

COPY

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

FILED

ALAN AVANT

APPELLANT

VS.

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SUPREME COURT
COURT OF APPEALS

NO. 2009-CP-00680-COA

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR APPELLANT

BY:

Alan Avant

Alan Avant

WCCF, #W1264

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Woodville, MS 39669

ORAL ARGUMENT NOT REQUESTED

PROSE PRISONER BRIEF

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VS.

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APPELLEE

CERTIFICATE OF INTERESTED PERSONS

1. Alan Avant, Appellant pro se.
2. Honorable Jim Hood and staff, Attorney General
3. Honorable Vernon Cotton, Circuit Court Judge
4. Honorable Robert Brooks, District Attorney

Respectfully Submitted,

BY: Alan Avant
Alan Avant
WCCF, #W1264
P. O. Box 1079
Woodville, MS 39669

Appellant

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

ALAN AVANT

APPELLANT

VS.

NO. 2009-CP-00680-COA

STATE OF MISSISSIPPI

APPELLEE

STATEMENT OF CASE

Allan Avant was indicted by the Leake County Grand Jury on November 1, 2004 for the offense of armed robbery. (R. 45-47).

Appellant Avant was appointed Honorable Christopher Collins to represent him.

Just prior to trial petitioner's attorney instructed Appellant that he should plead guilty because if he went to trial he would be sentenced to life without parole as a violent habitual offender.

Mr. Collins came to Appellant several times with plea bargain deals which Appellant continuously refused until Mr. Collins kept applying that Appellant had been charged as a violent habitual offender would be sentenced as such.

Appellant informed Mr. Collins that he was not a violent habitual offender and that he did not want to plead guilty to the charges.

Upon pleading guilty the trial court never received the required information to form the basis of the plea of guilty and the court accepted the plea without admission of the elements and imposed sentence.

The trial court imposed a sentence of 15 years with the prosecution not pursuing the alleged habitual charges.

The trial court never advised Appellant of the right to appeal the sentence to the Mississippi Supreme Court directly even after there had been a plea of guilty.

STATEMENT OF INCARCERATION

The Appellant is presently incarcerated and is being housed in the Mississippi Department of Corrections at Woodville, Mississippi, in service of a mandatory prison term imposed as a direct result of the conviction and sentence under attack in this case. Appellant has been continuously confined in regards to such sentence since date of his transfer from federal custody where he was sent following the conviction and imposition by the trial court.

STATEMENT OF ISSUES

ISSUE ONE

Whether Appellant Avant was denied due process of law where the prosecution indicted Appellant purposefully as a habitual offender solely to force and pressure Appellant to plead guilty to armed robbery when the prosecution knew Appellant was not a habitual offender under the requirements of the habitual statute.

ISSUE TWO

Whether Appellant Avant was denied due process of law where he was convicted of the offense of arm robbery without having admitted a sufficient factual basis to demonstrate guilt of such armed robbery offense. The admissions made in upon court by Appellant Avant do not constitute sufficient basis for armed robbery.

ISSUE THREE

Whether Appellant was denied due process of law where he was allowed and enticed to plead guilty to arm robbery under duress and coercion when defense counsel gave advice that if Appellant did not plead guilty he would get life without parole. Appellant would assert that the manner in which the trial court imposed the sentence constitutes a denial of due process and an illegal sentence. The law is clear that a criminal sentence cannot be placed in lay away. The 15 year sentence imposed in this case constitutes a lay away sentence.

ISSUE FOUR

Whether Appellant Alan Avant was subjected to a denial of due process of law where the trial court failed to advise Alan Avant of the correct law in regards to filing direct appeal of a sentence rendered upon a plea of guilty to the Supreme Court. Appellant Alan Avant was never told that under applicable law the

On this claim the trial court found that, after reviewing the indictment, the state had properly charged Appellant as a habitual offender under Miss. Code Ann. Sec. 99-19-83. (R. 35) Appellant would assert here that the trial court was incorrect in such finding where there was no finding on the record that either of the prior offenses raised by the state in support of such allegations involved these of violence, threats, use of weapon, or bodily harm to any individual. Such subsequent offenses were, therefore, not qualified to escalate the status to habitual offender under Miss. Code Ann. Sec. 99-19-83. The trial court made absolutely no findings on the record of the guilty pleas in regards to such prior convictions. This Court should reject the trial court's actions in denying the PCR on this claim.

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

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.

