CASE NO. 2008-~~KA~~KP-00754-COA

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

CRAIG LASHOUN McBEATH
APPELLANT/DEFENDANT

VS.

STATE OF MISSISSIPPI
APPELLEE/PLAINTIFF

APPEAL FROM THE CIRCUIT COURT OF
SCOTT COUNTY, MISSISSIPPI

APPELLANT'S OPENING BRIEF

ORAL ARGUMENT NOT REQUESTED

BY: Craig McBeath

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Appellant PRO SE

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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, ask that same be allowed by Appellant's attorney

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II.

CERTIFICATE OF INTERESTED PERSONS

The undersigned 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. Craig Lashoun McBeath, Appellant
2. Honorable Jim Hood, Attorney General, and staff
3. Honorable Marcus D. Gordon, Circuit Court Judge
4. Honorable Mark Duncan, District Attorney

Respectfully submitted,

BY: _____
Craig Lashoun McBeath

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III.

STATEMENT OF THE ISSUES

ISSUE ONE

Whether Appellant was subjected to a denial of effective assistance of counsel under the 6th Amendment of the Constitution of the United States.

ISSUE TWO:

Whether the trial court's sentence for kidnapping exceeded the Statutory Maximum Penalty thereby constituting a violation of the 6th Amendment of the United States Constitution and the constitution of the State of Mississippi.

ISSUE THREE:

The trial court erred in allowing purported expert purported expert testimony, over the objection of Appellant, as to how the injuries occurred to the victim as this testimony was outside the expertise of the witness. .

ISSUE FOUR:

The trial court erred in refusing to grant 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. .

ISSUE FIVE:

Whether McBeath was subjected to double jeopardy in violation of the 5th Amendment.

ISSUE SIX:

The trial Court erred in denying the Appellant's motion for a new trial as the verdict was against the overwhelming weight of the evidence.

ISSUE SEVEN:

The trial court erred in failing to give instruction on manslaughter by culpable negligence.

ISSUE EIGHT:

That 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

Appellant Craig L. McBeath, is presently incarcerated and being housed in the Mississippi Department of Corrections at SMCI, Leakesville, 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 of sentence by the trial court.

V.

STATEMENT OF CASE

Craig Lashoun McBeath was indicted for Count I, murder of Shannon Lee Torrence while engaged in the commission of a robbery in violation of Mississippi Code Section 97-3-19(2)(e), and County II, kidnapping of Shannon in violation of Mississippi Code Section 97-3-53. On April 15, 2008, Nelson was tried in the Scott County Circuit Court, Judge Marcus D. Gordon presiding, for the capital murder and kidnapping of Torrence. The jury convicted McBeath of simple murder, a lesser offense, and kidnapping. McBeath was sentenced in Count I to life imprisonment for murder and in Court II to forty years for kidnapping, to run consecutively with Count I.[1]

VI.

SUMMARY OF ARGUMENTS

The Appellant was denied effective assistance of counsel in violation of his Sixth Amendment Right to the Constitution of the United States and the Constitution of the State of Mississippi. Appellant was represented at trial by Honorable Roy K. Smith, an attorney of Jackson, Mississippi. Prior to trial, defense counsel failed to request discovery. Additionally, defense counsel never objected to the fact that there was a lack of evidence and that another person[2] had already been convicted of the murder and kidnapping in which Appellant was being tried and that only one person could be guilty of actually murdering and kidnapping Torrence. Appellant could only be an accessory. Defense counsel was ineffective in failing to seek an

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[1] Issac Jermaine Nelson was also charged along with McBeath for these same offenses. Nelson was convicted and sentenced to the same terms. Nelson's appeal was subsequently granted in part by the Supreme Court in regards to the sentence. Nelson v. State, ___ So.2d ___ (Miss. 2009) No. 2008-KA-00299-SCT (Decided April 23, 2009)

[2] Issac Jermaine Nelson was convicted of the murder and kidnapping of Torrence on January 24, 2007 over a year before Appellant's trial. McBeath was not charged as a accessory to the crime.

instruction for accessory after the fact of murder and kidnapping. Such failure was deficient and prejudicial to Appellant's defense.

The trial court erred in imposing a 40 year sentence upon McBeath for the kidnapping offense where such sentence exceeded the statutory amount which the trial court may impose for kidnapping in the absence of a recommendation from the jury.

VII.

STATEMENT OF FACTS

On February 23, 2007, Shannon Torrance was declared missing. A search was conducted by the police which resulted in Shannon being found in a wooded area in rural Scott County, Mississippi. Shannon was found nude with a plastic bag over his head. (Tr. 74) The body was discovered by Scott County Patrol Deputy Sheriff Investigator Billy Patrick. (Tr. 73-74) Craig McBeath and Issac Jermaine Nelson were subsequently arrested and charged with murder. Upon being arrested the police asked McBeath to give them a statement. (Tr. 88) McBeath gave police a verbal statement that he had picked up the deceased and dropped him off at another location and had left. The location he delivered Shannon to was in Chinatown and he had not seen Shannon since. (Tr. 90) Another police officer who was present during the same interview testified that McBeath told them Shannon Torrence had dropped him and Nelson off at McBeath's home. (Tr. 96)[3] These statements were made by McBeath, according to Officer Greer and Officer Crotwell, prior to Shannon's body being found. (Tr. 96)

[3] Officer Steven Crotwell and Officer Greer testified to two different version of what was said by McBeath during the same interval.

VIII.

ARGUMENT

Appellant was subjected to ineffective assistance of counsel at trial in violation of his 6th Amendment rights to the United States Constitution

To prevail on a claim of ineffective assistance of counsel the defendant must satisfy the well-established two prong test set forth in Strickland v. Washington, 466 U.S. 668, 689, 104 S.Ct. 2052, 2065, 80 L.Ed.2d 674 (1984). First the party must show that counsel's performance was objectively deficient. The party must further show that but for the deficient performance of his counsel, he would have prevailed.

