CASE NO. ~~2009~~ 2008-KP-01920-COA

COURT OF APPEALS OF THE STATE OF MISSISSIPPI

FREDRICK DENELL GRIM
APPELLANT/Appellant

VS.

STATE OF MISSISSIPPI
APPELLEE/PLAINTIFF

APPEAL FROM THE CIRCUIT COURT OF
TUNICA COUNTY, MISSISSIPPI

APPELLANT'S OPENING BRIEF

ORAL ARGUMENT NOT REQUESTED

BY: Fredrick Grim

Fredrick Grim, #T1076
Unit 29-J
Parchman, MS 38738

Appellant, pro se

CASE NO. **2009-KP-01920-COA**

COURT OF APPEALS OF THE STATE OF MISSISSIPPI

FREDRICK DENELL GRIM
APPELLANT/DEFENDANT

VS.

STATE OF MISSISSIPPI
APPELLEE/PLAINTIFF

APPEAL FROM THE CIRCUIT COURT OF
TUNICA COUNTY, MISSISSIPPI

ORAL ARGUMENT NOT REQUESTED

I.

STATEMENT REGARDING ORAL ARGUMENT

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

CASE NO. **2009-KP-01920-COA**

COURT OF APPEALS OF THE STATE OF MISSISSIPPI

FREDRICK DENELL GRIM
APPELLANT/DEFENDANT

VS.

STATE OF MISSISSIPPI
APPELLEE/PLAINTIFF

APPEAL FROM THE CIRCUIT COURT OF
TUNICA COUNTY, MISSISSIPPI

APPELLANT'S OPENING BRIEF

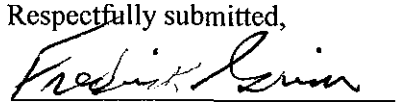
II.

CERTIFICATE OF INTERESTED PERSONS

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

1. Appellant Fredrick Grim, Appellant pro se
2 Honorable Jim Hood, and staff, Attorney General
3. Honorable Albert Smith, Circuit Court Judge
4. Honorable Laurence Mellen, District Attorney
5. Honorable Richard B. Lewis, Defense Attorney at trial

Respectfully submitted,

BY: 

Fredrick Grim, #T1076
Unit 29-J
Parchman, MS 38738

Appellant pro se

CASE NO. **2009-KP-01920-COA**

COURT OF APPEALS OF THE STATE OF MISSISSIPPI

FREDRICK DENELL GRIM
APPELLANT/DEFENDANT
VS.

STATE OF MISSISSIPPI
APPELLEE/PLAINTIFF

APPEAL FROM THE CIRCUIT COURT OF
TUNICA COUNTY, MISSISSIPPI

III.

STATEMENT OF THE ISSUES

ISSUE ONE

THE HABITUAL PORTION OF THE INDICTMENT, CHARGING APPELLANT AS A HABITUAL OFFENDER UNDER MISS. CODE ANN. §99-19-83, IS CONSTITUTIONALLY AND STATUTORILY DEFECTIVE AND VOID WHERE THE INDICTMENT FAIL TO CHARGE, AND THE STATE FAILED TO INTRODUCE PROOF OF, THE STATUTORY REQUIRED ELEMENT OF THE DATES OF THE *SENTENCING* IN THE PRIOR CONVICTIONS.

ISSUE TWO:

APPELLANT WAS SUBJECTED TO INEFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL AND DURING THE SENTENCING PROCEEDINGS IN THE TRIAL COURT, IN VIOLATION OF HIS 6TH AMENDMENT RIGHTS TO THE UNITED STATES CONSTITUTION AND THE CONSTITUTION OF THE STATE OF MISSISSIPPI.

ISSUE THREE:

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

ISSUE FOUR:

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 FIVE:

THE INDICTMENT IS DEFECTIVE IN IT'S ATTEMPT TO CHARGE HABITUAL OFFENDER STATUS WHERE IT CHARGED APPELLANT UNDER TWO DIFFERENT HABITUAL STATUTES WITHOUT SPECIFYING EXACTLY WHICH STATUTE THE PROSECUTION WOULD APPLY.

ISSUE SIX:

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 AMENDMENTS TO THE UNITED STATES

IV.

STATEMENT OF INCARCERATION

The Appellant is presently incarcerated and is being housed in the Mississippi Department of Corrections at the Mississippi State Penitentiary, 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 the sentence by the trial court.

V.

STATEMENT OF CASE

On August 13, 2009, an indictment was filed in the Tunica County Circuit Court charging Appellant Fredrick Grim, with sale of cocaine, being a second and subsequent drug offender, and being a habitual offender within the means of Miss. Code Ann. §99-19-83. (R. 7-11)

Appellant was represented at trial by Honorable Richard B. Lewis, of Clarksdale, Mississippi. Upon conviction of all counts in the indictment Appellant was sentenced to a total sentence of life without parole in the custody of the Mississippi Department of Corrections and as a habitual offender under Miss. Code Ann. §99-19-83. (R. 96-97)

Being aggrieved by the verdict and sentence, Appellant Grim perfected an appeal of the convictions and sentences of the Circuit Court of Tunica County, Mississippi.

Appellant is now proceeding with the preparation and filing of his brief in the court pro se which will contain a total of six (6) separate claims for reversal.

VI.

SUMMARY OF ARGUMENT

The record is clear that the state initially indicted Appellant under duel habitual enhancement statutes, Miss. Code Ann. §99-19-81 and Miss. Code Ann. §99-19-83, without referring to either specifically but noticed Appellant that the state was seeking life imprisonment when only one such statute allowed life imprisonment. (C.P. 9) The trial court, following conviction, proceeded to impose sentence under the large habitual sentencing option in the form of a life sentence without the possibility of parole under each charge. During the sentencing phrase of the proceedings defense counsel actually said nothing and made no objections to the

legality of the indictment. The record will show that the state never set out the dates of the judgment of either of the prior convictions and quoted an incorrect sentencing date for the prior conviction which it set out in Cause No. 3253, 3249 and 2005-404CD. Grim was sentenced under a defective indictment. The indictment failed to comply with Rule 11.03 of the Miss. Unif. Rules of Cty. and Cir. Court Practice[1] which requires that the indictment set forth the date of judgment in each prior conviction and an element of the proof required. The state failed to satisfy such requirement, which constitutes plain error and cannot be waived by a failure to object at trial. Additionally, the prosecution failed to present proof of the element of the charge where there was no credible evidence as to the substance which the state alleged to be a controlled. The testimony introduced by the state's witness on the substance was not proper where the law did not allow such technical analyst present proof in regards to a report which he did not write and tests which he did not personally perform.

