IN THE COURT OF APPEALS OF MISSISSIPPI

CASE NO. 2008-TS-01705

WILLIE CHERRY, JR. — APPELLANT

V.

STATE OF MISSISSIPPI — APPELLEE

BRIEF OF APPELLANT

APPEAL FROM THE CIRCUIT COURT OF BOLIVAR COUNTY
OF THE STATE OF MISSISSIPPI
THE SECOND JUDICIAL DISTRICT
CASE NO.: 2007-0033 KLT

WILLIE CHERRY, JR., #K3104, PRO SE
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WILLIE CHERRY, JR. **APPELLANT**

V.

STATE OF MISSISSIPPI **APPELLEE**

CERTIFICATE OF INTERESTED PERSONS

The undersigned Pro se Appellant of Record certifies that the following listed persons persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Hon. Boyd P. Atkinson, Attorney for Defendant Willie Cherry, Jr.
2. Mr. Willie Cherry, Jr., #K3104, Appellant Pro se
3. Hon. Jim Hood, Attorney General, Appellee
4. Henry Jennings, #K6626, Codefendant
5. Hon. Brenda Mitchell, Asst. District Attorney, Appellee
6. Hon. Laurence Y. Mellen, District Attorney, Appellee
7. Mrs. Karen Tanner, Official Court Reporter for Judge Kenneth L. Thomas
8. Hon. Kenneth L. Thomas, Circuit Judge, Bolivar Co., 2nd Judicial District
9. Mr. Ken Vehrens, Law Clerk for Judge Kenneth L. Thomas
10. Mrs. Virgin White, Original Court Reporter of Record for Judge K. L. Thomas*
11. Hon. Raymond L. Wong, Attorney for Defendant Henry Jennings

* Court Reporter that recorded Guilty Plea Transcript.

STATEMENT OF ORAL ARGUMENT

The Appellant presents the following as the Statement of the Oral Argument:

Appellant feels that oral argument is not needed due to the fact that the Assignment of Errors or the Argument on the Statement of the Issues are plain and clear for the Court to consider in this case. However, if the opposing counsel or appellee feels that oral argument is needed, Appellant requests that counsel be appointed to make oral argument on his behalf.

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STATEMENT OF THE ISSUES

Appellant Cherry hereby presents the followings as his Statement of the issues:

1.

Whether Petitioner Willie Cherry, Jr. was denied effective assistance of counsel during the pretrial proceedings because of defense counsel's failure to be abreast of the proceedings, the applicable law, and the fact that defense counsel advised Cherry to plead guilty openly and without an agreement or restraint upon the sentence which would be imposed. Defense counsl's advice to Cherry subjected Cherry to an illegal guilty plea conviction and sentence when Cherry involvement, according to the credible evidence given by Cherry did not indicate that he was guilty of the element aiding and abetting, which subjected to a violation of his 6th Amendment rights in regards to such actions by his counsel, making his plea involuntarily and unintelligently entered?

2.

Whether Petitioner Cherry was denied due process of law where he was convicted of the offense of aiding abetting armed robbery by the exhibition of a deadly weapon without having admitted a sufficient factual basis to demonstrate guilt of such armed robbery offense after signing a form petition to enter plea of guilty?

3.

Whether Cherry's Guilty Plea was voluntarily and intelligently entered on notice of an Indictment for Robbery by the exhibition of a pistol, a deadly weapon, when in fact that a B.B. pistol was used and is not considered as a deadly weapon within the meaning of the armed robbery statute which he was indicted?

4.

Whether Cherry was subjected to a denial of due process of law where the trial court failed to advise Cherry of the correct law in regards to appealing a sentence rendered upon a plea of guilty to the Supreme Court. Petitioner Cherry was never told that, under applicable law, his sentence could be appealed to the Supreme Court for direct review.

5.

Whether Cherry's eight year sentence imposed after Cherry entered a plea of guilty is an excessive because the evidence given during plea can only be accessory after the fact, and counsel was ineffective for failure to bring this matter to the court.

6.

Whether the State intentionally, deliberately and unfairly concealed and withheld exculpatory and material evidence from the Petitioner in violation of his fundamental due process and Sixth Amendment Rights, being contrary to the United States Supreme court holdings in Brady v. Maryland, Giglio v. United States, and Banks v. Dretke, committing prosecutorial misconduct, and counsel was ineffective for failure to object.

7.

The Bolivar County Circuit Court abused its discretion by failure to address why Cherry was not allowed to proceed with his discovery during the pendency of his post-conviction motion, where Cherry filed a Motion for Production of Documents Add - 8, and Motion for Order Compelling Discovery, DP 51; and, the said Court failed or refused issue any order disposing the said motions and/or why petitioner was not allowed to proceed with his discovery after giving him the right to do so.

STATEMENT OF THE CASE

Appellant Cherry hereby presents the following as his state of the case:

(1) **Course of Proceedings and disposition in court below:**

Petitioner was indicted by a grand jury on March 24, 2004 for a charge of Robbery with the use of a deadly weapon, with said indictment elements tracking the language pursuant to Section 97-3-79 of the Miss. Code Ann. 1972, that is, "... by putting him and/or them in fear of immediate injury to his and/or their person by the exhibition of a pistol, a deadly weapon." R 45

That on or about April 29, 2004, upon the advice of his counsel to enter a plea of guilty, petitioner subsequently went up before the court with the assistance of his counsel, the Hon. Boyd P. Atkinson and entered a plea of guilty to the said charge, which was recorded on record in this court. TR 1-10

On April 29, 2004, Petitioner Cherry signed a "Petition To Enter Plea Of Guilty" upon the advice of his appointed counsel, the Hon. Boyd P. Atkinson and based on the information fixed in said form petition, on the same date (April 29, 2004). R 2

Petitioner was allegedly convicted, in the Circuit Court of Bolivar County, Mississippi, pursuant to a plea of guilty for the offense of "Armed Robbery" **by the exhibition of a pistol, a deadly weapon**, which was recorded on record and in open court, Cherry was sentenced by the said Court to serve a term of Eight (8) years in the custody of the Department of Corrections. TR 1-10

The Judgment or sentencing order was filed by the Circuit Clerk of Bolivar County, on May 4, 2004 in Cause No. 2004-005-CR2 at approximately 9:43 A.M..

On April 27, 2007, Petitioner-Appellant Cherry timely signed a Motion for Post Conviction Relief to Vacate and Set Aside Conviction and Sentence, which was deposited in the Prison's mailbox on same date. R 41- 42

The said motion was received and filed by the Bolivar County Circuit Court Clerk on May 7, 2007 under Civil Action No. 2007-0033. R.-1 (DP 2-51) Affidavits to support issues by Willy Cherry, Sr., Geraldine Cherry and Roger Sims were attached to Cherry's Motion for Post Conviction Relief to Vacate and Set Aside Conviction and Sentence, which was erroneously was not made a part of the record by the Clerk. See Add 1, 2 & 3.

On June 25, 2007, Cherry's motion for post conviction relief to vacate and set aside conviction and sentence was assigned to the Hon. Kenneth L. Thomas. DP- 2-51

On July 20, 2007, a Letter of Assignment, with attached : "Order setting Deadlines for Discovery, Hearing On Preliminary Matters and Pretrial Statement, etc.; Orders to be Approved

by Attorneys filed March 9, 2007; and, non-filing of Discovery Materials, filed March 9, 2007, all were mailed to Petitioner Willie Cherry, Jr., (Petitioner-Appellant Pro se) on July 20, 2007. DP 2-51 (see Add-4)

Appellant Cherry began his discovery by first filing a "Motion for Production of Documents, which was signed on August 23, 2007, and sent to the Clerk of Court for filing. The Docket Page (DP) does not show the date received by the Court. Add-5

After having filed his First Set of Interrogatories and received no response, Cherry filed with the Court a "Motion for Order Compelling Discovery, which the court failed to rule on, nor was the said motion disposed of in its final order denying Cherry's post-conviction motion. DP 51. Add.-6 On 11-15-07, Cherry filed with the Court a Motion for Default Judgment. Add - 7

After having been so much delay without the court making any order or ruling, Cherry filed with the Supreme Court of Mississippi a "Petition for a Writ of Mandamus" which was signed and mailed to the said court on March 11, 2008.

On March 20, 2008, the Bolivar County issued an Order denying Cherry's Motion for Post Conviction Relief to Vacate and Set Aside Conviction and Sentence. DP 52-54

On March 31, 2008, the Supreme Court of Mississippi filed an Order dismissing Cherry Petition for a Writ of Mandamus as "Moot." DP 54

Cherry subsequently filed a Notice of Appeal and a Petition to Reopen Time for Appeal. DP 55 Cherry also filed his Designation of Record. DP 56; Add - 8 Cherry filed an Amended Designation of Record on July 3, 2008, requesting a copy of the Guilty Plea Colloquy Proceeding, Judgment, Sentencing Order, Indictment, Pre-trial Discovery Materials, including all

affidavits and investigation reports of Willie Cherry, Jr. and Henry Jennings, the Presentence Report, if an; and, the Court's Docket Sheet indicating all proceedings, which included all pretrial motions, if an and which have been filed in the criminal and civi case. DP 57.

Cherry was subsequently granted the right to proceed with his appeal in forma pauperis. DP 86 Cherry subsequently filed with the Supreme Court a "Motion for an Order Demanding the Appellee to Release Docket of Deadly Weapon seized for Post-conviction Appeal as a supplemental to the Designation of Records. Add -9

On November 11, 2008, the Court of Appeals issued an Order finding that the said motion is not well taken and should be denied, and denied it without stating good reason why not. DP 87 Add - 10

(2) **Statement of the Facts**

Approximately 1:20 a.m., early Monday morning on August 11, 2003, Cherry was running across the street with Mr. Henry Jennings, and all a certain Mr. Jennings pulled out a B.B. gun pistol, smashed the driver side window of the car that Ricardo Hollingsworth was driving with Joseph Chandler sitting in the passenger seat, and Mr.Jennings demanded money from them. R 35, Add - 11

Cherry knew that Mr. Jennings owned and had possession of a B.B. gun pistol, but Cherry had no knowledge of him planning on using it to rob someone. Jennings used the B.B. pistol to break the window of the driver's side of the car and demanded the money from Mr. Chandler and Mr. Hollingsworth. R 35-36, Add -11

As Cherry was standing across the street during the said robbery, and when he observed of what was going on, Cherry left the scene of the crime and went home. Jennings was caught

leaving the scene of the crime with the B. B. pistol in his possession and with the money he took from Mr. Chandler and Mr. Hollingsworth. R 36 The arrest was made by Investigator George Serio of the Cleveland police Department, along with officer Veronica Butler, Officer Gerald Wesley, Officer Robert Graham and Officer Sparks, with all being investigators of the Cleveland Police Department. R 50