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. 1587) (citing Strickland v. Washington, 466 U.S. 668, 688 (1d984)). 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 strong 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 would asserts that there was much information and facts he provided to his attorney which was never used by counsel in Appellant's defense. First, Appellant argues that the deficiency of defense counsel, Smith, which resulted in the greatest prejudice to McBeath was prejudice failure to adequately investigate his case prior to trial. Counsel's failure to adequately investigate the case prior to trial. Defense counsel had adequate information and evidence to secure subpoenas to summon various witnesses who would have verified McBeath's defense. Several would have came voluntarily without a subpoena. Defense counsel never attempted to secure these witnesses. This Court should conclude that defense counsel rendered ineffective assistance of counsel and that such ineffectiveness prejudiced 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 promptly investigating all essential facts, physical evidence, and witnesses in the case. Defense counsel failed to adequately investigate the credential of Dr. Steven Haynes and to cross examine Haynes on his qualifications which would have revealed Haynes not to be board certified and qualified to provide evidence on the theory in which he presented at trial.

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).
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> [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 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).

In the instant case now before this Court, Appellant McBeath would assert that the trial testimony elicited from Dr. Haynes never proved Appellant killed Torrence and his attorney never properly pointed this out to the jury which left the jury with only the theory offered by Dr. Haynes who was not a board certified expert as he made himself out to be.

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. McQuarter 506 So.2d at 687. The burden to demonstrate the two prongs is on the defendant. Id. Leatherwood v. State, 473 So.2d 964, 968 (Miss. 1994), reversed in part, affirmed in part, 539 So.2d 1378 (Miss. 1989), and he faces a strong rebuttable presumption that counsel's performance falls within the broad spectrum of reasonable professional assistance. McQuarter, 574 So.2d at 687; Waldrop, 506 So.2d at 275; 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 defence." Thus, a fair trial is one in which evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding. The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel's skill and knowledge is necessary to accord defendants the "ample opportunity to meet the case of the prosecution" to which they are entitled. Adams v. United States ex rel. McCann, 317 U.S. 269, 275 , 276 (1942); see Powell v. Alabama, supra, at 68-69.

Because of the vital importance of counsel's assistance,

this Court has held that, with certain exceptions, a person accused of a federal or state crime has the right to have counsel appointed if retained counsel cannot be obtained. See Argersinger v. Hamlin, 407 U.S. 25 (1972); Gideon v. Wainwright, supra; Johnson v. Zerbst, supra. That a person who happens to be a lawyer is present at trial alongside the accused, however, is not enough to satisfy the constitutional command. The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results. An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair. [466 U.S. 668, 686] For that reason, the Court has recognized that "the right to counsel is the right to the effective assistance of counsel." McMann v. Richardson, 397 U.S. 759, 771 , n. 14 (1970). Government violates the right to effective assistance when it interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense. See, e. g., Geders v. United States, 425 U.S. 80 (1976) (bar on attorney-client consultation during overnight recess); Herring v. New York, 422 U.S. 853 (1975) (bar on summation at bench trial); Brooks v. Tennessee, 406 U.S. 605, 612 -613 (1972) (requirement that defendant be first defense witness); Ferguson v. Georgia, 365 U.S. 570, 593 -596 (1961) (bar on direct examination of defendant). Counsel, however, can also deprive a defendant of the right to effective assistance, simply by failing to render "adequate legal assistance," Cuyler v. Sullivan, 446 U.S., at 344 . Id. at 345-350 (actual conflict of interest adversely affecting lawyer's performance renders assistance ineffective). The Court has not elaborated on the meaning of the constitutional requirement of effective assistance in the latter class of cases - that is, those presenting claims of "actual ineffectiveness." In giving meaning to the requirement, however, we must take its purpose - to ensure a fair trial - as the guide. The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result. The same principle applies to a capital sentencing proceeding such as that provided by Florida law. We need not consider the role of counsel in an ordinary sentencing, which may involve informal proceedings and standardless discretion in the sentencer, and hence may require a different approach to the definition of constitutionally effective assistance. A capital sentencing proceeding like the one involved in this case, however, is sufficiently like a trial in its adversarial format and in the existence of standards for decision, see Barclay [466 U.S. 668, 687] v. Florida, 463 U.S. 939, 952 -954 (1983); Bullington v. Missouri, 451 U.S. 430 (1981), that counsel's role in the proceeding is comparable to counsel's role at trial - to ensure that the adversarial testing process works to produce a just result under the standards governing decision. For purposes of describing counsel's duties, therefore, Florida's capital sentencing proceeding need not be distinguished from an ordinary trial.

III

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

A

As all the Federal Courts of Appeals have now held, the proper standard for attorney performance is that of reasonably effective assistance. See Trapnell v. United States, 725 F.2d, at 151-152. The Court indirectly recognized as much when it stated in McMann v. Richardson, supra, at 770, 771, that a guilty plea cannot be attacked as based on inadequate legal advice unless counsel was not "a reasonably competent attorney" and the advice was not "within the range of competence demanded of attorneys in criminal cases." See also Cuyler v. Sullivan, supra, at 344. When a convicted defendant [466 U.S. 668, 688] complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness. More specific guidelines are not appropriate. The Sixth Amendment refers simply to "counsel," not specifying particular requirements of effective assistance. It relies instead on the legal profession's maintenance of standards sufficient to justify the law's presumption that counsel will fulfill the role in the adversary process that the Amendment envisions. See 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 Goodpaster, [466 U.S. 668, 690] The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases, 58 N. Y. U. L. Rev. 299, 343 (1983). The availability of intrusive post-trial inquiry into attorney performance or of detailed guidelines for its evaluation would encourage the proliferation of ineffectiveness challenges. Criminal trials resolved unfavorably to the defendant would increasingly come to be followed by a second trial, this one of counsel's unsuccessful defense. Counsel's performance and even willingness to serve could be adversely affected. Intensive scrutiny of counsel and rigid requirements for acceptable assistance could dampen the ardor and impair the independence of defense counsel, discourage the acceptance of assigned cases, and undermine the trust between attorney and client. Thus, a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of