[1] Rule 6.04 of the Miss. Unif. Rules of Cty. and Cir. Court Practice has been amended to Rule 11.03 of the of the Miss. Unif. Rules of Cty. and Cir. Court Practice. The particular language which Appellant relies upon is contained under Rule 11.03(1).

VII.

ARGUMENT

ISSUE ONE

THE HABITUAL PORTION OF THE INDICTMENT, CHARGING, APPELLANT AS A HABITUAL OFFENDER UNDER MISS. CODE ANN. §99-19-83, IS DEFECTIVE AND VOID WHERE THE INDICTMENT FAIL TO CHARGE, AND THE STATE FAILED TO INTRODUCE PROOF OF, THE ELEMENT OF THE DATES OF THE SENTENCING IN THE PRIOR CONVICTIONS.

The habitual portion of the indictment filed against Grim alleged the following as the basis for such habitual charge.

CONTINUATION OF INDICTMENT AGAINST THE DEFENDANT
FREDERICK DENELL GRIM

and upon conviction the said defendant is hereby charged under MCA §99-19-83 to be sentenced to life imprisonment and under MCA §99-19-81[2] to be sentenced to the maximum term of imprisonment prescribed for such felony, namely life imprisonment, and such sentence shall not be reduced or suspended nor shall such person be eligible for parole or probation; in that the said defendant shall, then and there have been convicted at least twice previously of a felony or federal crime upon charges separately brought and arising out of separate incidents at different times, and shall have been sentenced to and served separate terms of one (1) or more in this state or elsewhere; and to the extent that the specifics of said convictions and sentences are known to the Grand Jury at this time, they are more particularly described as follows:

CAUSE NO.	COURT OF CONVICTION	DATE OF CONVICTION	OFFENSE	DATE OF INCIDENT	SEN. (YRS.)
3253	Circuit Court Tunica County, MS	03/27/97	Poss. Cocaine	09/24/96	3
3449 Ct. I	Circuit Court Tunica County, MS	03/06/98	Agg. Assault	07/15/97	7
3449 Ct. II	Circuit Court Tunica County, MS	03/06/98	Poss. Of Firearm By Felon	07/15/97	7

[2] The state attempts here to take two bites of the apple by attempting to make a catchall approach. This Court have previously held that one bite of the apple is all which is allowed. Smith v. State, 646 So.2d 538 (Miss. 1994); Stringer v. State, 500 So.2d 928 (Miss. 1986). If a defendant is only entitled to one bite of the apple in defending himself, Sanders v. State, 440 So.2d 278 (Miss. 1983); Read v. State, 430 So.2d 832 (Miss. 1983), then it follows that the state should only be entitled to one bite as well.

2005-404CD Circuit Court 10/05//05 Grand 12/02/04 2
Desoto County, MS Larceny

the above specifics may be and shall be amended whether by addition, deletion, substitution, or in any other manner whatsoever as many times as necessary to correctly state the specifics of any and all convictions, including, but not limited to the above, relevant to the above charge that the defendant shall be sentenced under MCA § 99-19-83 and MCA § 99-19-81;

contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the State of Mississippi.

CONTINUATION OF INDICTMENT AGAINST THE DEFENDANT
FREDERICK DENELL GRIM

The defendant herein is further charged by authority and provisions of MeA § 41-29-147! as being a second and subsequent offender, whereby he may be imprisoned, after conviction, to a term of up to twice the term otherwise authorized for the charge or charges in the fact of this indictment and fined an amount up to twice that otherwise so authorized, or both. Defendant is charged as having been previously convicted of violation of a provision of a law or statute of the State of Mississippi! United Stated! or any states, dealing with drugs or controlled substances, which conviction or convictions are as follows:

CAUSE NO.	COURT OF CONVICTION	DATE OF OFFENSE CONVICTION	DATE OF INCIDENT	SEN. (YRS.)
3253	Circuit Court, 03/27/97 Tunica County, MS	Poss. Cocaine	09/24/96	3

The above specifics may be and shall be amended - whether by addition, deletion! substitution! or in any other manner whatsoever - as many times! as necessary to correctly state the specifics or any and all convictions! including! but not limited to the above, relevant to the above charges that the defendant shall be sentenced under MeA § 41-29-147;

contrary to the form of the statute in such cases made and provided and against the peace and dignity of the State of Mississippi.

The charges made in the indictment fail to allege the specific date in which the previous sentences which the state sought to use against Grim to forfeit the remainder of Grim's earthly life were imposed. The record, as it quoted above word for word, confirms this. This cannot be disputed. (C.P. 7-10)

During the sentencing hearing before the trial court, in regards to the habitual portion of the indictment, the prosecution presented the following:

MS. MUSSELWHITE: Your Honor, the State presented to the Court State's Exhibit 5 and 6, which are records from the Mississippi Department of Corrections, and we do have the

records supervisor from MDOC here today and she is prepared to testify.

THE COURT: Where is he?

MS. MUSSELWHITE: It's Ms. Gloria Gibbs.

THE COURT: Step forward.

(Witness approaches bench.)

MR. LEWIS, SR.: What's the last name?

MS. MUSSELWHITE: Yes.

THE COURT: Raise your right hand side.

(Witness sworn by Court.)

THE COURT: Please take a seat up here.

(Witness seated on stand.)

GLORIA GIBBS,

after having been first duly sworn, was examined and testified as follows, to-wit:

DIRECT EXAMINATION

BY MS. MUSSELWHITE:

Q Could you state you name, for the record?

A Gloria Gibbs.

Q Where do you work, Ms. Gibbs?

A Mississippi State Penitentiary.

Q And at any time, has the District Attorney's Office requested documents regarding a Mr. Fred Grim?

A Yes, ma'am.

MS. MUSSELWHITE: Your Honor, may I

approach the witness?

THE COURT: Sure.

Q I'm going to hand you what has been marked as State's Exhibit 5 and 6.

THE COURT: I admitted those, if I recall.

MR. LEWIS, SR.: I believe I admitted them. But go ahead.

BY MS. MUSSELWHITE:

Q Could you review those document?

THE COURT: Subject to, you know, argument. But I went ahead and admitted them last time.

A (Examining documents.)

Q Did you - - can identify those documents?

A Yes, ma'am.

Q Okay. What are those documents?

A Court documents on offender Frederick Grim.

Q And did you actually produce those documents?

A Yes, ma'am.

Q Okay. And did you send those to the District Attorney's Office?

A Yes, ma'am.

Q Okay. And, uh, does the - - do the documents include a photo of the defendant?

A Yes, ma'am.