Cherry did not give a statement the same night or morning that Jennings gave his statement because he was not arrested the same night, but was arrested next day and a half later at his home by the same investigators or officers. R 36 , Add -11

When Cherry was arrested, which occurred at his home, the first statement he gave was that he was at home and that he didn't know what the investigating officers were talking about; and, that is when Investigator George Siero told him that he knew that Cherry was lying and that he was going to charge him with two (2) counts of armed robbery and two (2) counts of Embezzlement. R 36, Add - 11

That is when Cherry told the investigating officers that he was with Mr. Jennings that night at the scene of the crime. He also told them he was just there at the scene and that he did not take any part of the robbery because when he saw the police cars coming down south street, he stopped, and started for home, and that when Jennings started running but was caught approximately 5 minutes later. R - 36, Add - 11

During the entire time while being at the police station, Cherry did not write a statement, one of the officer wrote it down and told him to sign it, and Cherry signed the statement without reading it over. Add - 11

Cherry did not tell the officers that he wanted an attorney present during the

interrogation and they never asked him, "did he want an attorney." Cherry could not remember signing away or waiving his rights, and if he did, Cherry did not know exactly what he was signing. R 36, Add - 11

As to Cherry's knowledge, He did not aid and abet the said armed robbery nor did he counsel or help plan such a robbery. If Cherry committed a crime, he committed it after the robbery by trying to conceal the robbery by stating that he was at home and didn't know what they were talking about it. R 36

On or about March 24, 2004, Cherry and Mr. Jennings were indicted for aiding and abetting one another or acting concert with each other to commit robbery by putting the victims in fear and/or in fear of immediate injury by the exhibition of a pistol, a deadly weapon. R 37

On about March 30, 2004, Cherry went up before the Judge Kenneth L. Thomas for arraignment of trial, where he was appointed Mr. Boyd P. Atkinson as his representing attorney.

On or about April 29, 2004, Attorney Atkinson, told Cherry that it would be best that he enter a plea of guilty to the armed robbery charge.

Cherry's attorney made no preparation for him to be trial by a jury, and he did not file any motions on my behalf, such as pretrial motions: (1) to squash the indictment (2) motion to suppress the evidence (3) to disclose the firearm including the series numbers or to disclose the weapon used to commit the robbery for examination by the defendant, and motion for severance (to divide or separate the defendants) because they had separate attorneys and most likely when Jennings was coerced to give his statements, he was also coerced put Cherry with him during the robbery, and failed to tell the investigating officers that he had no part of the robbery. Because of that, Cherry knew he wouldn't have a chance to win before jury. R 38

Cherry averred that he did not see his attorney again after he was appointed, until April 29, 2004, approximately one (1) week before he went to court, and that when his attorney told him that Cherry would most likely received a life sentence if he went to trial, and be found guilty by a jury for the armed robbery. Cherry's attorney put him in fear thinking that he will be lock up for the rest of his life, and told him it will be best for him to sign a petition to enter a plea of guilty. R 38

By Cherry's attorney not explaining to him how he could be guilty of aiding and abetting the said armed robbery, his plea of guilty was coerced by him and it is involuntarily and unintelligently entered in the record because Cherry thought just because he was with Mr. Jennings that night and was present at the scene of the crime, he could be guilty of aiding and abetting the armed robbery Mr. Jennings committed alone without my knowing what his intentions were. R 39

After researching his case, it is Cherry's belief that he could only be guilty for accessory after the fact to the alleged armed robbery by withholding information after having witnessed the alleged armed robbery committed by Jennings.

Cherry also believes that since the Mr.Jennings used a B.B. gun (pistol) to commit the robbery, a BB pistol does not satisfy the element of a deadly weapon which was alleged in the indictment, and because such evidence was concealed by the Investigating officers and the prosecutor, Cherry's plea of guilty was given to a faulty and defected indictment.

The above facts are set out upon personal knowledge, information, records, and the belief of petitioner and will be proven by the record in this case and testimony of witnesses. R-37-38

SUMMARY OF THE ARGUMENT

Appellant, all times known as a lay person, has shown herein that his rights to notice of the charge in the by an indictment has been deviously violated. His rights to freely voluntarily and intelligently to make up his own mind whether to enter a true plea of guilty or to proceed to trial before a jury has been deviously violated, simply because he depended upon his representing counsel to be effective and do the right thing by educating him concerning element of the charge(s) against. He depended upon his counsel to investigate and to seek and look at every peace of the evidence in order to determine whether his client is a victim of a setup based upon the information that his client has given him. The said counsel failed to be that post that he was willing to lean on in order keep him from falling, and to keep him from being buried in the mud of deception, unrighteously, and including prosecutorial misconduct in order just to get a conviction, whether it be by entering a plea of guilty or whether it be before a jury or before a pure hearted judge who will also weigh the evidence against him.

It is the Court's job to see whether the defendant is being given justice or a just chance before a court of law before his life and/or liberty is taken from him, in order to prevent him from being devoured like a lamb, sitting in an unjust court waiting to be eaten by many wolves prepared by the unjust prosecutor himself. The constitutional and statutory law of this great state have made for the purpose that man may receive a just trial, however, the constitution and statutory laws have been careless respected by case laws, where it is almost impossible that a defendant receive justice before the high court of appeals. Cherry has presented his case, and the court must not take it lightly just because he made up his mind to enter a plea of guilty. He has should that if the true evidence had been presented in the discovery made ready for trial, the

outcome would have been different and Cherry would have been free to be given a second chance to be with his family to help raise his children as any other man. At least he deserved that chance before a just court of law.

Cherry has been a victim of prosecutorial misconduct, an unjust an careless court and most of all a victim of ineffective assistance of counsel overall. Even in his last stage and only chance to make things right through his post-conviction motion, the lower court denied him that chance trying keep what was wrongfully done concealed as it was from the beginning in order to protect the even wrongs and mistakes done by his professional colleges, those who acted above the law and not within the laws which was given by the legislature and our forefathers in order to make sure that one that accused will get a fair chance before a court of law. And because of their unjust actions, Cherry plea of guilty was involuntarily and unintelligently entered because the concealed of a pistol used as an element in the indictment as a deadly weapon, but truly was only a B. B. Pistol, which in the eyes of the public, the community is not considered as a deadly weapon.

ARGUMENT

STANDARD OF REVIEW

"When reviewing a lower court's decision to deny a petition for post conviction relief this Court will not disturb the trial court's factual findings unless they are found to be clearly erroneous. However, where questions of law are raised the applicable standard of review is de novo." See Callins v. State, 2005-CP-00071-COA (Miss.App 2007) (citing Lambert v. State, 941 So.2d 804 (Miss. 2006)) (quoting Brown v. State, 731 So.2d 595 (Miss. 1999)).

1.

Whether Petitioner Willie Cherry, Jr. was denied effective assistance of counsel during the pretrial proceedings because of defense counsel's failure to be abreast of the proceedings, the applicable law, and the fact that defense counsel advised Cherry to plead guilty openly and without an agreement or restraint upon the sentence which would be imposed. Defense counsel's advice to Cherry subjected Cherry to an illegal indictment and sentence when Cherry involvement, according to the credible evidence given by Cherry did not indicate a guilty of the element aiding and abetting, which subjected to a violation of his 6th Amendment rights in regards to such actions by his counsel, making his plea involuntarily and unintelligently entered?

and

2.

Whether Petitioner Cherry was denied due process of law where he was convicted of the offense of aiding abetting armed robbery by the exhibition of a deadly weapon without having admitted a sufficient factual basis to demonstrate guilt of such armed robbery offense after signing a form petition to enter plea of guilty.

Cherry avers that his appointed counsel failed to investigate his trial, failed to file the necessary motion in order to prepare for trial. Counsel failed to file a motion to suppress the statement that Cherry gave without the presence or the advisement of an Attorney, immediately after his arrest. If Counsel did file such a motion, he did not state to his client that he had filed such a motion nor did Cherry see such a motion. Cherry avers that he did not see his appointed counsel until one (1) week before he went to court, and that his appointed did not attempt to file any motions on his behalf. Counsel even failed to investigate the case and if said counsel had

prepared for trial, he would not have enter a plea of guilty to the charge in the indictment.

Cherry contends that after the entering a plea of guilty based upon the advice of his representing counsel, the trial court failed to questioned him to determine whether his plea to the charge of armed robbery was knowingly, understandingly, freely and voluntarily made. When the court asked Cherry was he in fact entering a guilty plea to armed robbery, Cherry was slow about answering until his counsel whisper in his ear and told him to say yes. Cherry remembering bowing his head in affirmative, but never admitted in over court that he himself alone committed Armed Robbery or aided and abetted the alleged armed robbery, in order to satisfy the element of aiding and abetting charged in the indictment. Cherry knew that he was indicted for aiding and abetting an armed robbery offense along with his co-defendant Henry Jennings, in which he did not believe that he was guilty of that element "aiding and abetting"as to his limited understanding of what it meant. In Lenot v. State, 727 So.2d 753 (Miss.App. 1998), Mississippi Supreme Court stated:

"Any person who is present at the commission of a criminal offense and aids, counsels, or encourages another in the commission of that offense is an`aider and abettor' and is equally guilty with the principal offender." Hoops v. State, 681 So.2d 521, 533 (Miss. 1996) (quoting Sayles v. State, 552 So.2d 1383, 1389 (Miss. 1989)). The evidence here sufficiently warrants the instruction on aiding and abetting."

Therefore, Cherry was present at the commission of the criminal offense, but he did not aid, counsel or encourage Jennings in the commission of that criminal offense; therefore, the evidence will show that he was not an aider and abettor nor is he equally guilty as Jennings who is the principal offender. Accordingly to Cherry's statement and affidavit, the evidence does not sufficiently warrants aiding and abetting the armed robbery by using a firearm. Cherry's attorney knew or should have known that Cherry could not be convicted in a court of law before

a jury for aiding and abetting armed robbery by the use of a firearm. The said counsel knew that the robbery was not or intended committed with the use of a firearm since the alleged firearm was in fact a B.B. Pistol allegedly used by Jenning to commit the said alleged robbery.

Jennings is an older defendant, who was caught leaving the scene of the crime carrying the loop from the alleged robbery, and there was arrested and the B.B. pistol (the alleged firearm) was seized at the same time of his arrest.

Cherry was arrested later at his home. It is obvious that after Jennings was arrested, he gave a statement involving Cherry in the crime. The Indictment alleged the word "intent" which means something that is intended; an aim or purpose. In law, the word "intent" means "[t]he state of one's mind and will focused a specific purpose." See "The American Heritage Dictionary of the English Language" Third Edition.