professionally competent assistance. In making that determination, the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case. At the same time, the court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. These standards require no special amplification in order to define counsel's duty to investigate, the duty at issue in this case. As the Court of Appeals concluded, strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic [466 U.S. 668, 691] choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments. The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. In particular, what investigation decisions are reasonable depends critically on such information. For example, when the facts that support a certain potential line of defense are generally known to counsel because of what the defendant has said, the need for further investigation may be considerably diminished or eliminated altogether. And when a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable. In short, inquiry into counsel's conversations with the defendant may be critical to a proper assessment of counsel's investigation decisions, just as it may be critical to a proper assessment of counsel's other litigation decisions. See United States v. Decoster, supra, at 372-373, 624 F.2d, at 209-210.

B

An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment. Cf. United States v. Morrison, 449 U.S. 361, 364 -365 (1981). The purpose of the Sixth Amendment guarantee of counsel is to ensure [466 U.S. 668, 692] that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding. Accordingly, any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution. In certain Sixth Amendment contexts, prejudice is presumed. Actual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice. So are various kinds of state interference with counsel's assistance. See United States v. Cronic, ante, at 659, and

n. 25. Prejudice in these circumstances is so likely that case-by-case inquiry into prejudice is not worth the cost. Ante, at 658. Moreover, such circumstances involve impairments of the Sixth Amendment right that are easy to identify and, for that reason and because the prosecution is directly responsible, easy for the government to prevent. One type of actual ineffectiveness claim warrants a similar, though more limited, presumption of prejudice. In Cuyler v. Sullivan, 446 U.S., at 345 -350, the Court held that prejudice is presumed when counsel is burdened by an actual conflict of interest. In those circumstances, counsel breaches the duty of loyalty, perhaps the most basic of counsel's duties. Moreover, it is difficult to measure the precise effect on the defense of representation corrupted by conflicting interests. Given the obligation of counsel to avoid conflicts of interest and the ability of trial courts to make early inquiry in certain situations likely to give rise to conflicts, see, e. g., Fed. Rule Crim. Proc. 44(c), it is reasonable for the criminal justice system to maintain a fairly rigid rule of presumed prejudice for conflicts of interest. Even so, the rule is not quite the per se rule of prejudice that exists for the Sixth Amendment claims mentioned above. Prejudice is presumed only if the defendant demonstrates that counsel "actively represented conflicting interests" and that "an actual conflict of interest adversely affected 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 a conviction or sentence. Attorney errors come in an infinite variety and are as likely to be utterly harmless in a particular case as they are to be prejudicial. They cannot be classified according to likelihood of causing prejudice. Nor can they be defined with sufficient precision to inform defense attorneys correctly just what conduct to avoid. Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another. Even if a defendant shows that particular errors of counsel were unreasonable, therefore, the defendant must show that they actually had an adverse effect on the defense. It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding. Virtually every act or omission of counsel would meet that test, cf. 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 defendant need not show that counsel's deficient conduct more likely than not

altered the outcome in the case. This outcome-determinative standard has several strengths. It defines the relevant inquiry in a way familiar to courts, though the inquiry, as is inevitable, is anything but precise. The standard also reflects the profound importance of finality in criminal proceedings. [466 U.S. 668, 694] Moreover, it comports with the widely used standard for assessing motions for new trial based on newly discovered evidence. See Brief for United States as Amicus Curiae 19-20, and nn. 10, 11. Nevertheless, the standard is not quite appropriate. Even when the specified attorney error results in the omission of certain evidence, the newly discovered evidence standard is not an apt source from which to draw a prejudice standard for ineffectiveness claims. The high standard for newly discovered evidence claims presupposes that all the essential elements of a presumptively accurate and fair proceeding were present in the proceeding whose result is challenged. Cf. United States v. Johnson, 327 U.S. 106, 112 (1946). An ineffective assistance claim asserts the absence of one of the crucial assurances that the result of the proceeding is reliable, so finality concerns are somewhat weaker and the appropriate standard of prejudice should be somewhat lower. The result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome. Accordingly, the appropriate test for prejudice finds its roots in the test for materiality of exculpatory information not disclosed to the defense by the prosecution, United States v. Agurs, 427 U.S., at 104 , 112-113, and in the test for materiality of testimony made unavailable to the defense by Government deportation of a witness, United States v. Valenzuela-Bernal, supra, at 872-874. The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. In making the determination whether the specified errors resulted in the required prejudice, a court should presume, absent challenge to the judgment on grounds of evidentiary insufficiency, that the judge or jury acted according to law. [466 U.S. 668, 695] An assessment of the likelihood of a result more favorable to the defendant must exclude the possibility of arbitrariness, whimsy, caprice, "nullification," and the like. A defendant has no entitlement to the luck of a lawless 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 sentencer - including an appellate court, to the extent it independently reweighs the evidence - would have concluded that the balance of aggravating and mitigating circumstances did not warrant death. In making this determination, a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury. Some of the factual findings will have been unaffected by the errors, and factual findings that were affected will have been affected in different ways. Some errors will have had a pervasive effect on the inferences to [466 U.S. 668, 696] be drawn from the evidence, altering the entire evidentiary picture, and some will have had an isolated, trivial effect. Moreover, a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support. Taking the unaffected findings as a given, and taking due account of the effect of the errors on the remaining findings, a court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors.

