted of capital murder shall be sentenced (a) to death; (b) to imprisonment for life in the State Penitentiary without parole; or (c) to imprisonment for life in the State Penitentiary with eligibility for parole as provided in Section 47-7-3(1)(f).

The trial court imposed the sentence in this instant under Sec. (b) of this statute. No such sentence would be applicable under a charge of simple murder.

While the state attempted to indict Appellant for the offense of murder, the trial court

applied the conviction differently. Had the trial court treated the charge as murder then the sentence could have been no greater than life imprisonment. An indictment serves a valuable

purpose in the criminal process. Its purpose is to inform the defendant with some measure of

certainty as to the nature of the charges brought against him so that he may have a reasonable

opportunity to prepare an effective defense and to enable him to effectively assert his

constitutional right against double jeopardy in the event of a future prosecution for the same

offense. U.S. v. Gordon, 780 F.2d 1165, 1169 (5th Cir. 1986). In furtherance of that underlying

purpose, Uniform Rules of Circuit and County Court Rule 7.06(5) requires, as an essential

element of an indictment, a statement of "[t]he date and, if applicable, the time at which the

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 Fernando Parker of his constitutional right to a fair trial, as guaranteed to him under the Sixth and Fourteenth Amendments to the United States

**APPELLANT SUFFERED CUMULATIVE ERRORS  
WHICH CAUSED HIM TO BE DEPRIVED OF HIS  
CONSTITUTIONAL RIGHT TO A FAIR TRIAL IN  
VIOLATION OF THE 5TH AND 14TH AMENDMENTS  
TO THE UNITED STATES**

**ISSUE SIX**

jeopardy clause was offended and that the murder charge should be set aside and vacated.

On this claim, Appellant would ask that this court reverse and remand this case to the trial court for re-sentencing where the sentence of life without parole is unlawful and excessive to the language of the indictment under Count II. In the alternative, this Court should find the double jeopardy clause should be vacated as being excessive under the law. While this Court may hold that under Mississippi law there is no parole when the sentence is life, Appellant would assert that there is some future possibility of release when the sentence is less than life without parole. Miss. Code Ann. Sec. 47-7-3(1).

is considered, there is a lack of necessary information that a defendant is entitled to receive by way of the indictment in order to charge capital murder. Appellant would assert that double jeopardy, by way of the trial court's actions, should be found. Moreover, the sentence of life without parole should be vacated as being excessive under the law. While this Court may hold that under Mississippi law there is no parole when the sentence is life, Appellant would assert that there is some future possibility of release when the sentence is less than life without parole.

offense was alleged to have been committed." URCCC 7.06(5). This Court should have no doubt that, from the language of Count II of the indictment, in the form returned by the grand jury, did not adequately fulfill its purpose of charging capital murder. However, the trial court treated it otherwise and thereby caused double jeopardy. When the language of the statute is considered, there is a lack of necessary information that a defendant is entitled to receive by way of the indictment in order to charge capital murder. Appellant would assert that double jeopardy, by way of the trial court's actions, should be found. Moreover, the sentence of life without parole should be vacated as being excessive under the law. While this Court may hold that under Mississippi law there is no parole when the sentence is life, Appellant would assert that there is some future possibility of release when the sentence is less than life without parole.

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." Johnson 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 defendant. 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 defendant 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 defendant, 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 Johnson 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 Cuthrinds 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 judge falls within the perimeters of that described in Scarborough v. State,

37 So.2d 748 (Miss. 1948):

This is not one of those cases 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 defendant 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 and 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, *Johnson v. State*, *supra*, there shall be no procedural bar to these assignments of error, which collectively denied Appellant Fernando Parker his constitutional fundamental right to a fair trial, being raised for the first time in a direct appeal. *Gallion*, 469 So.2d 1247 (Miss. 1985).

Appellant Fernando Parker did not receive a fair trial in this case when the trial judge allowed the prosecution to introduce speculative and hypothetical evidence and where the Court did not raise or question the defense counsel on a competency claim which should have been raised under Rule 9.06

This Court should reverse and render this case on the basis that the trial court deprived Appellant of her fundamental right to due process of law and a fair trial.

### CONCLUSION

The Appellant asserts that he was denied effective assistance of counsel during the pretrial and trial proceedings in violation of the Sixth Amendment to the United States Constitution and the Mississippi Constitution. Defense counsel failed to properly raise the issue of double jeopardy; failed to present any competency issue; failed to object when the trial court imposed a sentence of life without parole or probation.



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This, the 18th day of May, 2009.

Respectfully submitted,

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This is to certify that I, Kelsey L. Rushing, Attorney for Appellant, have this date served a true and correct copy of the above and foregoing Brief for Appellant, by United States Postal

# CERTIFICATE OF SERVICE

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