The Court failed to ask Cherry to explain how he aided and abetted an armed robbery by using a firearm. (1) If the Court had done so, it would found that there was no basis to entering a plea of guilty to the element of the indictment. The State, defense counsel and the Court knew there was not any Physical evidence in the discovery. Because there was no proof of any physical evidence, such as a firearm, which was an element of the indictment charging the defendant under MCA Section 97-3-79. a firearms has to be proven that it was in fact a firearm that was cable of firing in order to be able to put the victims in fear of immediate injury to their person by the exhibition of a pistol, a deadly weapon. A firearm is a weapon, especially a pistol or rifle, capable of firing a projectile and using an explosive charge as a propellant. Therefore, the indictment is faulty when it does not give notice of the true element charging the crime committed. (2) If the court had asked Cherry did he in fact attempted the used a firearm to

commit the alleged Robbery, the court would have found that there was not a firearm used and that Cherry did not aid or abet the use of it. (3) If the court would had asked Cherry what part did he play in aiding and abetting the armed robbery, the court would have found that Jennings, the alleged co-defendant, was the only person that owned and had possession of a B.B. gun (B.B. pistol), and that Jennings acted alone and the one that demanded the money from the victims Mr. Chandle and Mr. Hollingsworth. The Court would also found that the attempted Robbery occurred when Jennings himself, pulled out the B.B. gun pistol, smashed the driver side window of the vehicle (car) that Ricardo Hollingsworth was driving and Joseph Chandler was the passenger. The Court would also found that the only part that defendant Cherry did was ran across the street with Jennings and stood afar off witnessing Jennings smashing the car window and demanded money from Hollingsworth and Chandler. When Cherry ran across the street with Jennings, Cherry had no idea that Jennings intended or planned to Rob the people in the vehicle. After Jennings was arrested leaving the scene, he gave a statement to the arresting officers admitting that he did commit the robbery.

During the guilty plea colloquy proceeding the Court did not explain the element aiding and abetting to Cherry, and by him being a first time offender, Cherry was not familiar with the law term "aiding and abetting. Therefore, he did not fully understand the charge of aiding and abetting armed robbery when it should have been conspiracy to commit armed robbery and/or accessory after the fact. The Court must determine on the record whether there was a factual basis for the plea because neither the "evidence nor the plea allocation showed in the record whether Cherry knew the meaning of aiding and abetting and the meaning of the element " by the exhibition of a **deadly weapon**.

"What is the meaning of a "deadly weapon ?"

"A deadly weapon as "any object or instrument that is likely to cause death or great bodily injury because of the manner and under the circumstance in which is used. Strickler v. Greene, 527 U. S. 263 (1999). In *Stricklery*, Cherry's ineffective-assistance-of-counsel claim based, in part, on trial counsel's failure to file an amended motion under Brady v. Maryland, 373 U. S. 83 (1963), "to have the Commonwealth disclose to the defense **all exculpatory evidence** known to it — or in its possession." In answer to Cherry's Attorney Motion for Discovery, the State concealed the excupatory evidence and by presenting no physical evidence at all. The State also made a list of all the statements, Reports, etc., but failed to make those documents part of the record. Even the Clerk or the Prosecutor failed make those document a part of the record after Cherry filed his amended designation of record requesting them to funish those document in order to prepare his appeal. R 57-58 Cherry even put fort due diligence efforts by filing with appeal court a Motion Demanding the Appellee to Release the Docket of Deadly weapon Seized for Post-conviction Appeal as a Supplemental to Designation of Records, and the Supreme Court denied the said motion without stating the cause of their denial. R 87 Cherry avers that such evidence is material and if the exculpatory evidence (the deadly weapon) had been disclosed to the defense before trial or even before Cherry enter his plea of guilty, there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different, if Cherry counsel had filed a motion to squash the indictment based on the fact that element "deadly weapon" was not a pistol (firearm), but only a unloaded B.B. pistol.

"What is a B. B. gun (pistol)?"

"In 15 C.F.R. Section 1150.1, Commerce interprets "traditional B-B, paint-ball, or pellet-firing air guns" as those guns that are described in *American Society for Testing and Materials standard F 589-85, Standard Consumer Safety Specification for Non-Powder gnns (June 28, 1985).* Section 1.1, which defines the scope of the specifications, expressly covers "non-power guns, and pellet guns, which propel a projectile by means of energy released by compressed air, compressed gas, mechanical spring action, or a combination thereof ...." id. In adopting this definition, Commerce thereby gave very broad reading to the preemptive provisions of Section 5001(g), for section 1.1 appears to cover all B-B and pellet guns, so long as the guns do not use gunpowder to propel their rounds." See Coalition of New Jersey sportsment v. James J. Florio , 744 F.Supp. 602 (N.J. 1990).

"The purpose of an indictment is to adequately advise a defendant of the charges against him so as to allow him the opportunity to prepare an effective defense. Battaya v. State, 861 So.2d 364, 367 (Miss.App. 2003)(citing Moses v. State, 795 So.2d 569, 572 (Miss. Ct. App. 2002)) Even if Cherry had a trial before a jury, it is readily apparent that the exhibition of deadly weapon is a key element of the crime of armed robbery and a description of the crime certainly could not be made adequately without describing the weapon used and what was done with that weapon. See Page v. State, So.2d 757, 761 (Miss. 1979).

In *Brady*, this Court held "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." . We have since held that the duty to disclose such evidence is applicable even though there has been no

request by the accused, United States v. Agurs, 427 U.S. 97, 107 (1976), and that the duty encompasses impeachment evidence as well as exculpatory evidence, United States v. Bagley, 473 U.S. 667, 676 (1985). Such evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Id., at 682; see also Kyles v. Whitley, 514 U.S. 419, 433-434 (1995). Moreover, the rule encompasses evidence "known only to Page 281 police investigators and not to the prosecutor." Id., at 438. In order to comply with Brady, therefore, "the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in this case, including the police." Kyles, 514 U.S., at 437.

This Court must reverse the lower court's order of dismissal on this error and remand the case for an evidentiary hearing.

3.

Whether Cherry's Guilty Plea was voluntarily and intelligently entered on notice of an Indictment for Robbery by the exhibition of a pistol, a deadly weapon, when in fact that a B.B. pistol was used and is not considered as a deadly weapon within the meaning of the armed robbery statute which he was indicted.

STANDARD OF REVIEW

An accused has a constitutional right "to be informed of the nature and cause of the accusation." U. S. Const. amend VI. This State's Constitution does not expand the right. Miss. Const. art. III, Section 26. Entering a guilty plea does not waive an indictment's failure to include an element of a crime, nor does the plea waive subject matter jurisdiction.. Conerly v. State, 607 So.2d 1153, 1156 (Miss. 1992). An indictment charging the essential elements of a crime must be served on a defendant in order for a court to obtain subject matter jurisdiction over the subject of a particular offense. Jefferson v. State, 556 So.2d 1016, 1021 (Miss. 1989). (citing from Neal v. State, 936 So.2d 463 (Miss.App. 2006))

The Court must determine whether a guilty plea was involuntary because he was misinformed about the elements of aiding and abetting an armed robbery offense by the exhibition of a deadly weapon, to-wit: a pistol.

"Only a voluntary and intelligent guilty plea is constitutionally valid. Brady v. United States, 397 U.S. 742, 748. **"A plea is not intelligent unless a defendant first receives real notice of the nature of the charge against him."** See Bousley v. United States , 523 U.S. 614 (1998)(citing Smith v. O'Grady, 312 U.S. 329, 334. The Bousley Court explained that Cherry's

plea would be, contrary to the Court's view, constitutionally invalid if he proved that the Court misinformed him as to the elements of armed robbery offense. See also McMann v. Richard, 397 U.S. 759. Because of this, Cherry's Plea was not knowing and intelligent, and his guilty plea conviction and sentence should be vacated and the court shall dismiss him from his illegal incarceration.

Even though Cherry signed a guilty plea form and admits that he pleaded guilty to the charge in the indictment, but before during so, no one told his that a B.B. pistol would not be considered as a deadly weapon. "That plea in no way waives his right to present hid defense of lack of notice." Reeves v. Pettcox, 19 F.3d 1060, 1062 (5th Cir. 1994). A "guilty plea in criminal case waives right to challenge all non jurisdictional defects except those directly related to the plea." Reeves, supra (citing Smith v. Estelle, 711 722 F.2d 677 (5th Cir. 2982)).

The Court failed to ask Cherry what part did he play in the armed robbery in order to aid and abet the said charge. The Court failed to let Cherry explain on the record just how he helped or how he aided and abetted the commission of the armed robbery with Jennings before

accepting his plea of guilty to this charge. The Court as well as the State knew that before a guilty plea be accepted there must be factual basis for the plea. This cannot be determined without the court itself total here the confession of the defendant on how he committed the crime due to the fact that the defendant is a lay person and may not had understood all what his attorney related unto him concerning the enter of a plea of guilty. Signing a form is simply not enough and letting the defendant agree to the term. The Court must make a record for himself. See Gladney v. State, 2006-CA-00631-COA (Miss.App. 2007), where the court stated:

"In order for a trial court to accept a plea of guilty it must determine that there is a factual basis for the plea and that the defendant is entering the plea voluntarily and intelligently. Bennett v. State, 933 So.2d 930, 940 , (¶ 24) (Miss. 2006) (citing URCCC 3.03(2)). A guilty plea is valid where it is entered into 'Voluntarily, knowingly, and intelligently, 'with sufficient awareness of the relevant circumstances and likely consequences.'" Bradshaw v. Stumpf, 545 U.S. 175, 183, 125 S.Ct. 2398, 162 L.Ed.2d 143 (2005) (quoting Brady v. United States, 397 U.S. 742, 748, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970)). By entering a guilty plea, Gladney confessed to the actions as charged in the indictment and stipulated that the prosecution did not need to advance evidence of guilt. Florida v. Nixon, 543 U.S. 175, 187-88, 125 S.Ct. 551, 160 L.Ed.2d 565 (2004) (quoting Boykin v. Alabama, 395 U.S. 238, 242-43, 89 S.Ct. 1709, 23 L.Ed.2d 274

(1969)).

Here, in the case sub judice, unlike Gladney, Cherry, in regarding to entering a guilty plea, he did not confess to the actions as charged in the indictment before the court nor was it shown in the record that he stipulated that the prosecution did not need to advance evidence of guilt into the record. The court must not take lightly that the prosecution or the defendant's attorney has earnestly related unto the defendant a factual basis for the plea or that the defendant had voluntarily, knowingly and intelligently, entered a plea of guilty without hearing those factual basis himself. Simply because the defendant may have not plea to all the elements of the indictment as to his lay understanding. The record does not show that Cherry confessed to the

actions as charged in the indictment nor did he stipulate that the prosecution did not need to advance evidence of guilt. It is all times known that the Indictment should have been read into the record, indicating all of the elements of the indictment, notwithstanding that the prosecution should have stipulated in the record of what it was intended to prove if the defendant had chosen to go to trial before a jury. No such record was made before the court. See Guilty Plea Hearing Transcript page 1-10. See Gaddy v. State, 2008-CP-00343 (Miss.App. 4-28-2009), as so much overruling *Gladney* by stating the following:

"IV. WHETHER THERE WAS A FACTUAL BASIS FOR GADDY'S CONVICTION. ¶ 20. "A factual basis is not established by the mere fact that a defendant enters a plea of guilty." Knight v. State, 983 So.2d 348, 352, (¶ 12) (Miss.Ct.App. 2008) (citing Lott v. State, 597 So.2d 627, 628, (Miss. 1992)). "A factual basis for a plea may be established by the admission of the defendant, but **the admission must contain factual statements constituting a crime or be accompanied by independent evidence of guilt."** Parkman v. State, 953 So.2d 315, 319, (¶ 16) (Miss.Ct.App. 2007). "[W]e are not limited to the plea hearing and may look to the record as a whole to determine if there is a factual basis for the plea." Id. at (¶ 17).