IV

A number of practical considerations are important for the application of the standards we have outlined. Most important, in adjudicating a claim of actual ineffectiveness of counsel, a court should keep in mind that the principles we have stated do not establish mechanical rules. Although those principles should guide the process of decision, the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. In every case the court should be concerned with whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results. To the extent that this has already been the guiding inquiry in the lower courts, the standards articulated today do not require reconsideration of ineffectiveness claims rejected under different standards. Cf. Trapnell v. United States, 725 F.2d, at 153 (in several years of applying "farce and mockery" standard along with "reasonable competence" standard, court "never found that the result of a case hinged on the choice of a particular standard"). In particular, the minor differences in the lower courts' precise formulations of the performance standard are insignificant: the different [466 U.S. 668, 697] formulations are mere variations of the overarching reasonableness standard. With regard to the prejudice inquiry, only the strict outcome-determinative test, among the standards articulated in the lower courts, imposes a heavier burden on defendants than the tests laid down today.

> The difference, however, should alter the merit of an ineffectiveness claim only in the rarest case. Although we have discussed the performance component of an ineffectiveness claim prior to the prejudice component, there is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one. In particular, a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed. Courts should strive to ensure that ineffectiveness claims not become so burdensome to defense counsel that the entire criminal justice system suffers as a result.

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

Under the standards set forth above in Strickland, and by a demonstration of the record and the facts set forth in support of the claims in this case, it is clear that Craig McBeath has suffered in violation of his constitutional rights to effective assistance of counsel, in violation of the 6th Amendment to the United States Constitution.

While the Mississippi Supreme Court has previously held in Wilcher v. State, 863 So.2d 776, 825 (¶171) (Miss. 2003), that it is unusual for the court to consider a claim of ineffective assistance of counsel when the claim is made on direct appeal, it is not an impossibility. Ward v. State, 935 So.2d 1047 (Miss. Ct. App. 2005). The Supreme Court reasoned this conclusion on the point that the consideration of the issue would be limited to the trial court record and that there is usually insufficient evidence in the record to evaluate the claim. The same state of the record would be available where the Appellant wait until the Court has decided his direct appeal and subsequently file a PCR where the appeal is affirmed. The record would not have changed. What would have changed would be the Appellant's inability to have his claim heard on direct appeal. This Court should consider Appellant's ineffective

assistance of counsel claim on the merits since such a claim can be raised for the first time on direct appeal.

Consequently, based on the deficiencies outlined above, the Appellant's conviction and sentence should be reversed and the case remanded to the trial court for a new trial or other proceedings which this Court may determine.

ISSUE TWO

WHETHER THE TRIAL COURT SENTENCE FOR KIDNAPPING EXCEEDED THE STATUTORY MAXIMUM PENALTY.

McBeath would assert that the trial court imposed a sentence that exceeded the statutory maximum penalty for kidnapping. The jury found McBeath guilty of kidnapping. However, the jury did not impose a life sentence.

Mississippi Code Annotated Section 97-3-53 states:

> Any person who, without lawful authority and with or without intent to secretly confine, shall forcibly seize and confine any other person, or shall inveigle or kidnap any other person with intent to cause such person to be confined or imprisoned against his or will, or without lawful authority shall forcibly seize, inveigle or kidnap any child under the age of sixteen (16) years against the will of the parents or guardian or person having the lawful custody of the child, upon conviction shall be imprisoned for life in the custody of the Department of Corrections if the punishment is so fixed by the jury in its verdict. If the jury fails to agree on fixing the penalty at imprisonment for life, the court shall fix the penalty at not less than one (1) year nor more than thirty (30) years in the custody of the Department of Corrections.
>
> This section shall not be held to repeal, modify or amend any other criminal statute of this state.

Miss. Code Ann. § 97-3-53 (Rev. 2006) (emphasis added).

The record filed in this case clearly reflects that the trial judge based the forty-year kidnapping sentence on a mortality table which indicated the expected life span for someone McBeath's age. The Court state: "I'm required to sentence you to a number of years less your

life expectancy. You are hereby sentenced in Count II to serve a term of forty years in the custody of the Mississippi Department of Corrections." (Tr. 251). McBeath's attorney never made an objection to the sentence nor raised the issue in the Motion for a new trial. As previously pointed out, such failure jives with and supports McBeath's claim that his attorney provided him with ineffective assistance of counsel. At the same time, it would be backward to consider the claim of the Court's imposition of a sentence which was excessive without also considering whether defense counsel was ineffective when McBeath placed all his trust and hope in his attorney ton defend him from such aggression. Piece milling the claims by requiring part to be heard on direct appeal and the other part on post conviction would not be appropriate. It would be prejudicial to the Appellant in his ability to obtain the cumulative effective of his claims.

Notwithstanding McBeath's attorney's failure to object or raise the sentencing issue on his motion for a new trial, the language of the statute states that "If the jury fails to agree on fixing the penalty at imprisonment for life, the court shall fix the penalty at not less than one (1) year nor more than thirty (30) years in the custody of the Department of Corrections." Miss. Code Ann. §97-3-53 (Rev. 2006). The jury did not impose a life sentence. Therefore, that statute permitted the trial court to impose a sentence of not less than one year nor more than thirty years. The trial court imposed a sentence of *forty years,* which exceeded the statutory maximum and the authority of the court. Under these circumstances, this aggressive actions by the trial court demonstrates that the Court was prejudice against McBeath.[4] A fair trial court not have been obtained in that Court. This Court should not only vacate the sentence but it should

[4] It would seem that the Court's aggressiveness in this case would be based upon the alleged victim being white and the defendants being black. The trial judge was also white. This much is apparent from the record and demonstrated by the trial court's actions. A seasoned Circuit Court Judge should know the Court's limitations on sentencing under any charge. The sentence should have been carefully considered by the trial court judge before imposing. If in any doubt the Court should have taken as long as necessary to examine consider the law

vacate the convictions as well along with all the actions of the Court. Trial before a new court should occur. This court has stated that an illegal sentence may be challenged at any time and over the prohibitions of any procedural bars. Luckett v. State, 582 So. 2d 428, 430 (Miss 1982); Smith v. State, 477 So. 2d 191, 195-96 (Miss. 1985).