However, a sentence for armed robbery allows a non-habitual to accumulate earned time credits after serving the initial 10 years of such sentence. Collins v. Puckett, 624 So.2d 496, 499-500 (Miss. 1993).

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 raising questions regarding the voluntariness to 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.²

ISSUE TWO

Alan Avant was represented in the Circuit Court by Honorable Christopher A. Collins who informed Appellant that if Appellant did not plead guilty to the charges he would get life without parole. The law is clear that such a tactic is illegal. Myers v. State 583 So. 2d 174 (Miss. 1991) on the basis the pleas entered by Avant is coerced as well as involuntary. The judgments entered there under, as a matter of law, is subject to collateral attack.

While the trial court found that this claim was unfounded, there is no legal authority mentioned by the court to discredit that authority which Appellant

² 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 and who is serving that sentence or must serve such sentence at some point in the future and which that person desire to attack collaterally.

asserted in support of his claim. The record demonstrates that the robbery charge, which this prosecution used as one of the subsequent offenses, without any violence or the threat of violence, cannot constitute the basis for life without parole as a habitual offender. Stated another way, Avant was not eligible for a life sentence without parole and the trial court was incorrect in its findings. The trial court never asserted that the prior robbery charge involved acts of violence as required by Miss. Code Ann. Sec. 99-19-83.

Appellant would assert that the cumulative effect of each of the errors set forth in his motion for PCR and in this brief, when combined, constitutes a denial of due process of law and amounts to reversible plain error as having denied Appellant his constitutional right to a fair trial.

ISSUE THREE

DENIAL OF DUE PROCESS OF LAW WHERE SENTENCE WAS PLACED IMPOSED IN LAYAWAY UNTIL AFTER FEDERAL TERM WAS COMPLETED

The sentence which the Circuit Court imposed in this case was imposed illegally where said sentence was imposed to be served following the service of a federal term. The state sentence was designated to commence after the service of the federal sentence. This Court should find that such action was illegal. Appellant should be permitted credit on the state sentence from the date of its imposition notwithstanding where Appellant may have been in custody as long as he was in

some form of lawful custody. The state should be responsible for its voluntary release of Appellant to another jurisdiction prior to the complete service of the state's term. The state court imposed sentence should not have been allowed to be placed in the layaway. The trial court never elaborated upon these issues other than merely asserting that such claim was unfounded. Under this broad finding any attack upon any sentence is unfounded with the trial court. This Court should find that the trial court was incorrect in imposing a sentence and releasing Appellant to another jurisdiction for service of the sentence at a future date. Such an action is without statutory authority.

Appellant Avant filed this specific claim, aside from the additional claims, not to challenge the criminal judgment against him but to challenge the implementation of the judgment by the state in the manner the judgment designated the sentence to be served. This is not the kind of claim which Avant could challenge in the court proceedings during the guilty plea colloquy where Appellant Avant had not yet begun to serve the sentence. Appellant had no standing to bring this claim at that time.

The issue is whether the rule against installment punishment was violated in Avant's case should now be before this Court. It is clear from the facts that such prohibition was violated.

The gravamen of Appellant's claim is that when the Circuit Court imposed the state sentence to start after the federal sentence which was being served at that time was fully completed then the state court imposed the sentence in a layaway or installment fashion. The state court sentence should have been deemed to have started at the time of imposition. Just as the state court has no authority to impose a state sentence to be served concurrent to a federal sentence, the same Court has no jurisdiction to impose a state sentence to run consecutive to a federal sentence. Petitioner's case poses a question of law. The sentencing proceedings that occurred in this case contain serious constitutional defects that affect Avant's Fifth Amendment rights under the United States Constitution. Appellant Avant is entitled to relief under this claim. This Court should find that the trial court erred in it's ruling and this case should be reversed and remanded to the trial court.