Q And is that Defendant located in the courtroom today?

A Yes, na'am.

MS. MUSSELWHITE; Your Honor, may --

Q Can you identify the defendant?

THE COURT: She did, and those are the documents on this guy here, right?

THE WITNESS: Yes, ma'am. I mean, yes, sir. I'm sorry. Yes, sir.

MS MUSSELWHIT: Your Honor, at this time, the State would ask that --

THE COURT: The documents be --

MS. MUSSELWHITE: -- S-5 and 6 be admitted.

THE COURT: Which ones, S-5 and what?

MS. MUSSELWHITE: 6

the court: Any objections?

MR. LEWIS, SR.: We object to it, your Honor, as to the accuracy of the records, and we'll get into the argument.

THE COURT: Well, without more, I'm going to admit 5 and 6 into the record.

MR. LEWIS, SR.: We understand. We just want to make our record.

(STATE'S EXHIBIT NUMBERS S-5 AND s-6 MARKED AND ADMITTED INTO EVIDENCE.)

BY MS. MUSSELWHITE:

Q Ms. Gibbs, how many felonies has the

defendant been convicted of in the state of Mississippi?

A Four.

Q And can you start with the first on and tell us when the first offense occurred?

A The first offense, possession on controlled substance.

Q Okay. And when did -- what was the offense date on that?

A September the 24th, 1996.

Q All right. And was the -- what was the defendant sentenced to in that cause?

A One year.

Q Okay. And did the defendant in fact serve that year with the Mississippi Department of Corrections?

A Yes, ma'am.

Q And can you tell us the time period that he served that year?

A Yes, ma'am.

Q And what was that?

A His sentence started July 30, 1997 and ended July 13, 1998.

Q When was the defendant charged with the next felony?

THE COURT: We're going to ask you about

all of them. So, kind of go from one to the other.

THE WITNESS: Okay.

BY MS. MUSSELWHITE:

Q Yes. If you can, just without me prompting you, just go ahead and to through all of his felony convictions, what he was sentenced to and how long he served.

A March 6, 1998, he was sentenced for aggravated assault, two years: possession of a firearm by a conviction felon, two years.

Q Okay. And we --

THE COURT: Those are -- ag' assault is one charge. Did he get another charge of possession of a firearm by a convicted felon?

THE WITNESS: Yes, sir.

THE COURT: What year was that? Is that also '98?

THE WITNESS: 1998.

THE COURT: Okay, there were two counts in that, and he got two years to serve?

THE WITNESS: Two years to serve, each count running *CC.*

THE COURT: Running CC. Any probation, or is that all

together?

THE WITNESS: Uh, he had five years probation.

THE COURT: Okay. What happened next?

THE WITNESS: October 5, 2005.

THE COURT: Okay.

THE WITNESS: He was sentenced to grand larceny, seven days time to serve and two years probation.

THE COURT: Okay. Where was that out of?

THE WITNESS: Beg your pardon?

THE COURT: Do you know what jurisdiction that was out of?

THE WITNESS: DeSoto County.

THE COURT: Okay.

BY MS. MUSSELWHITE:

Q Where were the prior convictions from, the possession of controlled substance and aggravated assault; possession of a firearm by a convicted felon?

THE COURT: I don't need all that. It speaks for -- I've already accepted it. Move on. Let's go.

BY MS. MUSSELWHITE:

Q How long did the defendant serve on the aggravated assault charge?

A One year and 13 days.

Q Okay. And how long did he serve on the possession of a firearm by a convicted felon?

A That was running CC.

Q So, it was one year and 13 days?

A Yes, ma'am.

MS. MUSSELWHITE: I tender the witness, your Honor.

(Tr. 191-198)

The testimony of Chief Records Officer Gibbs, while Ms. Gibbs attempted excessively hard to salvage and resuscitate the state's botched indictment, meet the required elements of habitual offender status as set forth under Miss. Code Ann. Sec. 99-19-83 and Rule 11.03(1) of the Miss. Rules of Cir. and Cty Court Practice. Rule 11.03(1) provides that:

> The indictment must include both the principal charge and a charge of previous convictions. The indictment must allege with particularity the nature or description of the offense constituting the previous convictions, the state or federal jurisdiction of any previous conviction, and the date of judgment.

In the instant case the indictment makes no such allegation and the testimony of Gibbs never asserted, with particularity, the date of the previous judgments. The law requires that this element be set out in the indictment. The state never amended

the indictment to cure such ailment. No motion to that effect was made. The Appellant objected to the previous charges at the outset of the testimony of Ms. Gibbbs and at the time the state sought to introduce the exhibit 4 and 5. (Tr. 194)

On cross examination, Gibbs actually confirmed that the state's indictment was faulty. She testified as follows:

CROSS-EXAMINATION

BY MR. LEWIS, JR.:

Q How are you doing, Ms. Gibbs? I'm Attorney Lewis.

A All right. Let me point your attention to State's Exhibit 5, the third page, where it says "sentence compilation record."

A Yes, sir.

Q Okay. Tell me, on these three charges, when did they -- when was the date of sentence on the three charges?

A October 6, 1997.

Q Okay. So that was the sentence for all three?

A No, sir.

Q Okay. Where does it show any other date?

A He was sentenced on the Tunica County Case to aggravated assault and the possession of firearm March 1, 1998 on some --

Q Where does it show that on here?

A On the top sheet. Not on the sentence computation sheet.

Q It doesn't show it on here?

A Not on the sentence computation sheet.

Q Where does it say on here which sentence starts first?

A It says on the top sheet, the third page -- the fourth page.

Q The fourth page. Where does it say?

A Tunica County, possession of controlled substance October 6, 1997.

(Tr. 198)

There is no place in the indictment where the state alleged Grim had been sentenced, or that the date of the judgment was, March 1, 1998 or October 6, 1997, as Gibbs asserted that her records indicated. The indictment therefore failed to meet with the mandatory language of Rule 11.03(1). This rule requires that the indictment "must allege these dates with particularity." The indictment filed against Grim, to allege proof of prior convictions, was therefore constitutionally invalid and faulty as a matter of law. The enhanced sentence, based upon this faulty indictment, must fail.

At one point the state attempted to question Gibbs as to where the prior convictions were from. The Court directed the state to move on and not question on this subject. (Tr. 197)

Such an action was improper by the trial court since questions on where the prior convictions occurred were absolutely relevant under Rule 11.03 and Miss. Code Ann. Sec. 99-19-83. While the Court asserted that: "I don't need all that. It speaks for -- I've already accepted it. Move on. Lets go." (Tr. 197). Such action by the trial court was clearly improper since the record must show that proof on such matter was presented. This Court should hold that the trial court's actions were manifestly incorrect and that such incorrect action deprived Grim of an adequate record to support his claims to this Court on appeal.