This court should find that McBeath's sentence is illegal and excessive as a matter of law under the provisions provided by §97-3-53 (Rev. 2006)

ISSUE THREE

THE TRIAL COURT ERRED IN ALLOWING PURPORTED EXPERT TESTIMONY, OVER THE OBJECTION OF THE APPELLANT AS TO HOW INJURIES OCCURRED TO THE VICTIM AS THIS TESTIMONY WAS OUTSIDE THE EXPERTISE OF THE WITNESS.

Appellant asserts that the trial court abused its discretion when it allowed the State's expert witness, Dr. Stephen Hayne, to testify and render opinions outside his area of expertise. Whether evidence is admissible is within the discretion of the trial judge. Davis v State, 684 So.2d 643, 661. (Miss. 1996); Johnston v. State, 567 So.2d 237, 238 (Miss. 1990). The trial judge's decision will not be overturned on appeal unless it was an abuse of discretion. Davis, 684 So. 2d at 661; Johnston, 567 So.2d at 238. This Court will not reverse the trial court's decision merely because of an erroneous evidentiary ruling. Newsom v State, 629 So.2d 611, 614 (Miss. 1993). The Appellant must show that he was effectively denied a substantial right by the ruling before a reversal can be possible. Peterson v State, 671 So.2d 647, 656 (Miss. 1996); Newsom, 629 So.2d at 614. If a constitutional right bas been violated, the case must be reversed unless this Court finds that the "error was harmless beyond a reasonable doubt" upon consideration of the entire record. Newsom, 629 So.2d at 614.

Appellant would assert that Dr. Hayne's testimony as to the exact cause of death of Torrence and his opinion on such theory should have been objected to. As provided in the decision rendered by this court in Edmonds v. State, 955 So.2d 787 (Miss. 2007), Dr. Haynes was not qualified to render such opinion.

The direct testimony of Dr. Stephen Hayne regarding his conclusion as to the cause of death to Torrence reads as follows:

Q. (By Mr. Duncan) Okay. Doctor Hayne, you testified about the photograph that I just showed you, that it showed the -- uh -- plastic bag and some duct tape around the -- uh -- Shannon Torrance's face. Is that right?

A. That's correct, sir.

Q. Uh -- was the -- the plastic bag and duct tape, the way it was placed around his face, was that sufficient to cut off his oxygen supply?

A. It would be my opinion it would be, sir. It would conclude the -- uh -- airways, both the right and left nares as well as the mouth.

Q. How long could a person have lived like that?

A. With complete occlusion as opposed to narrowing or incomplete, I would estimate four to five minutes, somewhere in that time frame.

Q. Now, you also testified to some injuries about the neck.

A. Yes, sir, on the external surface, but there were also injuries on the organs themselves.

BY MR. RUSHING: Excuse me, doctor. Did you say four to five minutes or fourty-five?

BY THE WITNESS: Approximately four to five minutes, counselor.

BY MR. RUSHING: Four to five?

BY THE WITNESS: Four to five. That's with complete obstruction of the airways.

Q. (By Mr. Duncan) Describe again those -- those injuries to the neck.

A. The ones I have described were on the external surface of the neck consisting of abrasions or scratches located on the front, left front, and right side, and they measured up to approximately three and a half inches. One of them was -- uh -- curved lineature and it looked -- and it was certainly suggestive of a -- uh -- fingernail scratch.

Q. Now, did you also conduct an internal examination in the area of the neck?

A. I did, sir.

Q. And what did you find?

A. There was hemorrhages at multiple sites, specifically there was hemorrhage around the esophagus, the tube that leaves from the mouth to the stomach, -- uh -- small in size, measuring approximately a quarter of an inch. There was also hemorrhage around the hyoid bone, which is a bone structure located fairly high in the neck on the front surface that's commonly injured in strangulation deaths. There was also -- uh -- hemorrhage or bleeding around the -- uh -- the larynx or voice box, and there was hemorrhage on the what are called the sternocleidomastoid muscles, those are the strap muscles that travel down the front -- uh -- right side of the neck and front left side of the neck, and -- uh -- they measured up to approximately three - quarters of an inch individually.

Q. Okay. You described your external examination and part of you internal examination. Were there any other significant findings in your internal examination of Shannon Torrance?

A. No, sir. The significant findings were essentially early decomposition change where the body was beginning to break down.

Q. Okay. Upon conducting this examination, externally and internally, did you come to an opinion as to the cause of Shannon Torrance's death?

A. I did, sir.

Q. And what was that?

A. I would -- incomplete strangulation with terminal suffocation, that there was intent to -- uh -- induce manual strangulation with compression of the neck and that was followed by taping this individual's nose and mouth shut which would produce suffocation.