Therefore, here in the case sub judice, looking at the case itself and the record as a whole, Cherry's plea of guilty is an invalid plea, and any such alleged waiver connected to it should be vacated for the following reasons:

(1) Cherry was a lay person and did not have any understanding of the law, and the statutory law which he was indicted under.

(2) He is a victim of ineffective assistance of counsel because the counsel failed to explain, whether or not a B.B. pistol could be considered as a "deadly weapon" in according with the armed robbery statute;

(3) his attorney, the state prosecutor as well as the judge himself, failed to explain to Cherry the meaning of aiding and abetting and/acting in concert with each other and/or another, and it has to be known to the court did he in fact, assisted in committing this crime with the intention to steal and take someone's money.

Unlike the *Gaddy's* case, nothing was presented to the Judge for the court to determine whether or not Cherry did commit the crime which he was charged in the indictment. The Court did not see any guilty plea petition, sworn to by Cherry's attorney or even signed by Cherry. Unlike the Gaddy's case, the record shows no facts, recited by the judge and admitted to by Cherry, there were no investigation reports or signed affidavits ready by the defense or the prosecution for the court to glean from or to make a determination of a factual basis for the plea. No one nor even Cherry himself provided sufficient facts and detail to support the charges against Cherry. The court even failed to see a guilty plea colloquy and/or various reports, such as the signed affidavits by Cherry and Jennings and even there was none to see, the Court still could made a record in order to suffice himself at the guilty plea hearing in order to make a decision whether there was a true factual basis for Cherry to enter his plea of guilty. Here, in the case sub judice, Cherry was denied his rights under Rule 8.04(3) to be free from being deceived of the element "deadly weapon, therefore, under the fact of "deception" of all the element of the charge, Cherry plea of guilty cannot be voluntarily entered.

"A plea is deemed `voluntary and intelligent' only where the defendant is advised concerning the nature of the charges against him and the consequences of the plea." Loden v. State, 971 So.2d 548, 573 (Miss. 2007 , (¶ 60) (quoting Alexander v. State, 605 So.2d 1170, 1172 (Miss. 1992)). The trial court never outlined all the elements of the charged crimes, and no summation of the evidence against him was ever presented to him by the State at the plea hearing. Cherry avers that without the court doing so, makes his plea invalid and unintelligently made. The record shows the following:

BY THE COURT: All right. Pay attention as Ms. Mitchell reads the charge,

please.

> BY MS. MITCHELL: In Cause No.. 2004-005, Willie Cherry, Jr., on or about August the 11th, 2003, individually or while aiding and abetting or acting in concert with Henry Jennings and/or another did unlawfully, willfully and feloniously with the intent to steal take approximately $50.00 of United States' currency which was the property of Joseph Chandler and/or approximately $1,961.40 in United States' currency which was the property of McDonalds from the person or presence of and against the will of Joseph Chandler or Ricardo Hollingsworth by putting either of them in fear of immediate injury to their person by the exhibition of a pistol. R 7

Here, the defendant was not given complete notice of the charge, because all the elements of the indictment was not read or was not made known to Cherry because the part about " a deadly weapon" was not revealed in the record. It is possible that part was not read because the State knew or should have known that a B. B. pistol is not considered as a deadly weapon. It is clearly a violation of the Sixth Amendment of the United States, if the defendant in not informed of the nature and cause of the accusation and the failure of Cherry to have effective assistance of counsel for his defence. From the beginning, the State and/or the investigating officers concealed the alleged part about the deadly weapon allegedly used in the crime. Even after the defense made its motion for discovery, the State concealed the physical evidence (the pistol as an alleged deadly weapon). First, there was no description of this alleged deadly weapon, Second, no serial number for identification, and Third, no indication or examination of the said deadly weapon of whether or not it was capable of being fired. The State, the defense counsel and/or the court made no effort to reveal the fact that the alleged pistol which was described in the indictment as a

deadly weapon was or is a B. B. pistol. Cherry, as a lay person, that had never been charged or convicted for armed robbery before, was never explained to him the meaning of the exhibition of a deadly weapon as an element of the indictment, before his counsel advised him to enter a plea of guilty. Even, the court failed to specifically question him at the guilty plea hearing, did he in fact used deadly weapon to commit the crime or to give the description of the weapon he used. Therefore, the actions of the prosecutor, the ineffectiveness of his counsel, which he had confident in, prejudiced Cherry's defense, and if the true facts had been revealed by the alleged pistol, the outcome before jury trial would have been different, and Cherry would had been found not guilty of aiding and abetting armed robbery.

"A claim of ineffective assistance of counsel is judged by the standard stated in Strickland v. Washington, 466 U. S. 668 (1984). The two inquiries under that standard are: (1) whether counsel's performance was deficient, and, if so, (2) whether that deficient performance was prejudicial to the defendant's defense in the sense that the defendant is deprived of a fair trial. Id. at 687. "To show prejudice, the claimant must demonstrate that, but for his attorney's errors, there is a reasonable probability that a different result would have occurred." Watts v. State, 981 So.2d 1034, 1039 (¶ 12) (Miss.Ct.App. 2008). This standard is also applicable to the entry of a guilty plea. Roland v. State, 666 So.2d 747, 750 (Miss. 1995). The burden of proving that both prongs of Strickland is on the defendant, "who faces a `rebuttable presumption that counsel's performance falls within the broad spectrum of reasonable professional assistance.'" Walker v. State, 703 So.2d 266, , 268 (¶ 8) (Miss. 1997) (citation omitted)." See Gaddy v. State, supra.

Cherry's counsel was also ineffective for failure to object or by failure to bring this matter to the court's attention.

Even though Cherry's Attorney, within a month from the time Cherry was served with the Indictment or when the indictment was issued by the grand jury, fixed up a form "Petition to Enter Plea of Guilty" for Cherry to sign, which the said attorney did mental coerced Cherry to sign the Petition to enter a plea of guilty, by stating that if Cherry proceeded to trial he will possibly receive a Life Sentence for aiding and abetting armed robbery, but if he enter a plea of guilty, the State has agreed to sentence in to a term of eight (8) years. However, Cherry's attorney concealed the fact that Cherry would not be eligible for parole on the 8 year sentence. Cherry was in fear of being incarcerated for the rest of his life, when he signed every page of the said form petition. Cherry's attorney never told him that it had to be up to the jury to give him a life sentence. Note: (The Circuit Clerk failed to include guilty plea form as part of the record for appeal.

Even though that Cherry's attorney advised that if he enter a plea of guilty, the Prosecutor had agreed to make a recommendation that he be sentence to a term of Eight years and Restitution, however, Cherry attorney and/or the prosecutor failed to reveal to Cherry the evidence of proof that would be presented against him before a jury if his case proceeded to trial, before entering a plea of guilty; and, the Court failed to include in the record or ask the State, what evidence would be given to prove that Cherry is guilty of aiding and abetting of attempted armed robbery or armed robbery by the exhibition of a deadly weapon as he was charged in the indictment.

The Court also failed to ask Cherry or his attorney whether Cherry was under any or had consumed any medications, drugs or alcohol before the court determine whether Cherry was competent to understand the nature of the charge or the consequences of the plea. Here, in the_

case sub judice, Petitioner would show that the form plea petition was not an oral statement in (Miss.App. 2003); however "[g]reat weight is given to statements made under oath and in open court during sentencing." (citing Gable v. State, 748 So.2d 703, 706 (Miss. 1999). In this case, the Court will have to refer to the record to see if he did in fact failed asked the appropriate questions to see whether Cherry was competent enough understand the nature of the charge or the consequences of the plea. Especially, when the form plea petition failed to ask or quote similarly question while or before Cherry signed the plea agreement. Counsel was ineffective for failure to make sure that Cherry was competent to enter such a plea to give up all his rights to a trial. By Counsel failure to do so, Counsel cannot be sure whether Cherry was competent then nor can he be sure whether Cherry was competent enough to stand before the court to enter a plea of guilty to the element of the charge or competent enough to understand the element of the charges or the consequences of the plea.

Under URCCC 8.04(A)(3), "before the trial court may accept a plea of guilty, the court must determine that the plea is voluntarily and intelligently made and that there is factual basis for the plea." In Corley v. State, 585 So.2d 765, 767 (Miss. 1991), the Supreme Court of Mississippi discussed Rule 3.03(2), Miss. Unif. Crim. R Cir. Ct. Pract. (1979, as amended), requiring that the trial court have before it "... substantial evidence that the accused did commit the legally defined offense to which he is offering the plea." See, e.g., *Brown v. State*, 533 So.2d 1118, 1124 (Miss. 1988); Reynolds v. State, 521 So.2d 914, 917 (Miss. 1988).

The Mississippi Supreme Court has long recognized that the courts of the State of

Mississippi are open to those incarcerated at Mississippi Correctional facilities and Institutions [1] raising questions regarding the voluntariness of their pleas of guilty to criminal offenses or the duration of confinement. Hill v. State, 388 So.2d 143, 146 (Miss.1980); Watts v. Lucas, 394 So.2d 903 (Miss. 1981); Ball v. State, 437 So.2d 423, 425 (Miss. 1983); Tiller v. State, 440 So.2d 1001, 1004-05 (Miss. 1983). This case represents one such instance.

The Mississippi Supreme Court has continuously recognized that a plea of guilty may be challenged for voluntariness by way of the Mississippi Uniform Post Conviction Collateral Relief Act.

The entry of guilty pleas is governed by Rule 8.04 of the Mississippi Uniform rules of Circuit and County Court Practice, which states as following:

A. Entry of guilty pleas.

1. A defendant may plead not guilty, or guilty, or with the permission of the court, nolo contendere.

2. Entry of guilty plea. A person who is charged with commission of a criminal offense in county or circuit court, and is represented by an attorney may, at his/her own election, appear before the court at any time the judge may fix, and be arraigned and enter a plea of guilty to the offense charged, and may be sentenced by the court at that time or some future time appointed by the court.