ISSUE FOUR

TRIAL COURT FAILED TO CORRECTLY INFORM ALAN AVANT THAT HE COULD DIRECTLY APPEAL THE SENTENCE IMPOSED UPON PLEA OF GUILTY

The trial court informed Avant, when accepting the plea of guilty, that there could be no appeal. This was clearly an incorrect advice given by the trial court. This Court have fashioned out the rule that even upon a plea of guilty the law would allow Avant a limited direct appeal of the sentence imposed. The trial court judge made a fundamental error where he failed to advise Avant of his avenue of

review of the sentence in regards to the plea of guilty. The trial court, in fact, advised Avant of the exact opposite. The law is clear that a defendant who pleads guilty has a limited 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)

While the trial court stated in the order denying the PCR that Appellant admitted in open court that he had no right to appeal his guilty plea, Appellant would assert that the appeal of the guilty plea and the appeal of the sentence is two totally different matters. This Court would most likely consider previous findings that the trial court had no obligation to inform Appellant of any available procedure to appeal the sentence which the court imposed. That point would be a valid one where the trial Court had not mislead Appellant by providing evasive, disguised, and encrypted information regarding the appeal. The correct information, if provided to Appellant by the trial court, would have been counterproductive to the court's sentence. Out of fairness, if the trial court believed the sentence was, in fact, a fair one, the Court should have been willing and readily agreeable in informing Appellant of his avenue of appeal of the sentence, notwithstanding the plea. It would mean little if this Court was to spend time fashioning out a procedure to allow a defendant to have a sentence imposed upon a plea of guilty directly reviewed by a timely appeal if the procedure is not to be told to or inform unto the defendant which it directly effects. A procedure of

keeping the dumb and ignorant dumb and ignorant is not the correct procedure. The procedure and information should be published by and made readily available to the defendant by the trial court. Misleading a defendant with opposite information should not suffice. This Court should reverse and remand on this claim or should find that trial courts which undertake a practice to inform a defendant of any appeal process should inform the defendant of the all of the correct process to appeal a conviction and sentence and where each such appeal may apply.

ISSUE FIVE

INEFFECTIVE ASSISTANCE OF COUNSEL.

Appellant Alan Avant was denied his Sixth Amendment right to effective assistance of counsel where his attorney, representing him during the plea and sentencing proceedings, advised Avant to plead guilty to armed robbery or he would be sentenced to life without parole were he to proceed to trial. This information and advice constitutes ineffective assistance of counsel. More over, defense counsel's advice caused Avant to fear life without parole if he continued on the course of asserting his rights to a trial. Lawfully, defense counsel was not in a position to advise Avant of a projected sentence he would receive when no such trial or sentencing hearing had yet been held. Sentencing, even had Avant been found guilty, was a matter for the court.

In. Jackson v. State, 815 So.2d 1196 (Miss. 2002), 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) his attorney's performance was deficient and (2) the deficiency deprived the defendant of a fair trial. Hiter v. State, 660 So.2d 961, 965 (Miss.1995).

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

Avant claims that the following instances demonstrate that he suffered ineffective assistance of counsel during the pre-plea proceedings. First, defense counsel never informed Avant of the fact that armed robbery, even upon a plea of guilty carried with it a mandatory sentence;³ Defense Counsel coerced Avant into pleas by informing Avant that a failure to plead guilty would result in a sentence of life without parole; Defense Counsel never informed Avant that the habitual charges against him were not proper where Avant was not a violent habitual offender. Had defense counsel correctly instructed Avant on these critical points, Avant would not have entered a plea of guilty. Defense Counsel clearly was not

³ Appellant was never told of the mandatory sentencing practice until he had appeared before the trial court. It was sprung on Appellant by the trial judge for the first time. At this point counsel knew Appellant had passed the point of no return and that he would have to go through with the plea or prejudice himself with the court by asking questions or disagreeing. This much counsel knew the Appellant would not do. Defense counsel should have made Appellant aware of this information prior to any appearance before the trial court for a plea.

informed on or fully aware of the law in regards to sentencing for that offense of armed robbery or being a habitual violent offender in Mississippi.

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

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

In the instant case, defense counsel failed to know the law in regards to armed robbery and as a result counsel failed to correctly advise Avant of the law regarding sentence.

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 Supreme Court of Mississippi 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 his attorney's errors, defendant would have received a different result. Nicolaou v. State, 612 So.2d 1080, 1086 (Miss. 1992); Ahmad v. State, 603 So.2d 843, 848 (Miss. 1992).

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

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

II

In a long line of cases that includes Powell v. Alabama, 287 U.S. 45 (1932), Johnson v. Zerbst, 304 U.S. 458 (1938), and Gideon v. Wainwright, 372 U.S. 335 (1963), this Court has recognized that the Sixth Amendment right to counsel exists, and is needed, in order to protect the fundamental right to a fair trial. The Constitution guarantees a fair trial through [466 U.S. 668, 685] the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment, including the Counsel Clause: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence." Thus, a fair trial is one in which evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding. The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel's skill and knowledge is necessary to accord defendants the "ample opportunity to meet the case of the prosecution" to which they are entitled. Adams v. United States ex rel. McCann, 317 U.S. 269, 275 , 276 (1942); see Powell v. Alabama, supra, at 68-69.