MR. LEWIS, JR: Can I approach, your Honor --

THE COURT: Sure.

MR. LEWIS, JR: -- so I can see what she's --

BY MR. LEWIS, JR.:

Q What page is that?

A Four.

Q Four. Is this the same thing I'm looking at?

A Yes, sir.

Q Could you point out to me where it says that.

A)Pointing.)

Q Oh, okay. Okay. I see where you are saying. Okay. So, on the possession of controlled substance, he was sentenced to three years of

probation at first, is that correct?

A Yes, sir.

Q Okay. And he was revoked for one year on Ocotber 6 of '97?

Q Is that correct?

Okay. Now, it doesn't say that -- okay, hold on a second. So, you are saying that he served the one year from what -~ what dates, again?

A From July 13, 1997 to July 13, 1998~

Q So, he started serving on the probation for possession of a controlled substance before he was revoked, is that correct?

A Uh, yes. It all depends on his jail time.

Q Okay. So, on the aggravated assault and the possession of a firearm by a felon, there is nothing in there that specifically says that those didn't start first instead of the possession of controlled substance?

A His sentence always start first. It depends on how they were sentenced. He was sentenced on the possession of controlled substance from the first, so it start first.

Q Okay. but it was consecutive to the other sentences?

A Yes sir.

Q Isn't that correct?

So, it automatically starts first?

A Yes, sir.

Q Okay. I know you stated the -- where you said the parole revocation took place on October 6 of '97. But where does it specifically say in the paperwork that it's supposed to start first?

A I don't guess the paperwork has said it's supposed to start first, but since he was sentenced first.

Q So it doesn't say it?

A Right.

Q And the aggravated assault and the possession of the firearm, they arose out of the same incident, is that correct?

A (Nodding.)

Q Okay. And you're basing your opinions basically strictly on these records, is that correct?

A Yes, sir.

Q Okay

MR. LEWIS, JR: That's all, your Honor.

MS. MUSSELWHITE: Your Honor, I would like to go over this one more time and make sure we're clear.

REDIRECT EXAMINATION

BY MS. MUSSELWHITE:

Q And correct me if I'm wrong, Ms. Gibbs. The defendant, the offense date for the possession of the controlled substance was on September 24, 1996, correct?

A Yes, sir. Yes, ma'am.

Q Okay. And he was sentenced or revoked for those three years of probation on October 6, '97, correct?

A Yes, ma'am.

Q And that sentence -- he was revoked for a year, and therefore, had the two years of probation afterwards, correct, out of three.

The aggravated assault charge and then possession of firearm by a convicted felon, offense dated was July 15, 19977

A Yes, ma'am.

Q He was not sentenced on that charge until March 6, 1998?

A Yes, ma'am.

Q In the meantime, the sentence had been calculated to start running on 7-13-97 because he got credit for time in jail; correct?

A Yes, ma'am.

Q Okay. And the -- he served a year from 7-13-97 to 7-13-98 on the possession of controlled substance! correct?

A Yes, ma'am.

Q After he finished serving that time, the sentence began to run on the aggravated assault charge that he had been sentenced to second and that -- he served, you said, a year and 13 days from July 13, '98?

A Yes, ma'am.

MS. MUSSELWHITE: That's all I have, your Honor.

MR. LEWIS, JR: May I ask one more question, your Honor?

MR. BLECK: Object.

MS. MUSSELWHITE: I'm going to object, your Honor. He's already

MR. LEWIS, SR., JR.: I just wanted to know when the specific release date was that she is saying?

THE COURT: Do you know?

THE WITNESS: The release date? Yes. He was released 11-3 of 1999.

MR. LEWIS, SR., JR.:

MR. LEWIS, JR: What did you say, 11?

THE WITNESS: November 3, 1999.

THE COURT: Anything else?

MR. LEWIS, JR: Not from this witness, your Honor.

MS. MUSSELWHITE: No, sir.

THE COURT: All right. What other witness are there?

MR. LEWIS, JR: We would like to call the defendant, your Honor.

THE COURT: Okay, if you would step down.

(Witness seated in courtroom.)

FREDERICK DENELL GRIM,

after having been first duly sworn, was examined and testified as follows, to-wit:

BY MS MUSSELWHITE:

Q Please state your name?

A Frederick Denell Grim.

Q Okay, Mr. Grim, you were obviously present when this lady was speaking about your past convictions, right?

A Yes.

Q Are you denying necessarily andy of the convictions themselves?

A No.

Q Could you please explain to the Court as far as when you served your aggravated assault and

possession of a firearm and when you served the "possession of cocaine?

A Well, I pled guilty to aggravated assault and they violated after they violated me, I was not no bond. That's the reason I stayed in jail all the time.

Q You are saying that you pled guilty on the same date you were revoked?

A Yes

Q Okay. Now, when did you start serving your aggravated assault?

A July 15, 1997.

Q Okay. And you served how many years on that?

A I served two years.

Q Olay. And that would be July 13 of '99. Is that when you -- when did you start serving then?

A Well, I did eight months on my violation probation. (sic)

Q Possession of controlled substance?

A Yes.

Q And you were released after that?

A Yes.

Q When were you released?

A November 3, 1999.

Q Okay.

MR. LEWIS, JR: I think that's all, your Honor.

THE COURT: Any questions?

MR. LEWIS, JR: Well, one more question, your Honor.

BY MR. LEWIS, JR:

Q The aggravated assault and the possession Of a felony by -- possession of a firearm by a felon, please explain to the court what the circumstances were with those two charges? Were those of the same incident?

A Yes. They told me that if I plead guilty, it converts to one charge.

Q But they were -- was the gun part of the aggravated assault charge?

A Yes.

MR. LEWIS, JR: Okay. That's all, your Honor.

BY ME. LEWIS, JR:

Q The aggravated assault and the possession of a felony by -- possession of a firearm by a felon, please explain to the court what the circumstances were with those two charges? Were those of the same incident?

A Yes. They told me that if I plead guilty, it converts to one charge.

Q but they were -- was the gun part of the aggravated assault charge?

A Yes.

MR. LEWIS, JR: Okay. That's all, your Honor.

THE COURT: Any questions?

MS. MUSSELWHITE: No, your Honor.

THE COURT: You may return to your seat.

(Witness seated at defense table.)

THE COURT: Anybody have any other witnesses?

MS. MUSSELWHITE: No, our Honor.

MR. LEWIS, JR: No, your Honor.

THE COURT: All right.