3. Voluntariness. Before the trial court may accept a plea of guilty, the court must determine that the plea is voluntarily and intelligently made **and that there is a factual basis for the plea**. A plea of guilty is not voluntary if induced by fear, violence, **deception,** or improper inducements. A showing that the plea of guilty was voluntarily and **intelligently** made must appear in the record.

4. Advice to the defendant. When the defendant is arraigned and wishes to plead guilty to the offense charged, it is the duty of the trial court to address the defendant personally and to inquire

[1] While the Mississippi Supreme Court specified "Inmates at the Mississippi State Penitentiary", it is clear that this decision would apply to any inmate confined within or without the State of Mississippi who has been subjected to a Mississippi conviction and sentence which they desire to attack collaterally.

and determine:

a. That the accused is competent to understand the nature of the charge;

b. That the accused understands the nature and consequences of the plea, and the maximum and minimum penalties provided by law;

c. That the accused understands that by pleading guilty (s)he waives his/her constitutional rights of trial by jury, the right to confront and cross-examine adverse witnesses, and the right against self-incrimination; if the accused is not represented by an attorney, that (s)he is aware of his/her right to an attorney at every stage of the proceeding and that one will be appointed to represent him/her if (s)he is indigent.

5. Withdrawal of plea of guilty. It is within the discretion of the court to permit or deny a motion for the withdrawal of a guilty plea.

6. Sufficiency of motion. In order to be sufficient, a motion to withdraw a plea of guilty must show good cause.

7. Inadmissibility of withdrawn guilty plea. The fact that the defendant may have entered a plea of guilty to the offense charged may not be used against the defendant at trial if the plea has been withdrawn.

B. Plea bargaining.

1. The prosecuting attorney is encouraged to discuss and agree on pleas which may be entered by the defendant. Any discussions or agreements must be conducted with defendant's attorney, or if defendant is unrepresented, the discussion and agreement may be conducted with the defendant.

2. The prosecuting attorney, defendant's attorney, or the defendant acting pro se, may reach an agreement that upon an entry of a plea of guilty to the offense charged or to a lesser or related offense, the attorney for the state may do any of the following:

a. Move for a dismissal of other charges; or

b. Make a recommendation to the trial court for a particular sentence, with the understanding that such recommendation or request will not be binding upon the court.

3. Defense attorneys shall not conclude any plea bargaining on behalf of the defendant without the defendant's full and complete consent, being certain that the decision to plead is made by defendant. Defense attorneys must advise defendant of all pertinent matters bearing on the choice of plea, including likely results or alternatives.

4. The trial judge shall not participate in any plea discussion. The court may designate a cut-off date for plea discussions and may refuse to consider the recommendation after that date.

After a recommended disposition on the plea has been reached, it may be made known to the court, along with the reasons for the recommendation, prior to the acceptance of the plea. The court shall require disclosure of the recommendation in open court, with the terms of the recommendation to be placed in the record."

Even though the form petition may have covered most of these requirement before Cherry signed the said petition, the Court must address the petition in open court so that his plea entered can be recorded on record to determine whether the defendant is enter the plea of guilty voluntarily and intelligently.

In Hamberlin v. State, 2007-CP-01397-COA (Miss.App. 11-25-2008), the Court stated that, "[A] plea is binding only if it is entered into voluntarily." Robinson v. State, , (¶ 7) (Miss.Ct.App. 2007) (citing Myers v. State, , (Miss. 1991)). There must be "a showing in the record that the guilty plea is voluntarily" given. Id. "A plea of guilty is not voluntary if induced by fear, violence, deception, or improper inducements." URCCC 8.04(A)(3). *Hamberlin* asserts in his brief that his case is factually "on the mark" with Myers, where the supreme court reversed the trial court's denial of a post-conviction motion based on the false representations made by the defendant's counsel in regard to the minimum/maximum sentence. However, we reject the comparison. In Myers, counsel made oral statements that were clearly erroneous. Myers, . In addition, affidavits were provided from family members corroborating *Myers's* claims. Id. We find no such evidence here. ¶ 8. The transcript from the trial court clearly contradicts Hamberlin's claims. First, the transcript shows that the State specifically reported the recommended sentences at the hearing and that *Hamberlin* understood those. The transcript of the plea colloquy provides:

"In Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 179 (1969), where Boykin was charged with 5 counts of armed robbery, "[b]efore the matter came to trial, the court determined that

petitioner was indigent and appointed counsel to represent him. Three days later, at his arraignment, petitioner pleaded guilty to all five indictments. So far as the record shows, the judge asked no questions of petitioner concerning his plea, and petitioner did not address the court." *"The Court today holds that petitioner Boykin was denied due process of law, and that his robbery convictions must be reversed outright, solely because "the record Page 245 [is] inadequate to show that petitioner . . . intelligently and knowingly pleaded guilty."*

Also see Burrough v. State, 2008-CP-0034 SCT, where it states:

"¶ 14. Pursuant to Rule 8.04(A)(3) of the Uniform Circuit and County Court Rules, "[b]efore the trial court may accept a plea of guilty, the court must determine that the plea is voluntarily and intelligently made and that there is a factual basis for the plea." (Emphasis added). The factual-basis component of the rule requires that, "before it may accept the plea, the circuit court have before it, inter alia, substantial evidence that the accused did commit the legally defined offense to which he is offering the plea." Corley v. State, 585 So.2d 765, 767 (Miss. 1991). What facts must be shown depends on the crime and its assorted elements. Id. There are numerous ways by which the facts may be found, but what ultimately is required is "there must be enough that the court may say with confidence the prosecution could prove the accused guilty of the crime charged." Id. (citing United States v. Broce, 488, U.S. 563, 570, 109 S.Ct. 757, 102 L. Ed. 2d 927, 936 (1989)). ¶ 15. At the guilty-plea hearing, the State informed the trial court that it had multiple witnesses whose testimonies would show that Burrough broke into a home and therein stole property. The State also told the trial court that it was prepared to offer testimony that Burrough was interviewed shortly after the alleged crime and admitted to taking the property and disposing of it. When asked by the trial court if he did, in fact, do these things which the State intended to prove, Burrough stated, "Yes."

In Burrough, the Court satisfies the guilty plea proceedings pursuant to Rule 8.04, however, in the case sub judice, the record shows that the Court did not meet the standards as Burrough did.

Therefore, the record in open court, not the petition, must show that Cherry voluntarily, intelligently and knowingly pleaded guilty to all the elements of the charge in the indictment, if not, then Cherry plea must be reversed and the sentence should be vacated, and remand to the Bolivar Circuit Court with instructions to release Cherry from his illegal incarceration with time served.

PETITIONER WAS DEPRIVED OF DUE PROCESS OF LAW WHERE TRIAL COURT FAILED TO ADVISE CHERRY OF HIS RIGHT TO APPEAL THE SENTENCE.

4.

Whether Cherry was subjected to a denial of due process of law where the trial court failed to advise Cherry of the correct law in regards to appealing a sentence rendered upon a plea of guilty to the Supreme Court. Petitioner Cherry was never told that, under applicable law, his sentence could be appealed to the Supreme Court for direct review.

The trial court failed to advise Willie Cherry, Jr. that he had no right to appeal the actions of the Court in the sentence it arrived at in regards to the plea. Even upon a plea of guilty the law would allow Cherry a direct appeal of the sentence imposed. The trial court judge made fundamental error where it failed to advise Cherry of this avenue of review of the sentence in regards to the plea of guilty. The law is clear that a defendant who pleads guilty has a right to directly appeal the sentence to the Supreme Court. Trotter v. State, 554 So. 2d 313, 86 A.L.R.4th 327 (Miss. 1989).

5.

Whether Cherry's eight year sentence imposed after Cherry entered a plea of guilty is an excessive because the evidence given during plea can only be accessory after the fact, and counsel was ineffective for failure to bring this matter to the court.

Appellant Cherry was indicted for the offense of aiding and abetting armed robbery pursuant to Miss. Code Ann. §97-3-79[1]

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[1] *97-3-79. Robbery; use of deadly weapon.*

Every person who shall feloniously take or attempt to take from the person or from the presence the personal property of another and against his will by violence to his person or by putting such person in fear of immediate injury to his person by the exhibition of a deadly weapon shall be guilty of robbery and, upon conviction, shall be imprisoned for life in the state penitentiary if the penalty is so fixed by the jury; and in cases where the jury fails to fix the penalty at imprisonment for life in the state penitentiary the court shall fix the penalty at imprisonment in the state penitentiary for any term not less than three (3) years.

Willie Cherry, Jr.'s sentence was excessive under the law since he was given a sentence greater than any other defendant and the sentence which he was provided exceeds the term which would be applicable for accessory-after-the-fact of armed robbery. Cherry was guilty of being presence during the robbery committed by his co-defendant, Jennings, but was not guilty of aiding and abetting armed robbery because he was not armed and never threatened anyone or attempted to take or take anything of value from the victim. Cherry had no prior knowledge that Jennings was going to commit a robbery. The Court should hold that Cherry's plea of guilty to armed robbery, and the court's acceptance of such plea on the basis of the facts provided during the plea colloquy was improper.

The record clearly demonstrates that during the plea colloquy Cherry did not admit to aiding and abetting robbery by the use of a deadly weapon. First of all Jennings did not use a deadly weapon to commit the robbery. The pistol that was used was only a unloaded B.B. pistol which cannot be considered as a deadly weapon; and the greatest crime for which can be demonstrated by this record would be accessory after the fact of armed robbery and such crime carries a statutory maximum sentence of five years.[1]

The sentence imposed upon Cherry is above the maximum sentence which the court can impose for accessory after-the-fact of armed robbery. Thus, Willie Cherry Jr. was denied due process of law in being sentenced even where the charge were named armed robbery without the

[1] § 97-1-5. Accessories after the fact.

Every person who shall be convicted of having concealed, received, or relieved any felon, or having aided or assisted any felon, knowing that such person had committed a felony, with intent to enable such felon to escape or to avoid arrest, trial, conviction or punishment, after the commission of such felony, on conviction thereof shall be imprisoned in the penitentiary not exceeding five years, or in the county jail not exceeding one year, or by fine not exceeding one thousand dollars, or by both; and in prosecution for such offenses it shall not be necessary to aver in the indictment or to prove on the trial that the principal has been convicted or tried.

use of a deadly weapon. Since the admitted facts constituted accessory after-the-fact of armed robbery not at all since now firearm was used to attempt to commit armed robbery. One cannot be both a principal in the crime and an accessory after the fact. Hoops v. State, 681 So. 2d 521 (Miss. 1996). Here, in the case sub judice, Jennings was the principal of the so-called armed robbery crime.

The Supreme Court has previously held, in case similar to the one now presented here, "that the evidence was sufficient to support a conviction of accessory after the fact of robbery where the defendant was a part of the robbery plans in the beginning, she kept and provided the get-away automobile after the bank was robbed but before the active robbers had completed their flight, and she gave orders to her confederates after all of them were apprehended. Harrell v. State, 583 So. 2d 963 (Miss. 1991).