Because of the vital importance of counsel's assistance,

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

III

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

A

As all the Federal Courts of Appeals have now held, the proper standard for attorney performance is that of reasonably effective assistance. See *Trapnell v. United States*, 725 F.2d, at 151-152. The Court indirectly recognized as much when it stated in *McMann v. Richardson*, *supra*, at 770, 771, that a guilty plea cannot be attacked as based on inadequate legal advice unless counsel was not "a reasonably competent attorney" and the advice was not "within the range of competence demanded of attorneys in criminal cases." See also *Cuyler v. Sullivan*, *supra*, at 344. When a convicted defendant [466 U.S. 668, 688] complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness. More specific guidelines are not appropriate. The Sixth Amendment refers simply to "counsel," not specifying particular requirements of effective assistance. It relies instead on the legal profession's maintenance of standards sufficient to justify the law's presumption that counsel will fulfill the role in the adversary process that the Amendment envisions. See *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 *Michel v. Louisiana*, supra, at 101. There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way. See *Goodpaster*, [466 U.S. 668, 690] *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N. Y. U. L. Rev. 299, 343 (1983). The availability of intrusive post-trial inquiry into attorney performance or of detailed guidelines for its evaluation would encourage the proliferation of ineffectiveness challenges. Criminal trials resolved unfavorably to the defendant would increasingly come to be followed by a second trial, this one of counsel's unsuccessful defense. Counsel's performance and even willingness to serve could be adversely affected. Intensive scrutiny of counsel and rigid requirements for acceptable assistance could dampen the ardor and impair the independence of defense counsel, discourage the acceptance of assigned cases, and undermine the trust between attorney and client. Thus, a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. A convicted defendant making a claim of ineffective assistance must identify the acts or omissions

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

B

An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment. Cf. *United States v. Morrison*, 449 U.S. 361, 364-365 (1981). The purpose of the Sixth Amendment guarantee of counsel is to ensure [466 U.S. 668, 692] that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding. Accordingly, any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution. In certain Sixth Amendment contexts, prejudice is presumed.

Actual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice. So are various kinds of state interference with counsel's assistance. See *United States v. Cronin*, ante, at 659, and n. 25. Prejudice in these circumstances is so likely that case-by-case inquiry into prejudice is not worth the cost. Ante, at 658. Moreover, such circumstances involve impairments of the Sixth Amendment right that are easy to identify and, for that reason and because the prosecution is directly responsible, easy for the government to prevent. One type of actual ineffectiveness claim warrants a similar, though more limited, presumption of prejudice. In *Cuyler v. Sullivan*, 446 U.S., at 345 -350, the Court held that prejudice is presumed when counsel is burdened by an actual conflict of interest. In those circumstances, counsel breaches the duty of loyalty, perhaps the most basic of counsel's duties. Moreover, it is difficult to measure the precise effect on the defense of representation corrupted by conflicting interests. Given the obligation of counsel to avoid conflicts of interest and the ability of trial courts to make early inquiry in certain situations likely to give rise to conflicts, see, e. g., Fed. Rule Crim. Proc. 44(c), it is reasonable for the criminal justice system to maintain a fairly rigid rule of presumed prejudice for conflicts of interest. Even so, the rule is not quite the per se rule of prejudice that exists for the Sixth Amendment claims mentioned above. Prejudice is presumed only if the defendant demonstrates that counsel "actively represented conflicting interests" and that "an actual conflict of interest adversely affected his lawyer's performance." *Cuyler v. Sullivan*, supra, at 350, 348 (footnote omitted). [466 U.S. 668, 693] Conflict of interest claims aside, actual ineffectiveness claims alleging a deficiency in attorney performance are subject to a general requirement that the defendant affirmatively prove prejudice. The government is not responsible for, and hence not able to prevent, attorney errors that will result in reversal of 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 decision maker, even if a lawless decision cannot be reviewed. The assessment of prejudice should proceed on the assumption that the decision maker is reasonably, conscientiously, and impartially applying the standards that govern the decision. It should not depend on the idiosyncrasies of the particular decision maker, 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 fact finder would have had a reasonable doubt respecting guilt. When a defendant challenges a death sentence such as the one at issue in this case, the question is whether there is a reasonable probability that, absent the errors, the sentence - including an appellate court, to the extent it independently reweighs the evidence - would have concluded that the balance of aggravating and mitigating circumstances did not warrant death. In making this determination, a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury. Some of the factual findings will have been unaffected by the errors, and factual findings that were affected will have been affected in different ways. Some errors will have had a pervasive effect on the inferences to [466 U. S. 668, 696] be drawn from the evidence, altering the entire evidentiary picture, and some will have had an isolated, trivial effect. Moreover, a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support. Taking the unaffected findings as a given, and taking due account of the effect of the errors on the remaining findings, a court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors.