If you would stand with the defendant.

MR. LEWIS, JR: We would like to argue, your Honor.

MR. LEWIS, JR: We would like to present our point, on the record.

MR. LEWIS, SE.: We would like to present our point, on the record.

THE COURT: Make your point for the record. Let's go.

MR. LEWIS, JR: Your Honor, on the information we were provided by Mississippi

Department of Corrections, there is no indication of which offense started first. There is nothing -- it's just all combined into three years. But their -- that possession of a controlled substance is to run consecutive to the other two charges. There has been no proof other than just Ms. Gibbs guessing about what which one starts first. There is nothing in the record saying which one starts first. The -- and, of course, the aggravated assault and the possession of a firearm by a felon run out of the same facts and circumstances, same incident. So, that can only be one conviction. And he -- we are contending that he only served eight months on the possession of controlled substance. And the Grand Larceny was obviously, he only served seven days on. So, we are contending that Mr. Grim is an 81 habitual and not the 83 habitual that is stated by the State.

THE COURT: For the record, the Court does accept the testimony of Ms. Gibbs. I think that the protocol that she follows with the Department of Corrections as well as the records, give me no choice but to find that,

Mr. Grim, you have violated §99-19-83, which is, of course, the habitual offense statute, the big habitual ,offense statute, which states that every person convicted in this state of a felony he shall have been convicted twice previously. And what Ms. Gibbs said coincides with not only the exhibits offered and received, but the indictment which reflects. data incidents and dates of conviction of four previous felonies, two of which were the same -- at the same time. But be that as it may, any person who is convicted twice previously of any felony or federal crime upon charges separately brought and arising out of separate incidents at different times *in* which you have been sentenced to and served separate terms of one year or more in any state or federal penal institution whether in this state or elsewhere where anyone of such felonies shall have been a crime of violence, shall be sentenced to life imprisonment and said sentence shall not be reduced or suspended, nor shall such person be eligible for parole or probation.

Accordingly, this Court sentences you

to life imprisonment, which shall not be reduced or suspended. Nor shall you be eligible for parole or probation for the period of your natural life as related to in §99-19-83.

The -- and that is a result of the verdict of the jury finding you guilty of feloniously selling a controlled substance to-wit, cocaine in violation of statute.

With that, the Court wishes you well.

MR. LEWIS, JR: I did have one thing for the record. Which charges is the court basing its decision on, just --

THE COURT: Whatever the record says, whatever Ms. Gibbs says, and what were the exhibits. I'm not going to get into all that. The indictment speaks for itself. The Court adopted what was there.

That's going to be the order of the Court.

You are remanded to the sheriff's department.

You got any -- what you standing up for?

MR. LEWIS, JR: We would like --

MR. LEWIS, SR.: Your Honor, we would

like to just go ahead and address the motion for a JNOV while we got everybody here, quickly, and for the record, shortly.

THE COURT: Go ahead and for the record address the motion.

You may be seated.

MR. LEWIS, SR.: That's just so the court can have it.

Your Honor, we're not going to really argue --

THE COURT: Have you seen this, lawyer?

MS. MUSSELWHITE: Yes.

THE COURT: All right.

MR. LEWIS, SR.: We're not going to really argue the points of one through four. But we would just like, for the record -- we understand the Court's previous evidentiary ruling concerning the issue of confrontation. and that our main objection that we felt like a motion for new trial should be granted *was* the failure of the State to bring the technical reviewer, who was Gary Fernandez, to testify rather than Erik Frazure. And the Court has already ruled on that. We understand that ruling. We want to make sure our record is clear. [sic]

THE COURT: Well, you filed it. It's on the record. Your record is clear, once you filed it.

The Court will deny that motion.

MR. LEWIS, SR.: Thank you, your Honor.

THE COURT: I'M going to put this in the file and turn this over to Madam Clerk.

If nothing further, we're in recess.

This defendant is remanded to the Sheriff's Department to be taken to Department of Corrections.

Court's in recess.

(Hearing concluded: 12:17 p.m.)

The record demonstrates that the state never presented proof of the prior convictions consistent with that information which the indictment provided. Gloria Gibbs testified that in Cause No. 3253 Grim started his sentence on indictment noticed that such conviction occurred on March 27, 1997 (c.p. 009). The state failed to meet it's proof on this issue where the state did not prove what it had asserted in the indictment. The state should not be allowed multiple opportunities to prove a prior conviction. The prosecution should not be permitted to notice one date in the indictment and attempt at trial to prove another. The evidence of proof should be confined to the essential allegations alleged in the indictment. Thames v. State, 5 So.3d 1178 (Miss. App. 2009); Bullard v. Estelle, 665 F.2d 1347 (5th Cir. 1982)

In Cause No. 3449, Count I, and Cause No. 3449, Count II, Gloria Gibbs confirmed that these two charges arises from the same incident and resulted in two concurrent 2 year sentences.

(Tr. 196) while Gibbs clarified that the date of the sentencing was March 6, 2006 on both, the indictment do not refer to date of sentence but date of conviction[3]. (C.P. 009)

In Cause No. 2005-404 CD, Ms Gibbs confirmed that Grim was sentenced to only seven days to serve and two years probation. (Tr. 197) Clearly this conviction did not qualify under Miss. Code Ann. §99-19-81 nor 99-19-83. The law requires that one must be sentenced to serve one year or more in a state or federal penal institution before that sentence may apply as a prison conviction under the habitual offender statute. The state failed to prove the elements required by law in regards to the habitual status under either of the habitual status the state alleged.

The law on this issue dictates that the state dropped the ball by failing to allege and prove the date in which each of the prior sentencing occurred. Ard v. State, 403 So.2d 875, 876 (Midd. 1981).

In Ard the Supreme Court held that:

> It is readily seen that the indictment does not meet the requirements of the statute as interpreted in Usry in that it dies not state the court in which he was convicted, the date of the judgment, the nature or the description of the offense for which he was convicted, nor that he was sentenced to serve "one (1) year or more in any state and/or federal penal institution, whether in this state or elsewhere...."

Ard v. State, 403 So.2d 875, 876 (Miss. 1981).

In Watson v. State, 921 So.2d 741, 743 (Miss. 1974) the Court held that the indictment must substantially set forth the date of judgment of the prior judgment and the nature and description of the offense constituting the previous convictions. Also see Benson v. State, 551 So.2d 188 (Miss. 1989).

[3] As previously pointed out, the date of sentencing and date of conviction in Tunica County, Mississippi is entirely different dates. The statute require date of sentencing.