Here, in the case sub judice, accordingly to Cherry's affidavit and the evidence that he presented at the guilty plea colloquy proceeding, Cherry cannot be guilty of aiding and abetting the armed robbery, and it is not a clear fact that he is guilty of accessory-after-the-fact, except that he will not come forward with the true from the beginning when he gave his first statement, saying he was at home and was not presence during the robbery. This will only indicate that after-the-fact he would not give a statement concerning he was there and did in fact see Jennings committing the robbery and failed to give the law officers that information from the beginning. The court failed to ask Cherry, "what exactly the part that he played in the armed robbery", in order to determine whether he was entering a plea of guilty to the elements that he was charged with in the indictment.

A trial court should not accept the defendant's plea of guilty "without first addressing the defendant personally and determining that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea. Wilson v. State, 577 So.2d 394 (Miss. 1991) (citing Alexander v. State, 226 So.2d 905, 909 (Miss. 1969).

Here, Cherry was denied his State and Federal Constitutional rights by his counsel failure to prepare pre-trial motions, such as: Motion to Squash the Indictment because according to the true evidence and the physical evidence that the arresting concealed and falsified that a firearm a pistol was used in the attempted robbery, and even failed to prepare a pretrial motion to suppress the evidence. If such proceedings had been filed, Cherry would not have enter a plea of guilty, but proceeded to trial, and most likely would have been aquitted of the charge of armed robbery. Cherry was clearly denied effective assistance of counsel by the state appointed counsel, which is a clear violation of his constitutional rights under the Sixth Amendment of the United States Constitution as well a denial of the same right under the Mississippi State Constitution. When an indictment cannot be corrected on fatal errors, the defendant cannot be reindicted after having been found guilty and convicted on the fatal errors in the indictment, therefore, he must be granted an acquittal and released from his illegal incarceration.

In Walker v. State, 473 So.2d 435 (Miss. 985), the Court stated:

"One of the ingredients of a fair and impartial trial is that an accused person should be tried upon the merits of the case. Expressing it another way, the question of guilt or innocence of the crime charged should be received by the jury unhampered by any suggestion or insinuation of any former crime or misconduct that would prejudice jurors. . . . We commend vigorous prosecutions so long as they are conducted within the rules of evidence. Our adversary system of jurisprudence does not contemplate that attorneys for either side will be completely passive or indifferent during court trials. Yet, fundamental fairness requires that any defendant should not

be subjected to testimony and tactics which are highly inflammatory and prejudicial as shown by the record before us. See Allison v. State, 274 So.2d 678 (Miss. 1973); Kelly v. State, 278 So.2d 400 (Miss. 1973); and Wood v. State, 57 So.2d 193 (Miss. 1972).

Cherry did not proceed to trial by a jury, but false information and unfair testimony and tactics were given to the grand jury for indictment of Cherry, such as:

1. The State failed to reveal physical evidence contained in the discovery;

2. Officers claimed before the grand jury that a firearm (a pistol was used to put the victims in fear of their lives, and concealed that the pistol was an unloaded B.B. pistol which was used by Jennings to break the Driver's Window out of the car.

3. The officers concealed that Jennings acted alone, demanded the money and was caught alone with the money. (Cherry cannot be guilty of aiding and abetting an armed robbery by walking across the street and witnessing Jennings committed the robbery.

Because an indictment is jurisdictional, defendants at any time may raise and objection to the indictment base on failure to charge an offense, and the defect is "not waived by a guilty plea". See U. S. v Cabrera-Teran, 168 F.2d 141 (5th Cir. 1999). "To be sufficient, an indictment must allege each material element of the offense; if it does not, it fails to charge that offense. Id. at p. 43. United States v. Hughes, 147 F.3d 423, 436 9 (5th Cir. 1998),___ Cert denied, ___ U.S. ___, 9 S.Ct. 569, ___ L.Ed.2d ___ (1998), United States v. Morale Rosales, 838 F.2d 359, 361 (5th Cir. 1988) (citing United States v. Edrington, 726 F.2d 1029, 031 (5th Cir. 1984); United States v. Meacheam, 626 F.2d 503, 510 (5th Cir. 1980).

The State's evidence was legally insufficient to establish certain elements of the crime of armed robbery. Fisher v. State, 481 So.2d 203 (Miss. 1985). "Fisher correctly notes that, before

a conviction of any crime may stand, three must be in the record evidence sufficient to establish each element of the crime." Edward v. State, 469 So.2d 68, 70 (Miss. 1985); Watson v. State, 465 So.2d 1925, 1030 (Miss. 1985); Neal v. State, 451 So.2d 743, 757 (Miss. 1984).

"If the facts points out in favor of the defendant to the extent that reasonable jurors could not have found the defendant guilty beyond a reasonable doubt, viewing all facts in the light most favorable to the State, then it must sustain the assignment of error." See Bank v. State, 542 So.2d 222, 225-26 (Miss. 1989). Of course; the opposite is also true. "we may reverse the trail court's ruling only where one or more of the elements of the offense charged is lacking to such a degree that reasonable jurors could only have found the defendant not guilty." McClaim v. State, 625 So.2d 774, 778 (Miss. 1993); Fisher, supra at p. 212).

Do to the fact that the State failed to give the defendant clear notice of the charge, and because a BB pistol was used to aid in committing a robbery instead of a deadly weapon, and because the state falsified the physical evidence connected to the robbery, making the elements insufficient to charge aiding and abetting armed robbery, the court should vacate it judgment and release Cherry from his illegal incarceration, or in the alternative allow him to withdraw his plea of guilty and allow him to proceed to trial on the faulty indictment.

In order to prove Cherry's allegation herein, Cherry's father and a Paralegal went to the Bolivar County Courthouse to purchase a copy of the Guilty Plea Transcript and a Copy of the Sentence Hearing Transcript, but the transcripts could not be purchased because they were not transcribed and made a part of the file after sentencing. In a similar case, Wilson v. State, 577 So.2d 394 (Miss. 1991), the court stated:

"The record contains only Wilson's Petition to Enter a Plea of Guilty. The plea proceeding whereby the court considered the guilty plea and questioned Wilson about it was not

transcribed by a court reporter. Because of the inadequate record, it is impossible to make a determination of whether Wilson really understood the nature of his guilty plea. We have commended the practice of a judge who files a transcript of the guilty plea proceedings within days after that proceeding takes place. "This transcript is then available when a post-conviction motion of this nature is filed, allowing for immediate review and rapid disposition of the motion without the expenditure of county funds for transporting the petitioner from Parchman for a hearing." Garlotte v. State, 530 So.2d 693, 694 (Miss. 1988).

The Court further stated,

> "Because the plea hearing was not transcribed, we have no way of knowing whether Wilson entered plea voluntarily or whether his attorney p provided effective assistance. We can only examine his Petition to enter Plea of Guilty and that is, for the most part, a standardized form. We reverse and remand for an evidentiary hearing on those two issues."

Even the guilty plea transcript was transcribed at the time Cherry filed his urgent post conviction motion, it has not since then been transcribed and made part of the record for this appeal. And, what appellant has observed in the record of the transcript, an evidentiary hearing still would be in order or since a basis for the plea was not established in the record by the court this court must find Cherry's guilty plea was rendered involuntarily and unintelligently.

No matter how much admission the defendant may enter at some later time, without the state having presented proof to the contrary of what Cherry initially stated, such initial statement should be taken as being true for what it was. It is true that Cherry later said what the court wanted him to say, under the court's stringent interrogation, but still Cherry never admitted that he actually participated in the robbery. Cherry admitted that before Jennings committed the alleged armed robbery, he was walking across the road with Jennings and surprisely, all of a certain, Jennings pulled out a B.B. gun (pistol), ran up to the victims' vehicle, crash the driver side winter out with the B.B. pistol and demanded money from both of the victims. By not

wanting to be involved, Cherry fled from the scene of the crime and went home, not knowing what happen to Jennings. Cherry did not have a firearm, and never aided and abetted the use of the alleged firearm to commit or demand money from the victims in the vehicle. The only thing that he may have been guilty of is accessory-after-the fact, by giving a statement after he was arresting at his home, saying that he was not at the scene of the crime because he was act home and by withholding evidence that he witnessed Jennings committing the alleged armed robbery or attempt armed robbery.

This court must review the record closely and rule in favor of the defendant since he is alleging that his plea was involuntarily and unintelligently made, however,
if there is no record and the record cannot be transcribed and made a part of the file, the court should consider the ruling in Ward v. State, 879 So.2d 452 (Miss.App. 2003).

This Court should vacate the plea of guilty and the sentence and should find that Cherry pleaded guilty to nothing greater then accessory after the fact and should be sentenced accordingly.

VII.

PROSECUTORIAL MISCONDUCT

6.

Whether the prosecutor intentionally, deliberately and unfairly concealed and withheld exculpatory and material evidence from the Petitioner in violation of his fundamental due process and Sixth Amendment Rights, being contrary to the United States Supreme court holdings in Brady v. Maryland, Giglio v. United States, and Banks v. Dretke, committing prosecutorial misconduct, and counsel was ineffective for failure to object.

Petitioner avers that the Investigators and the prosecutor himself committed

prosecutorial misconduct, derelict from duty, and exercised unlawful behavior, willful improper character and caused a dishonest act by concealing the true physical evidence, the pistol that was considered as deadly weapon, when he knew or should have known that a B. evidence, the pistol that was allegedly considered as a deadly weapon, when the investigators and the prosecutor knew or should have known that an unloaded B.B. pistol was used to break the vehicle's window of the victims with the intent to commit a robbery. The prosecutor also intentionally failed to include the affidavits and reports of the investigators as the affidavits or statements made by petitioner Cherry and Jennings, including the Docket Report of the deadly weapon in the record for appeal, when Cherry clearly made such discovery as part of his designation of the record for appeal. Cherry even put forth due diligence by filing a motion with the appeal court with certificate of service to the prosecutor and the court for a copy of the deadly weapon docket (which was denied without stated reason) for proof that the evidence was tampered with or that the B.B. pistol was concealed from the defense for trial and may have been concealed from the court.

The prosecutor also deliberately filed a complaint with the Mississippi Bar against paralegal which he thought Cherry was paying, and practicing law without a license because the paralegal aided Cherry, who proceeded with this appeal pro se and in forma pauperis, with his post conviction research, trying to keep Cherry from revealing his wrongdoing. Even, the mail department at the institution where Cherry is incarcerated caused his appeal record to disappear that he mailed to his father to seek a legal aid to research and prepare his pro se brief for appeal. And, as to this current date, Cherry's father did not receive the attested record for his appeal nor was it ever returned to him.