IV

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

697] formulations are mere variations of the overarching reasonableness standard. With regard to the prejudice inquiry, only the strict outcome-determinative test, among the standards articulated in the lower courts, imposes a heavier burden on defendants than the tests laid down today. The difference, however, should alter the merit of an ineffectiveness claim only in the rarest case. Although we have discussed the performance component of an ineffectiveness claim prior to the prejudice component, there is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one. In particular, a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed. Courts should strive to ensure that ineffectiveness claims not become so burdensome to defense counsel that the entire criminal justice system suffers as a result.

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

Under the standards set forth above in Strickland, and by a demonstration of the record and the facts set forth in support of the claims in this case, it is clear that Alan Avant has suffered a violation of his constitutional rights to effective assistance of counsel, in violation of the 6th Amendment to the United States Constitution. Defense counsel should have made Avant aware of the law and should have given Avant the right to make an intelligent decision as to whether he would plead guilty. The decision cannot be intelligent where Avant was not provided with all the relevant information regarding the penalty and the admissions he was entering. This fact, coupled with the fact that defense counsel's advice was the driving force behind Avant's decision to plead guilty, constitutes gross ineffective assistance of counsel as well as coercion by counsel.

The Supreme Court of Mississippi has repeatedly held that an allegation that counsel for a defendant failed to advise him of the range of punishment 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, if 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 his attorney of the applicable maximum and minimum sentences a question of 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 prejudiced Appellant's guilty plea in such a way as to mandate vacation of such pleas as well as the sentence imposed. This Court should conduct an evidentiary hearing in regards to such claims and, if such claims are proven the Court should direct a new trial be held.

ISSUE SIX

CUMULATIVE ERROR

Appellant asserts that even in the event this Honorable Court hold that each of the aforesaid claims raised, standing alone, does not constitute cause to grant

relief, the cumulative effect of each acted to deprive Alan Avant of his constitutional rights to a fair trial, as guaranteed to him under the Sixth and Fourteenth Amendments to the United States Constitution, and Article 3, Sections 14 and 26 of our Mississippi Constitution. Rainer v. State, 473 So.2d 172, 174 (Miss. 1985); Collins v. State, 445 So.2d 798, 814 (Miss. 1984)

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

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

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

"The storm of opposition, brute force and hate which is sweeping across a large part of the universe has levered to the ground the temple of justice in many countries, and even in our own it has been shaken and broken in places,

yet we may fervently hope that when the storm shall have spent its fury there will remain undisputed, as one of the foundational pillars of that temple, the right of all men, whether rich or poor, strong or weak, guilty or innocent, to a fair trial, orderly and impartial trial in the courts of the land. Id. at 146. ,

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

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

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

Appellant Avant did not receive a fair trial in this case and, for that reason, as outlined above, he was unable to prove his innocence of the crimes because prosecuting authorities, aided by Avant's attorney, used unfair and illegal tactics to get Avant to incriminate himself by pleading guilty. Petitioner's trial attorney was grossly ineffective during the trial court proceedings. This Court should grant the motion and direct that the conviction and guilty sentence be set aside and that this case proceed to trial.

WHEREFORE THESE PREMISES CONSIDERED, Appellant Avant respectfully submits that based on the authorities cited herein and in support of his brief, that this Court should vacate the guilty plea, conviction and sentence imposed as well as the action taken by the trial court in regards to the post conviction relief motion. This case should be remanded to the trial court for an evidentiary hearing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above and foregoing Brief
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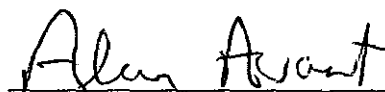
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This, the 2nd day of November 2009.

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