Q. So tell -- what's the difference between strangulation and suffocation?

A. Suffocation, usually the death is a product from compression of the major blood vessels in the neck, not -- not blocking the airways. It only takes approximately four or five pounds pressure to compress the jugular veins and approximately nine to ten pounds to compress the carotid arteries. It take approximately twenty-four to thirty pounds pressure to compress the airway itself. So usually you die from cerebrohypoxia, that is lack of blood flow to the brain, usually in strangulation deaths. In suffocation death it's a blockage of the airway, whether it be external, where you block the mouth and the nose or even if you swallow food you block the internal airway passage, usually in the voice box or the larynx. That stops airflow into the lungs which again stops oxygenated blood flow eventually to the brain, and usually death is a product of decreased oxygen flow delivered to the brain. In strangulation you -- uh -- cut down the blood flow. In suffocation you stop the air going into the lungs which subsequently is carried by the blood to the brain.

Q. And was it your opinion that Shannon Torrance died as -- as a combination of these two?

A. Yes, sir.

The State *continued* to question Dr. Hayne referring to other photographs depicting the back side of the deceased. Defense counsel did object to such question which the trial court improperly overruled. (Tr. 180) The trial court based its ruling upon the photograph having probative value which Appellant would assert was an incorrect ruling since said photograph has no probative value to the case said photograph was merely introduced into evidence to prejudice Appellant's defense and prejudice the jury. Marks on the deceased's back had no probative value to the cause of death.

Under Rule 702 of the Mississippi Rules of Evidence, Hayne is allowed to assist the jury in understanding the evidence by presenting his opinion of the victim's injuries so long as he is "qualified as an expert by knowledge, skill, experience, training, or education . . . . [and] (1) the testimony is based upon sufficient facts or data, (2) the *testimony is the product* of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case." M.R.E. 702. Further, this Court has held that while it is true that an expert opinion which embraces an ultimate conclusion to be reached by the finder of fact is not rendered inadmissible solely for that reason, the trial court has the obligation to determine whether permitting *such an* opinion to be expressed is truly helpful to the fact finder. Jenkins v CST Timber Co., 761 So.2d 177 (Miss. 2000).

In the present case, Dr. Hayne had no other evidence before him *other than the* autopsy of the deceased. Dr. Hayne had no evidence outside of his own report that would have caused him to conclude that the Appellant had suffocated Torrance. 'This type of opinion was hearsay and

speculation that should not have been admitted. Further, this testimony amounted to an opinion on the ultimate fact, which effectively invaded the province of the jury. "Questions which simply allow the witness to tell the jury what result to reach are impermissible, as are questions asking the witness for a legal conclusion." Dale v. Bridges, 507 So.2d 375, 378 (Miss. 1987). The trial court should have ruled that this particular line of questioning was outside Dr. Hayne's expertise and was not helpful to the trier of fact. By allowing Dr. Hayne to testify in this manner, the jury was confused and misled and took a hypothetical as expert testimony as to the manner of death. This ruling by the trial court was an abuse of its discretion and merely allowed the State to circumvent the Mississippi Rules of Evidence. This error was critical as this was a circumstantial evidence case and the only evidence to support a verdict of guilty was the medical testimony of Dr. Hayne. As such, this error requires reversal.

ISSUE FOUR

THE TRIAL COURT ERRED IN REFUSING TO GRANT THE APPELLANT'S MOTION FOR A 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 THE LAW.

At the close of the State's case, Appellant's Counsel moved for a directed verdict of acquittal. (Tr. pp. 197-204). The basis of such motion was that the state never proved kidnapping. Kidnapping being the underlying felony, proof of such was critical. The trial court erred in failing to grant such motion.

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 Wetz. v. State, this Court stated "Our concern here is whether the evidence in the record is sufficient to sustain a finding adverse to Wetz on each element of the offense of murder." Wetz v. State, 503 So.2d 803, 808 (Miss. 1981)). The Court continue "...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 roost favorable to the verdict." (citing Harveston 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 charge. the evidence so considered is such that reasonable and fair-minded jurors could only find the *accused not* ,guilty." 808.

Here, the prosecution's case against the Appellant was based on circumstantial evidence. In a circumstantial evidence case, it is fundamental that a conviction cannot be sustained on proof that amounts to no more than a possibility or even when it amounts to a probability, but it must rise to the height that will exclude every reasonable doubt. There was no direct testimony of any witness who actually seen McBeath commit any crime.

When in any essential respect the State relies on circumstantial evidence, it must be such as to exclude every other reasonable hypothesis other than that the contention of the State is true. Furthermore, in a case based solely on circumstantial evidence, the burden of proof throughout the trial remains with the State. Kolberg v State, 829 So.2d 29,, 39-40 *(Miss. 2002) (See also Hester v State, 463 So.2d 1087, 1093 (Miss. 1985) and Hemphill v. State, 304 So.2d 654, 655 (Miss. 1974)).*

The Appellant would argue here that the State's proof failed to establish sufficient evidence to support murder. That is, the evidence presented at trial failed to establish that McBeath was the

person who actually killed Torrance. Moreover, the evidence did not establish kidnapping. The jury found Appellant guilty of simple murder. Such finding demonstrates that the unlying offense to capital murder was not established all which the state could prove against Appellant was that he moved a dead body. The state convicted Issac Jermaine Nelson of the kidnapping and murder of Shannon Lee Torrence. Nelson v. State, 10 So.2d 898 (Miss. 2009) (No. 2008-KA-00299-SCT). Thus, the evidence against McBeath was legally insufficient to establish anything more than a probability of guilt and did not "invest mere circumstances with the force of truth." Steele at 809. Consequently, the conviction against McBeath should be reversed and the *Appellant* discharged.

ISSUE FIVE.

MCBEATH HAS BEEN SUBJECTED TO DOUBLE JEOPARDY IN VIOLATION OF THE 5TH AMENDMENT

Appellant was indicted for the offenses of capital murder and kidnapping . Kidnapping was used as the underlying offense for capital murder which the state put McBeath on trial for. The law is clear that whichever of the actions the jury used or considered can be said to have given rise to kidnapping charges which were subsumed within the murder and cannot, consistent with the protections of the 5th Amendment to the United States Constitution and Article 3, Section 22, of the Mississippi Constitution, form the basis of a prosecution for a separate offense.