Petitioner avers that after the defense had requested the state for discovery disclosure, on or about April 5, 2004, the State filed its Response to the Discovery Disclosure request, showing the state witnesses, statements, reports, etc, but no physical evidence was included. See R 50 In other words, the weapon, which the indictment indicated a deadly weapon used to commit the robbery was concealed by the State, and specifically was not shown in the discovery response.

Petitioner avers that was denied the opportunity to a fair trial and that his guilty plea was involuntarily and unintelligently entered due to prosecutorial misconduct. Cherry asserts that State, including members of the Investigation team, the Office of the Attorney General of the State of Mississippi have intentionally, knowingly, and deliberately concealed, withheld, and refused to produce exculpatory and material evidence. In other words they intentionally concealed the BB pistol used in the robbery and it is his belief that the State knew or should have known that a BB pistol is not considered as a deadly weapon, and if it was, it will not sold for to children as non-dangerous object. Cherry contends that, pursuant to Brady v. Maryland and its progeny, he is entitled to the vacation of his guilty plea conviction and sentence and that the indictment should be dismissed with prejudice or in the alternatively, be granted a new trial.

Cherry relies on Howard v. State, 945 So.2d 326 (Miss. 2006), the court stated:

.... "[t]he United States Supreme Court decision in Brady v. Maryland which held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Brady v. Maryland, 373 U.S. 83, 87, 83 s.Ct. 1194, 1196 - 97, 10 L.Ed.2d 215, 218 (1963). Evidence is favorable to an accused when the "evidence is material, and constitutional error results from its suppression by the government, `if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'" Simon v. State, 857 So.2d 668, 669 (Miss. 2003) (quoting Kyles v. Whitley, 514 U.S. 419, 433, 115 s.Ct. 1555, 1565, 131 L.Ed.2d 490, 505 (1995) and United States v. Bagley, 473 U.S. 667, 682, 105 S.Ct. 3375, 3383, 87 L.Ed.2d 481, 494(1985)). We have held To establish a Brady violation a defendant must prove the following:

(1) that the government possessed evidence favorable to the defendant (including impeachment evidence); (2) that the defendant does not possess the evidence nor could he obtain it himself with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) exists that had the evidence been disclosed to the defense, a reasonable probability that the outcome of the proceedings would have been different. [United States v.] Spagnoulo, 960 /F.2d 990, 994 (11th Cir.1992), citing United States v. Meros, 866 F.2d 1304, 1308, (11th Cir.1989), cert. denied, 493 U.S. 932, 110 S.Ct. 322, 107 L.Ed.2d 312 (1989). King v. State, 656 So.2d 1168 (Miss. 1995)."

Petitioner avers that the actions of the State and Investigating officers as well as his counsel denied him due process of law and equal protection of the law as guaranteed him under the Fifth and Fourteenth Amendment of the United States Constitution as well as violated the laws under the Constitution of the State of Mississippi. Cherry avers that he would not have been indicted for aiding and abetting armed robbery if the grand jury had known that the BB gun was used in the robbery instead of a deadly weapon, which would have caused him to be indicted under a different statute for robbery or aiding and abetting robbery. And, that he would most likely would been indicted only for accessory after the fact. And if his counsel had rendered him effective assistance of counsel, he would not have been indicted at all. And definitely would not have been indicted for aiding and abetting a robbery by the exhibition of deadly weapon. in a criminal prosecution is not that it shall win a case, but that justice shall be done." Berger v. United States, 295 U.S. 78, 88 (1935).

This court should vacate its judgment and discharge him from his illegal incarceration or in the alternative allow him to withdraw his plea of guilty and proceed to the trial on the said indictment of the original charge.

7.

The Bolivar County Circuit Court abused its discretion by failure to address why Cherry was not allowed to proceed with his discovery during the pendency of his post-conviction motion, where Cherry filed a Motion for Production of Documents Add - 8, and Motion for Order Compelling Discovery, DP 51; and, the said Court failed or refused issue any order disposing the said motions and/or the reason why petitioner was not allowed to proceed with his discovery after giving him the right to do so.

After Petitioner Cherry had filed his post-conviction motion, on June 6, 2007, Judge Thomas L. Kenneth, the same Judge that was over his criminal case, was assigned over his civil post-conviction motion. DP 51 On July 20, 2007, the Court's Clerk set to the petitioner a Letter of Assignment for orders to be approved by attorneys and non-filing of discovery materials mailed to petitioner on how to proceed with his discovery and including discovery deadlines. DP 51. Add-4

In order to aid with his discovery, Cherry filed a Motion for Production of Documents which was signed by the Petitioner on August 23, 2007, and forwarded to the Court's Clerk for filing. Add-5 The Clerk did not make reference to the said motion as part of the record on the Docket Page. The Circuit Court failed to issue an Order requesting the State to respond nor did the Court make any ruling on said motion or demanded any sanctions. Even when the Court filed its Order denying Cherry's post-conviction motion, it failed to address Petitioner's discovery motions or refused to dispose of the pending "motion for production of documents and motion for an order compelling discovery. Petitioner put effort and due diligence as a right file for discovery in support of the arguments alleged in his post-conviction motion, just in case the court would grant a hearing on his issues.

Petitioner avers that the failure of the court to act according to the rules and laws of the

court was clearly an abuse of discretion and prejudicial to petitioner and his case. The Court acted clearly acted above the law and denied Petitioner, who proceeded as pro se, his last chance in court on a post-conviction motion. The court's actions by denying him the right to proceed with his discovery, the failure issue an order demanding the State to respond or at lease file an answer to his post-conviction motion, by delaying the time to issue any order in pertaining to his post-conviction motion until he had filed a petition for writ of mandamus was clearly arbitrary and capricious and prejudicial as well as an clear abuse of discretion.

This Court must review this issue as plain error of the court. "When examine findings under clearly erroneous standard, an appellate court may reverse only when "on the entire evidence [i]t is left with the definite and firm conviction that a mistake has been committed." **Anderson v. City of Bessemer City**, 470 U.S. 564, 573, 105 S.Ct. 1504, 1511, 84 L.Ed.2d 518 (1985), quoting, **united States v. Gypsumlo**, 333 U.S. 364, 395, 68 S.Ct. 525, 542, 92 L.Ed. 746 (1948).

This court must reverse the case on this issue and remand the case back to the lower court with instructions to grant a hearing on his post-conviction motion.

VIII.

INEFFECTIVE ASSISTANCE OF COUNSEL

Petitioner Willie Cherry, Jr. was denied him Sixth Amendment right to effective assistance of counsel where his attorney, representing him during the plea and sentencing proceedings, advised Cherry to plead guilty openly to armed robbery when the involvement of Willie Cherry, Jr. constituted, at most, the crime of accessory after the fact of armed robbery. Mr. Boyd P. Atkinson, defense counsel, appeared to be disorientated during the trial. He was unaware of

whether Cherry was pleading guilty to the element of armed robbery or just to accessory to aiding and abetting after the fact. The state, on it's own initiative, corrected the court and advised that Cherry was pleading guilty to one charge. This is a matter which the defense should have been fully aware of and should have informed the court prior to any plea being made. Mr. Atkinson was not functioning as a counsel which the Sixth Amendment require. Mr. Atkinson assistance was less then adequate since had he been functioning properly an attorney Cherry would have been convicted of accessory after the fact of armed robbery and not on the principle charge itself.

The sentence would have been less severe and Cherry would not have been convicted of a crime which he, by his own admissions, never actually committed. Mr. Atkinson never stated that he had talked to the victims, Joseph chandler and Ricardo Hollingsworth, and there is no information in the record as to what was discussed between this witness and counsel. If Joseph Chandler and/or Ricardo Hollingsworth would the chance to testify, they would have testified that Cherry did not participate in the crime. It was pure ineffectiveness for Mr. Atkinson to not subpoena or require to be in court.

In. Jackson v. State, ___ So.2d ___ (Miss. 2002) (No. 2000-KA-01195-SCT), the Court held the following in regards to ineffective assistance of counsel:

"Our standard of review for a claim of ineffective assistance of counsel is a two-part test: the defendant must prove, under the totality of the circumstances, that (1) him attorney's performance was deficient and (2) the deficiency deprived the defendant of a fair trial. *Hiter v. State, 660 So.2d 961, 965 (Miss.1995).*

Anyone claiming ineffective assistance of counsel has the burden of proving, not only that counsel's performance was deficient but also that he was prejudiced thereby. Strickland v.

Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Additionally, the defendant must show that there is a reasonable probability that, but for him attorney's errors, he would have received a different result in the trial court. Nicolaou v. State, 612 So.2d 1080, 1086 (Miss. 1992). Finally, the court must then determine whether counsel's performance was both deficient and prejudicial based upon the totality of the circumstances. Carney v. State, 525 So.2d 776, 780 (Miss. 1988).

Cherry claims that the following instances demonstrate that he suffered ineffective assistance of counsel during his pre-plea proceedings. First, defense counsel never informed Cherry of the contents of any discussions he had with the victims, if any. Defense counsel never inform Cherry of whether or not he would be charged with the embezzlement charge. The advice by counsel to pleading guilty was simply rendered blindly and without any insight of what the consequences of such plea would cause. Mr. Atkinson was grossly ineffective and had he been functioning as the counsels which the constitution requires then Cherry would only stand convicted of accessory after-the-fact of armed robbery today. Mr. Atkinson's actions have caused Cherry grave consequences.

Defense counsel never sought to interview defense witnesses in preparation for the actual trial. This clearly demonstrates ineffective assistance. Neither was Cherry's codefendant Henry Jennings was interviewed. Had this happened then counsel would have known that petitioner's involvement in the crime was at a minimum. There is a number of cases holding that an attorney is ineffective when he fails to perform any pre-trial investigation or interview any witnesses at all. See generally Payton v. State, 708 So.2d 559 (Miss. 1998); *Woodward v. State, 635 So.2d 805, 813 (Miss. 1993)(Smith, J. dissenting); Yarbrough v. State, 529 So.2d 659 (Miss.*

1988); Neal v. State, 525 So.2d 1279 (Miss. 1987).

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

Effective assistance of counsel contemplates counsel's familiarity with the law that controls him client's case. *See* **Strickland v. Washington**, *466 U.S. 668, 689 (1984) (noting that counsel has a duty to bring to bear such skill and knowledge as will render the trial reliable); see also* **Herring v. Estelle**, *491 F.2d 125, 128 (5th Cir. 1974) (stating that a lawyer who is not 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 him attorney did not know the relevant law).*

In the instant case, defense counsel failed to know the law in regards to armed robbery and/or accessory after the fact of armed robbery as well as failed to advise Cherry of the law. Either way, it is ineffective assistance of counsel.

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; Gilliard v. State, 462 So.2d 710, 714 (Miss. 1985). The defendant must show that there is a reasonable probability that for him attorney's errors, defendant would have received a different result. Nicolaou v. State, 612 So.2d 1080, 1086 (Miss. 1992); Ahmad v. State, 603 So.2d 843, 848 (Miss. 1992).