In addition to case law, Appellant would point out that Rule 6.04, Miss. Unif. Crim. R. Cir. Court Pra. provides the following relevant:

> In cases involving enhanced punishment for subsequent offenses under state statutes, including but not limited to, the Habitual Criminal Statute, Miss. Code Ann. Sections 99-19-81 and 99-19-83 and the uniform Controlled Substances Law, Miss. Code Ann. Section 41-29-147:
>
> (1) The indictment must include both the principal charge and a charge of previous convictions. The indictment must allege with particularity the nature or description of the offenses constituting the previous conviction, and the date of judgment.[4]

Rule 6.04 has the force and effect of a statute where it is a rule of law adopted by the Miss. Supreme Court.

This Court should find that the indictment which the state presented was a defected instrument on the subject of the habitual offender status where the instrument failed to comply with the requirements of law as set forth under rule 6.04 of the Miss. Unif. Rules of County and Cir. Court practice. Moreover, if the indictment was defective, which it was according to law, then the enhancement of the sentence on the basis of this defective indictment should be voided. Mitchell v. State, 561 So.2d 1037, 1039 (Miss. 1990); Ormoud v. State, 599 So.2d 951, 963 (Miss. 1992); Vance v. State, 844 So.2d 510, 516-17 (Miss. App. 2003)

[4] This rule specifically requires date of "judgment" as opposed to date of "conviction". The inclusion of conviction in the rule requires that the indictment include both the principal charge and a charge of previous conviction. It do not ask for date of previous conviction but only the date of judgment. As the record shows in this case at bar, conviction and sentence is often carried out on separate dates.

ISSUE TWO

APPELLANT WAS SUBJECTED TO INEFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL AND DURING SENTENCING PROCEEDINGS IN THE COURT, IN VIOLATION OF HIS 6TH AMENDMENT RIGHTS TO THE UNITED STATES CONSTITUTION AND THE CONSTITUTION OF THE STATE OF MISSISSIPPI.

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. Then the party must show that, but for counsel's deficient performance, there is a reasonable probability that the result of the trial would have been different. Gilliard v. State, 462 So.2d 710, 714 (Miss. 1985).

In the case at bar, Appellant's counsel allowed Appellant to be sentenced to a term of life without any possibility of parole, by a judge rather then a jury, without the slightest objection and in the face of clear United States Supreme Court precedent which created a reasonable argument that a jury should make the determination in regards to enhancement of a penalty beyond that which is set out in the applicable statute which governs that crime. Apprendi v. New Jersey, 530 U. S. 466 (2000); Blakely v. Washington, 542 U. S. 296 (2004); Ring v. Arizona, 536 U. S. 584 (2002).[5] While defense attorney presented adequate arguments which should have prevailed in the trial court, counsel should have presented the argument of Appellant being sentenced as a habitual offender by a court which was biased against Appellant from it's previous rulings during the trial and the refusal to allow the state to elaborate on prior convictions and when thaey occurred. Grim was subjected to ineffective assistance of counsel. Leatherwood v. State, 473

[5] At the least a jury should have been allowed to determine whether the required elements of habitual, as a violent offender, was actually proven.

So.2d 964, 969 (Miss. 1985) (explaining that the basic duties of criminal defense attorneys include the duty to advocate the defendant's case" remanding for reconsideration of claim of ineffectiveness where the defendant alleged that his attorney did not know the relevant law.

It is clear that Appellant Grim was prejudiced by his attorney's failure to raise the issue outlined herein as well as the failure to raise numerous other issues and deficiencies which are set out in this brief. Defense counsel wanted Grim to plead guilty.

This Court should conclude that here 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 knowing the law and being familiar with the record and evidence.

Grim's conviction for sale of cocaine and being a habitual offender under Miss. Code Ann. §99-19-83 was the result of ineffective assistance of counsel at trial. The sentence imposed upon Grim as a result of such conviction was excessive and the conviction which arisen from the indictment, was a violation of due process of law. The defense attorney never objected to the state using the tactic of a catchall practice on the habitual statutes. The state used the and/or tactic with defense counsel never objecting.

The defense attorney allowed plain error to be committed where counsel never objected to the defective indictment which has been demonstrated by Appellant in his previous ground as being an error of law. Defense counsel should have raised this issue since it is doubtful that the state would have been able to show a date of sentencing in the Cause No. 3253, possession of cocaine; Cause No. 3349, Aggravated Assault; Possession of a Firearm; Cause No. 2005-404-CD, Grand Larceny. Defense Counsel never questioned the state's shortcomings. Such

failure by counsel was deficient performance which was prejudicial to Appellant. The defense counsel never objected on this basis.[6] Counsel merely allowed this plain error to proceed unchecked. This Court cannot find any thing in this instant claim except that defense counsel was ineffective where his actions, just on this issue, was deficient and prejudicial to the defendant. Reaching the other issues will not even be necessary in order to sustain this claim. If counsel was deficient and prejudicial in this matter then a new trial should be ordered. Any such new trial would be with prejudice to the state and making another run at the habitual status since the state has had that one bite of the apple which the law allows and in taking that bite the state came up short of making it's pleadings meet the requirements of the law. Supreme Court. The Supreme Court has previously held that in DeBussi v. State, 435 So.2d 1030 1034 (Miss. 1984), where the State has had one opportunity to prove the defendant eligible for enhanced sentence and where

[6] It is not disputed here that where an accused fail to object to the habitual offender issue during the sentencing phrase, he is procedurally barred to do so the first time on appeal. Sims v. State, 775 So.2d 1291, 1294 (Miss. App. 2000); Cummings v. State, 465 So.2d 993, 995 (Miss. 1995). Here, however, the circumstances are different. Grim was represented by counsel during the proceedings. This was an attorney in which Grim had expressed dissatisfaction with at the outset and asked the Court for other counsel. The Court was aware that Grim and his attorney had issues but nothing was done or said by the trial court to intervene when it was obvious from the face of the record that the indictment was defective and the state was permitted to cover up this defect at the sentencing hearing by never making any mention to the fact the indictment did not contain dates of sentencing in regards to the prior convictions and did not comply with Rule 6.04 of the Miss. Unif. Rules of County and Cir. Court Practice.

The issue of raising such an error as a defective indictment for the first time on appeal have been resolved by the Mississippi Supreme Court as being plain error. In Vince v. State, 844 So.2d 510, 516 (Miss. App. 2003), the Court of Appeals found that:

> Because the defect in the indictment in this case was so fundamental and because of the importance to the criminal process of a properly drawn indictment that fully acquaints the defendant with the nature of the accusations brought against him, we note the matter as plain error and conclude that it requires us to reverse Vince's sentence insofar as he was sentenced as a habitual offender. See Usry v. State, 378 So.2d 635, 639 (Miss.1979) (discussion).