Section 97-3-19 of the Mississippi Code requires that prosecutors show both an act of killing and "deliberate design to effect the death" in order to garner a conviction for murder." Miss. Code Ann 97-3-19 (2006). By comparison, Mississippi Code Section 97-3-53 defines kidnapping as an intentional, forcible seizure and confinement. Miss. Code Ann. 97-3-53 (Rev. 2006). Obviously, these two statutes are facially distinct, and therefore, while it may be correct that a defendant may be guilty of both kidnapping and murder, as it is elementary that "[a] single act may be an offense

against two statutes. . ." Blockburger v. United States , 284 U. S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932).

The facts of this case provide no basis to conclude that the kidnapping charge were not consumed by the murder. The seizure and confinement in this case were merely incidental to the act of murder, namely, taping a bag around Shannon Torrence's head, dragging his dying body to the car, and driving him to the woods where the body was dumped. This unbroken course of alleged conduct by McBeath which is alleged to have caused the death of Torrence, constituted the dastardly act of murder for which McBeath was convicted. But no more can it form the basis for a valid kidnapping charge than can the act of a gunman who backs his victim into a corner before shooting him. or the act of a strangler who seizes his quarry's throat until the poor soul breathes his last breath. This court should hold that acts , such as these, incidental to the very act of murder itself, are also acts of kidnapping. The court should also not hold that McBeath's alleged despicable and malicious conduct constituted the crime of kidnapping.

The crime of murder necessarily includes some degree of seizure, no matter how brief or how slight. If the court declares such incidental seizure is a fact sufficient to give rise to a separate charge of kidnapping, then the practical effect would be that every act of murder is capital murder, with kidnapping as the underlying felony. If readings of the kidnapping and murder statutes evince a legislative intent to permit such a result, then that interpretation would be lost to the court.

More fundamentally, though the double-jeopardy jurisprudence recognizes that "when the impulse is single, but one [charge] lies, no mater how long the action may continue. If successive impulses are separately given, even though all unite in swelling a common stream of action, separate [charge]s lie." *Id.* at 302. No such separation of impulses can reasonably be

gleaned from the facts of this tragic case; and to the extent that this particular alleged murder act suggests the propriety of a separate charge of kidnapping, such a suggestion lies in conflict with the state and federal constitutional guarantees of protection from double jeopardy.

Accordingly, this court should reverse and remand the conviction of kidnapping or reverse and remand the charge of murder unless the court finds that the double jeopardy violation invalidates and taints both convictions. In such event this court should reverse and render both convictions and sentences and set Appellant free.

ISSUE SIX

THE TRIAL COURT ERRED IN DENYING THE APPELLANT'S MOTION FOR A NEW TRIAL AS THE VERDICT WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE

The Appellant asserts that the trial court erred in denying his Motion for a New Trial because the verdict was against the overwhelming weight of the evidence. This Court has established the following standard of review:

> In determining whether a jury verdict is against the overwhelming weight of the evidence, this Court must accept as true the evidence which supports the verdict and will reverse only when convinced that the circuit court has abused its discretion in failing to grant a new trial. Only in those cases where the verdict is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice will this Court disturb it on appeal. As such, if the verdict is against the overwhelming weight of the evidence, then a new trial is proper.

Baker v State, 802 So-2d 77, 81 (Miss. 2001) (quoting Dudley v. State, 719 So.2d 180. 182 (Miss. 1998)).

"As distinguished from a motion for a directed verdict or JNOV, a motion for a *new trial asks* to vacate the judgment on grounds related *to the weight, not sufficiency of* the evidence." *Smith v* State, 802 So.2d 82, 85-86 (Miss. 2001). The Court has held that "the jury is the judge of the weight and credibility of testimony and is free to accept or reject all or some of the testimony given by each witness." Meshell v State. 506 So.2d 989, 991 (Miss. 1987) Notwithstanding this

high standard for reversal, Appellant asserts that the evidence was not of such a weight as to support the jury's findings. This was clearly a case where there was no direct evidence that McBeath caused the death of the victim. The bulk of the evidence against McBeath was the testimony of Dr. Haynes. In the present case, Dr. Hayne had no other evidence before him *other than the* autopsy of the deceased. Dr. Hayne had no evidence outside of his own report that would have caused him to conclude that the Appellant had suffocated Torrance. As pointed out above, '(T)his type of opinion was hearsay and speculation that should not have been admitted. Further, this testimony amounted to an opinion on the ultimate fact, which effectively invaded the province of the jury. As a circumstantial evidence case, the evidence must rise to an even stronger level, than one that excludes every reasonable hypothesis or supposition, except that of guilt. The legal standard given in the Court's legal instructions to the jury for a finding of guilt was that "only when on the whole evidence you are able to say on your oaths, beyond a reasonable doubt, and to the exclusion of every reasonable hypothesis *consistent* with innocence, that the defendant is guilty that the law will permit you to find him guilty.

Again, as stated above, the only medical testimony asserting that *the* Appellant suffocated the victim was that of Dr. Hayne. However, even in his testimony Dr. Hayne did not state this conclusion as fact, but merely as an inference stemming from a hypothetical situation presented to Hayne by the State. Furthermore, there were no other witness which could testify that McBeth suffocated the victim.