In Strickland v. Washington, 466 U.S. 668, 687 (1984), the United States Supreme Court held as follows:

> In assessing attorney performance, all the Federal Courts of Appeals and all but a few state courts have now adopted the "reasonably effective assistance" standard in one formulation or another. See Trapnell v. United States, 725 F.2d 149, 151-152 (CA2 1983); App. B to Brief for United States in United States v. Cronic, O. T. 1983, No. 82-660, pp. 3a-6a; Sarno, [466 U.S. 668, 684] Modern Status of Rules and Standards in State Courts as to Adequacy of Defense Counsel's Representation of Criminal Client, 2 A. L. R. 4th 99-157, 7-10 (1980). Yet this Court has not had occasion squarely to decide whether that is the proper standard. With respect to the prejudice that a defendant must show from deficient attorney performance, the lower courts have adopted tests that purport to differ in more than formulation. See App. C to Brief for United States in United States v. Cronic, supra, at 7a-10a; Sarno, supra, at 83-99, 6. In particular, the Court of Appeals in this case expressly rejected the prejudice standard articulated by Judge Leventhal in him plurality opinion in United States v. Decoster, 199 U.S. App. D.C. 359, 371, 374-375, 624 F.2d 196, 208, 211-212 (en banc), cert. denied, 444 U.S. 944 (1979), and adopted by the State of Florida in Knight v. State, 394 So.2d, at 1001, a standard that requires a showing that specified deficient conduct of counsel was likely to have affected the outcome of the proceeding. 693 F.2d, at 1261-1262. For these reasons, we granted certiorari to consider the standards by which to judge a contention that the Constitution requires that a criminal judgment be overturned because of the actual ineffective assistance of counsel. 462 U.S. 1105 (1983).

We agree with the Court of Appeals that the exhaustion rule requiring dismissal of mixed petitions, though to be strictly enforced, is not jurisdictional. See Rose v. Lundy, 455 U.S., at 515 -520. We therefore address the merits of the constitutional issue.

II

In a long line of cases that includes Powell v. Alabama, 287 U.S. 45 (1932), Johnson v. Zerbst, 304 U.S. 458 (1938), and Gideon v. Wainwright, 372 U.S. 335 (1963), this Court has recognized that the Sixth Amendment right to counsel exists, and is needed, in order to protect the fundamental right to a fair trial. The Constitution guarantees a fair trial through [466 U.S. 668, 685] the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment, including the Counsel Clause: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in him favor, and to have the Assistance of Counsel for him defence." Thus, a fair trial

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

Because of the vital importance of counsel's assistance, this Court has held that, with certain exceptions, a person accused of a federal or state crime has the right to have counsel appointed if retained counsel cannot be obtained. See Argersinger v. Hamlin, 407 U.S. 25 (1972); Gideon v. Wainwright, supra; Johnson v. Zerbst, supra. That a person who happens to be a lawyer is present at trial alongside the accused, however, is not enough to satisfy the constitutional command. The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results. An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair. [466 U.S. 668, 686] For that reason, the Court has recognized that "the right to counsel is the right to the effective assistance of counsel." Richardson, 397 U.S. 759, 771 , n. 14 (1970). McMann v.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.

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 Michael 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 Micheal 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, at 372-373, 624 F.2d, at 209-210.

B

An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment. Cf. United States v. Morrison, 449 U.S. 361, 364 -365 (1981). The purpose of the Sixth Amendment guarantee of counsel is to ensure [466 U.S. 668, 692] that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding. Accordingly, any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution. In certain Sixth Amendment contexts, prejudice is presumed. Actual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice. So are various kinds of state interference with counsel's assistance. See United States v. Cronic, ante, at 659, and n. 25. Prejudice in these circumstances is so likely that case-by-case inquiry into prejudice is not worth the cost. Ante, at 658. Moreover, such circumstances involve impairments of the Sixth Amendment right that are easy to identify and, for that reason and because the prosecution is directly responsible, easy for the government to prevent. One type of actual ineffectiveness claim warrants a similar,

though more limited, presumption of prejudice. In Cuyler v. Sullivan, 446 U.S., at 345 -350, the Court held that prejudice is presumed when counsel is burdened by an actual conflict of interest. In those circumstances, counsel breaches the duty of loyalty, perhaps the most basic of counsel's duties. Moreover, it is difficult to measure the precise effect on the defense of representation corrupted by conflicting interests. Given the obligation of counsel to avoid conflicts of interest and the ability of trial courts to make early inquiry in certain situations likely to give rise to conflicts, see, e. g., Fed. Rule Crim. Proc. 44(c), it is reasonable for the criminal justice system to maintain a fairly rigid rule of presumed prejudice for conflicts of interest. Even so, the rule is not quite the per se rule of prejudice that exists for the Sixth Amendment claims mentioned above. Prejudice is presumed only if the defendant demonstrates that counsel "actively represented conflicting interests" and that "an actual conflict of interest adversely affected him lawyer's performance." Cuyler v. Sullivan, supra, at 350, 348 (footnote omitted). [466 U.S. 668, 693] Conflict of interest claims aside, actual ineffectiveness claims alleging a deficiency in attorney performance are subject to a general requirement that the defendant affirmatively prove prejudice. The government is not responsible for, and hence not able to prevent, attorney errors that will result in reversal of a conviction or sentence. Attorney errors come in an infinite variety and are as likely to be utterly harmless in a particular case as they are to be prejudicial. They cannot be classified according to likelihood of causing prejudice. Nor can they be defined with sufficient precision to inform defense attorneys correctly just what conduct to avoid. Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another. Even if a defendant shows that particular errors of counsel were unreasonable, therefore, the defendant must show that they actually had an adverse effect on the defense. It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding. Virtually every act or omission of counsel would meet that test, cf. United States v. Valenzuela-Bernal, 458 U.S. 858, 866 -867 (1982), and not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding. Respondent suggests requiring a showing that the errors "impaired the presentation of the defense." Brief for Respondent 58. That standard, however, provides no workable principle. Since any error, if it is indeed an error, "impairs" the presentation of the defense, the proposed standard is inadequate because it provides no way of deciding what impairments are sufficiently serious to warrant setting aside the outcome of the proceeding. On the other hand, we believe that a defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case. This outcome-determinative standard has several strengths. It defines the relevant inquiry in a way familiar to courts, though the inquiry, as is inevitable, is anything but precise. The standard also reflects the profound importance of finality in criminal

proceedings. [466 U.S. 668, 694] Moreover, it comports with the widely used standard for assessing motions for new trial based on newly discovered evidence. See Brief for United States as Amicus Curiae 19-20, and nn. 10, 11. Nevertheless, the standard is not quite appropriate. Even when the specified attorney error results in the omission of certain evidence, the newly discovered evidence standard is not an apt source from which to draw a prejudice standard for ineffectiveness claims. The high standard for newly discovered evidence claims presupposes that all the essential elements of a presumptively accurate and fair proceeding were present in the proceeding whose result is challenged. Cf. United States v. Johnson, 327 U.S. 106, 112 (1946). An ineffective assistance claim asserts the absence of one of the crucial assurances that the result of the proceeding is reliable, so finality concerns are somewhat weaker and the appropriate standard of prejudice should be somewhat lower. The result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome. Accordingly, the appropriate test for prejudice finds its roots in the test for materiality of exculpatory information not disclosed to the defense by the prosecution, United States v. Agurs, 427 U.S., at 104 , 112-113, and in the test for materiality of testimony made unavailable to the defense by Government deportation of a witness, United States v. Valenzuela-Bernal, supra, at 872-874. The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

In making the determination whether the specified errors resulted in the required prejudice, a court should presume, absent challenge to the judgment on grounds of evidentiary insufficiency, that the judge or jury acted according to law. [466 U.S. 668, 695] An assessment of the likelihood of a result more favorable to the defendant must exclude the possibility of arbitrariness, whimsy, caprice, "nullification," and the like. A defendant has no entitlement to the luck of a lawless decisionmaker, even if a lawless decision cannot be reviewed. The assessment of prejudice should proceed on the assumption that the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision. It should not depend on the idiosyncracies 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, it is clear that Willie Cherry, Jr. has suffered a violation of him constitutional rights to effective assistance of counsel, in violation of the 6th Amendment to the United States Constitution. Defense counsel should have made Cherry aware of the law and should have gave Cherry the right to make an intelligent decision as to where he would plead guilty. The decision cannot be intelligent where Cherry was not provided with all the relevant information regarding charge, the penalty and the admissions he was entering. This fact, coupled with the fact that counsel failed to investigate and interview the witnesses which could and would have supported mitigating circumstances that Cherry was not fully involved in the crime or armed during the process, would have been reasonable doubt for a jury. This Court should recognize such violation and grant post conviction relief to Willie Cherry, Jr. who is entitled to a new trial and to have effective assistance of counsel during such trial.

This court has repeatedly held that an allegation that counsel for a defendant failed to advise him of the fact that the arresting officers concealed the weapon used to commit the

robbery and failed to present the alleged firearm a physical evidence to support the alleged armed robbery, to which he was subject to gives rise to a question of fact about the attorney's constitutional proficiency that is to be determined in the trial Court. See: Nelson v. State, 626 So.2d 121, 127 (Miss. 1993) [The failure to accurately advise Nelson of the possible consequences of a finding of guilt in the absence of a plea bargain ... may, of proven, be sufficient to meet the test in Strickland v. Washington] See also: Alexander v. State, 605 So.2d 1170 (Miss. 1992) [Emphasizing that where a criminal defendant alleges that he pleaded guilty to a crime without having been advised by him attorney of the applicable law pertaining to parole and post supervision release, a question and/or fact arises concerning whether the attorney's conduct was deficient].

This Court should conclude that here counsel rendered ineffective assistance of counsel and that such ineffectiveness prejudices Petitioner's guilty plea in such a way as to mandate a reversal of the plea as well as the sentence imposed. This Court should reverse that case to the trial Court and direct that an evidentiary hearing be conducted in regards to this case.

CONCLUSION

WHEREFORE THESE PREMISES CONSIDERED, Appellant Cherry prays that this Honorable court vacate the order of the Circuit Court dismissing his post-conviction motion and remand the case back for rehearing or and order discharging him from his illegal custody.

Respectfully submitted,

Willie Cherry

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CERTIFICATE OF SERVICE

I, Willie Cherry, Jr. do certify that I have this day mailed first class, via U. S. Postal Service, postage prepaid, a true and correct copy of the foregoing "BRIEF OF APPELLANT" to the following person:

Honorable Laurence Y. Mellen,
District Attorney's Office
P. O. Box 848
Cleveland, MS 38732.

This, the 28th day of May, 2009.

Willie Cherry

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