Moreover, in Luckett v. State, 582 So.2d 428, 430 (Miss. 1991), the Supreme Court rendered an opinion which well-settled the law that plain errors affecting fundamental constitutional rights may be excepted from procedural bars which would otherwise prohibit their consideration. This case discloses a sentence rendered on the basis of a defective indictment and, thus, a denial of due process in sentencing. See Smith v. State, 477 So.2d 191, 195-96 (Miss.1985).

the proof is defective because of the state's failure to comply with the rules, jeopardy attaches and that, even where the state may cure the trial error if it were given a second opportunity, the Mississippi Double Jeopardy Clause precludes the State from having a second chance to establish that which it dropped the ball on establishing on it's first opportunity. In Debussi, supra, the Court recognized that the essence of the double jeopardy prohibition is to limit the state to one fair opportunity to offer what proof it could assemble. Tibbs v. Florida, 457 U.S. 31, 41, 102 S.Ct. 2211, 2217, 72 L.Ed.2d 652 (1982).

Thus, if this Court find that Appellant was provided with ineffective assistance of counsel under the standards set forth in Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), and that a new trial should be provided, the state would be unable to attempt again to prove habitual status by amending the indictment and quoting the dates of the sentencing in each of the prior convictions.

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).
>
> [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 Grim would assert that his attorney failed to bring to the attention of the court, by proper objections, that the state's indictment was defective. Defense counsel stood still and did absolutely nothing while the state proceeded on an indictment seeking a sentence on the basis of an indictment which would not have withstood a challenge.

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).

In the instant case, Grim's defense counsel failed in his duties to adequately represent Grim during the stages of the case where representation was most critical. Defense counsel should have objected where the indictment did not set out the dates of sentencing when this particular information is mandated by the rules and law. Moreover, the defense attorney never objected to state's use of a duel habitual sentencing statute approach. Each of the habitual sentencing statutes require different elements of proof. The defense counsel should have made certain the state was confined to proceed with proof under one statute from the start of the case.

This Court should find that such failures was deficient performance and prejudicial to the Appellant.

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), Grim 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; Grim 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 Fredrick 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. Grim, 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 Grim has suffered in violation of his constitutional rights to effective assistance of counsel, in violation of the 6th Amendment to the United States Constitution. This Court should reverse and remand for a new trial on this claim.

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 153-155) The trial court, after allowing the state to respond, denied such motion without having made certain that the state had actually filed and the court allowed, jury instruction S-2 and S-3. (Tr. 154-155). Appellant's motion for directed verdict was made on the basis that the State had not actually proved the elements which must be demonstrated in a charge of sales of cocaine. Proof of the substance had never been demonstrated by testimony from the person who actually performed the scientific analysis. The state introduced a witness who testified that he was technical reviewer in the case and that he never performed the actual tests and did not see such tests performed. (Tr. 127-128)

The law in Mississippi is clear in regards to such matter. In Debrow v. State, 972 So.2d 550 (Miss. 2007), a case cited by defense counsel at trial, the Supreme Court held that:

> When the results of scientific analysis are admitted into evidence without the testimony of the analyst, such evidence may violate the defendant's right to confrontation as guaranteed under the sixth Amendment to the United States Constitution and Article 3, Section 26 of the Mississippi Constitution. Crisp v. Town, of Hatley, 769 So.2d 233, 236 (Miss. 2001) (citing Kettle v. State, 641 So.2d 746, 749 (Miss. 1994) and Barnette v. State, 481 So.2d 788 (Miss. 1985)). This Court has held that criminal defendants are entitled to require the individual responsible for scientific testing to appear and testify in person. Kettle, 641 So.2d at 750. For example, in Kettle, this Court reversed the defendant's conviction of selling a controlled substance when the State failed to provide the person who had conducted the chemical analysis establishing the substance as cocaine. Id. This Court has also held that it is error to admit an autopsy report without the testimony of the report's author. Gossett v. State, 660 So.2d 1285, 1295-1297 (Miss. 1995).

In Barnette v. State, 481 So.2d 788 (Miss. 1985), the Supreme Court held that:

> Of course, an essential element of the crime of selling a controlled substance is that the substance sold is indeed a controlled one within the purviews of Mississippi Code Annotated Section 41-29-139 (Supp.1985). This must be determined by a chemical analysis. To allow, without the consent of the defendant, this essential element to be

> proven solely by a certificate of the analyst impermissibly lessens the constitutionality required burden which is on the state.
>
> The allowance of such also denies the defendant the constitutionally guaranteed right to confront and cross examine witnesses against him.
>
> We hold that it was reversible error to admit, over the objection of Barnette, the certificate of analysis into evidence without the testimony of the analyst who prepared such.

Id. at 791.

Clearly, this Court has held that the exact same procedure introduced and allowed to be followed by the state court in this case has been held improper by the Supreme Court of Mississippi on numerous occasions.

At the time the defense raised his objections in the trial court the Court attempted to focus on the fact that Debrow v. State was a DUI case. (Tr. 133) While this is correct, the fact is that the Supreme Court rendered the findings in Debrow v. State by reference to Barnette v. State, a case involving the charges of sales of cocaine and the failure of the state introduce the actual testimony of the analyst who prepared the report. The witness presented by the state in this case stated that he did not physically analyze the controlled substance himself. (Tr. 134) Any testimony which he may give in cross examination and confrontation would therefore be from a report.

At the time the objection was made by the defense the state asserted that it had a case 2003 which stated that analyst from the Mississippi Crime Lab was allowed to testify as to the substance identification. (Tr. 132) The trial court asserted that he wanted to see such case because it would be contrary to the law in Debrow v. State, 972 So.2d 550 (Miss. 2007) and Barnette v. State, 481 So.2d 788 (Miss. 1985). (Tr. 132) The state never produced no such case. The trial court denied the the motion and allowed the technicial reviewer to testify in regards to

tests which he readily testified that he never performed and was not present when performed. The trial court noted the objections made to such testimony. (Tr. 116)

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, 503 So.2d 803 (Miss. 1981) the 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 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 Harvest on v. State, 493 So.2d 365, 370 (Miss. 1986). The Court 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 prosecution never presented proof to sustain each of the elements required to prove the charges. Grim was charge with sales of cocaine. The state never actually proved the substance was cocaine since it never properly presented the proof of the testing of the substance through an analyst which the Supreme Court has held to be qualified. A review analyst is not qualified by numerous ruling of the Mississippi Supreme Court. The trial court was clearly in error in failing to grant the motion to exclude the evidence and in failing to grant the directed

verdict where the state had not demonstrated the elements of the offense which it charged. Clearly the state failed to prove the elements of the charges which it made against Appellant. The Motion for Directed Verdict should have been sustained.