It was incumbent upon the prosecution in this wholly circumstantial evidence case, to prove McBeath's guilt beyond a reasonable doubt and to the exclusion of every reasonable hypothesis consistent with innocence. Leflore v. State, 535 So. 2d 68, 70 (Miss. 1988); Montgomery v. State, 515 So.2d 845, 848 (Miss. 1987); and Westbrook v. State, 202 Miss. 426,

32 So.2d 251, 251 (1947). The prosecution simply did not meet this burden in this case. The law is clear that "(i)t is fundamental that convictions of crime cannot be sustained on proof which amounts to no more than a possibility or even when it amounts to a probability, but it must rise to the height which will exclude every reasonable doubt; that when in any essential respect the state relies on circumstantial evidence, it must be such as to exclude every other reasonable hypothesis than that the contention of the state is true, and that throughout the burden of proof is on the state." It is the Court's duty to maintain these principles. Hester v. State, 463 So.2d 1087, 1093 (Miss. 1985) and Hemphill v. State, 304 So.2d 654, 655 (Miss. 1974) quoting Westbrook, 32 So.2d at 252.

There was too many other possibilities left unresolved by the prosecution in this case. Most critical is the fact that Nelson was convicted of the murder and kidnapping of the victim. McBeath could be nothing other then an accessory at most. If Nelson is guilty of the crime, as the state asserts, then McBeath is not guilty of the crimes but guilty of only being there

ISSUE SEVEN

THE TRIAL COURT ERRED IN FAILING TO GIVE INSTRUCTION ON MANSLAUGHTER BY CULPABLE NEGLIGENCE

Appellant would assert that the trial court erred in failing to give an instruction on manslaughter by culpable negligence when there was evidence presented during the trial that allowed the jury to consider such matter. The law provides that manslaughter is a lesser included offense of capital murder. Miss. Code Ann. §97-3-19(3), which provides that:

> 3) An indictment for murder or capital murder shall serve as notice to the defendant that the indictment may include any and all lesser included offenses thereof, including, but not limited to, manslaughter.

There was evidence presented during the trial that Craig may have been guilty of causing the death of the victim by culpable negligence which would have allowed the jury the option to find McBeath guilty of manslaughter. There was no evidence to sustain that Craig McBeath caused the death of the victim intentionally or while engaged in some other crime. Under the law defense counsel had a duty to seek a manslaughter instruction which would confirmed to the testimony and evidence offered at trial by the defense. **Defense counsel failed in this duty.**

It should be abundantly clear that pursuant to clear legislative intent expressed via Miss. Code Ann. §97-3-19(3), a capital murder indictment will unequivocally put any defendant on notice that he/she is also subject to being prosecuted for manslaughter, and that a properly worded manslaughter instruction may be given in any case in which such instruction is justified by the evidence. State v. Shaw, 880 So.2d 296 (Miss. 2004). In the instant case, such an instruction was justified by the evidence.

Under Miss. Code Ann §97-3-47, manslaughter is a killing "by the act, procurement, or culpable negligence of another, and without authority of law," which is not punished under any other section of the penal code. That version of manslaughter does not contain as an element that the killing occur during the commission of some other crime. There was credible evidence presented at trial that the victim could have died through culpable negligence. No such instruction was sought by the defense attorney on this theory of the case nor granted by the trial court. Appellant would assert that such failure evidences ineffective assistance of counsel in this regard. In accord with the provisions of Miss. Code Ann. §97-3-19(3), the trial court could have offered this instruction sua sponte. The jury should have been given this option. A defendant in a criminal case can be found guilty of a lesser-included offense, so long as it is necessarily a lesser-included offense of the offense charged. Payton v. State, 644 So.2d 1344 (Miss. 1994).

Moreover, the Court of Appeals held that "'[a] lesser-included offense by definition is one in which all its essential ingredients are contained in the offense for which the accused is indicted, but not all of the essential ingredients of the indicted offense. Fulcher v. State, 804 So.2d 556, 560 (Miss.Ct.App. 2001).

Appellant would ask that this court reverse and remand this case to the trial court for a new trial or that there be a new sentencing hearing to allow a new jury to consider the option manslaughter.

ISSUE EIGHT

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

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 Craig McBeath 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." 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 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 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 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, Johnson v. State, supra, there shall be no procedural bar to these assignments of error, which collectively denied Appellant Craig McBeath 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 Craig McBeath did not receive a fair trial in this case when the trial judge allowed the prosecution to introduce speculative and hypothetical evidence from the prosecution's expert witness, Dr. Hayne. This speculative and hypothetical evidence was allowed by the court as substantive evidence. The trial court allowed such evidence to be heard by 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.

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 investigate his case prior to trial by failing to obtain critical information from witnesses and failing to be adequately prepared. The record demonstrates that defense counsel never made appropriate objections to the evidence. Even where it was clear that the trial court was exceeding it's sentencing authority, the defense counsel never said a mumbling word. Proper investigation and discovery was crucial in order to properly cross-examine the expert testimony presented by the State against the Appellant and in order to prepare a vigorous and effective defense on Appellant's behalf. The State failed to prove beyond a reasonable doubt and to the exclusion of every reasonable hypothesis consistent with innocence that the Appellant "intentionally" inflicted injuries on the victim which to his death.

Lastly, the Appellant argues that the trial court erred in refusing to grant the Appellant's Motion For A New Trial as the verdict of the jury was against the overwhelming weight of the evidence. Thus, the Appellant requests that as to Issue One, Two, Three, Four, Six, Seven and

Eight, this Court reverse and remand for a new trial. With regard to Issue Five, Appellant submits that this Court should reverse and render this case and discharge the Appellant

Respectfully submitted,

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CERTIFICATE OF SERVICE

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

Honorable Jim Hood	Honorable Mark Duncan	Honorable Marcus D. Gordan
Attorney General	District Attorney	Circuit Court Judge
P. O. Box 220	P. O. Box 603	P. O. Box 220
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This, the 28 day of October, 2009.

Respectfully submitted,

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