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 sales of cocaine. .

The evidence was "legally insufficient to establish anything more than that Grim sold something. Proof of such substance being a controlled substance was never properly introduced. Consequently, the conviction and sentence should be reversed and the *Appellant* granted a new trial.

ISSUE FOUR

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. ***There*** was virtually no credible evidence that established that the substance asserted by the state to be cocaine was actually cocaine. The test results which had been excluded since the analyst which performed the test was not present at trial. The jury, although free to accept or reject all or some of the testimony, had virtually no legal evidence which supported the substance being cocaine without the testimony of the analyst which performed the tests and the right of Appellant to cross examine and confront that specific analyst.

The state asserted that it had introduced instruction No. S-2 and S-3. However, just as the 2003 case in which the state alleged it had to demonstrate that the technical reviewer could testify to tests performed by another person, the jury instruction S-2 and S-3, which the state referred to at trial, do not appear in the record and seem to be non existent. .

It was incumbent upon the prosecution in any criminal case, to prove the defendant'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 Fredrick Grim was convicted on hearsay evidence of the substance which was alleged to be cocaine was never tested by the person appearing in court to testify that it was actually a controlled substance. This Court should find that the motion for new trial should have been granted. .

ISSUE FIVE

THE INDICTMENT IS DEFECTIVE WHERE IT CHARGED APPELLANT UNDER TWO DIFFERENT HABITUAL STATUTES WITHOUT SPECIFYING EXACTLY STATUTE THE PROSECUTION WOULD APPLY.

The indictment charges Grim as a habitual offender under two separate statutes, Miss. Code Ann. §99-19-81 and Miss. Code Ann. §99-19-83. (C.P. 9) The indictment, as it charges the habitual status, is vague and ambiguous on this charge since it fails to specifically charge Grim under one statute or the other. The court elected to sentence Grim under the large habitual statute where there was facts involved which could have allowed the court to impose sentence under either.

The law provides that while the state is not required to prosecute a criminal defendant under the statute with the lesser penalty when the facts which constitute a criminal offense fall

under either of two statutes or when there is substantial doubt as to which of the two is to be applied, if the indictment is ambiguous the accused can only be punished under the statute with the lesser penalty. Beckham v. State, 556 So.2d 342, 343 (Miss. 1990). The same rule would apply where the ambiguity involves sentencing and punishment statutes. Clubb v. State, 672 So.2d 1201, 1205-06 (Miss. 1996).

In the instant case the prosecution has confessed that either statute could apply by the fact that the state elected to include both statutes within the indictment and never specified under which statute it specifically desired to proceed under. (C.P. 9)

The Supreme Court has held that: Our habitual offender sentencing procedure resembles in all relevant respects the sentencing phase of capital crimes. A separate trial is conducted on the sentencing issue. Cf §99-19-101 (Supp. 1983) with Mississippi Uniform Criminal Rule 6.04 (2). The state is required to prove the defendant guilty of additional facts which justify the sentence sought to be imposed. Cf. §99-19-101 with §99-19-81 to 83. The state' burden of proof is beyond a reasonable doubt. Cf. Wheat v. State, 420 So.2d 229, 241 (Miss. 1982), with Wilson v. State 395 So.2d 957, 960 (Miss 1981). Finally, the statutes permit little or no sentencing discretion in either proceeding. The alternatives in a capital sentencing trial are death or life imprisonment, and the jury is guided by specific statutory standards as to which should apply. Under Mississippi's habitual offender's statutes, if the convictions be properly proven the trial court has no alternative but to impose the sentence prescribed in the statute. The habitual offender sentencing hearing, like the capital sentencing hearing, is itself a trial on eligibility for a harsher sentence, and therefore constitutes jeopardy. See Cooper v. State 631, S.W..2d 508, 513-514 (Tex. Crim. App. 1982); People v. Quintana, 634 O,2d 413m 419 (Colo. 1981); State v.

Hennings 100 Wash2d 379, 670 P.2d 256, 260 (Wash. 1983). Debussi v. State, 453 So2d 1030, 1032-33 (Miss. 1984).

In the instant case it is clear that these habitual sentencing statutes are not merely statutes which do not require a trial and need not be specific. Debussi makes clear that such statutes are subject to double jeopardy and are statues which govern the burden of proof on the habitual sentencing hearing which is a trial on eligibility for a harsher sentence. This court should find that the State, in failing to charge Grim under a specific statute, created a defective and ambiguous indictment which required that the court could only sentence Grim under the lesser charge.[7] In the alternative, this court should find that the state waived the habitual charges by not being specific and in attempting to enjoy the best of both worlds under their catchall attempt.

ISSUE SIX

APPELLANT SUFFERED CUMULATIVE WHICH CAUSED HERE TO BE DEPRIVED OF HER 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 Fredrick Grim 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).

[7] The state attempted to use the statutes as a catchall method which allowed the state to enjoy the benefits of both statutes, one which would kick in if the other was found to be inapplicable. As previously presented in this brief. the state should only be allowed one opportunity to prosecute. The method in which the state has employed allows the state numerous opportunities.

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." Grim 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 Grim 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, Grim v. State, supra, there shall be no procedural bar to these assignments of error, which collectively denied Appellant Fredrick Grim 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 Fredrick Grim did not receive a fair trial when he was convicted and sentenced on an indictment which was defective in it's attempt to charge the habitual status. As a matter of law Grim was deprived of due process of law. This tainted indictment also tainted the criminal trial.

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

For the reasons and authority cited herein, Appellant Grim submits that the conviction and sentence imposed in this case should be reversed and rendered. In the alternative, Grim's Conviction and sentence should be reversed to the trial court with instructions that a new trial be granted or that new sentencing be imposed consistent with the laws of the State of Mississippi as cited herein.

Respectfully submitted,

By: Fredrick Grim

Fredrick Grim, #T1076
Unit 30-B
Parchman, MS 38738

CERTIFICATE OF SERVICE

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

Honorable Jim Hood Attorney General P. O. Box 220 Jackson, MS 39205	Honorable Laurence Y. Mellen District Attorney 115 First Street, Ste 130 Clarksdale, MS 38614	Honorable Albert Smith Circuit Court Judge P. O. Box 478 Cleveland, MS 38732

Respectfully submitted,

This, the ____ day of July, 2009.

By: Fredrick Grim

Fredrick Grim, #T1076
Unit 29-J
Parchman, MS 38738