IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

NO. 2009-CP-00733-~~SCT~~ COA

COREY LEWIS — APPELLANT

VS.

STATE OF MISSISSIPPI — APPELLEE

Appeal From The Circuit Court of Hinds County, Mississippi
First Judicial District
Honorable W. Swan Yerger, Circuit Judge presiding

APPELLANT'S SUPPLEMENTAL BRIEF

BY: Corey Lewis

Corey Lewis , #121534
MCCF
833 West Street
Holly Springs, MS 38634

Appellant pro se

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CERTIFICATE OF INTERESTED PERSONS

The undersigned Appellant, Corey Lewis, pro se, certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Judges or Justices of this Court or the Court of Appeals may evaluate possible disqualification's or recusal:

1. Corey Lewis, Appellant;
2. Honorable Jim Hood, Atty. General, and his staff;
3. Honorable Robert Smith, District Attorney
4. Honorable W. Swan Yerger, Circuit Court Judge;

Respectfully submitted,

BY: Corey Lewis

Corey Lewis/#121534
MCCF
833 West Street
Holly Springs, MS 38634-5188

CERTIFICATE OF INCARCERATION

Appellant, Corey Lewis, was incarcerated in a Mississippi State Prison facility, in regards to the conviction and prison sentence now at issue in this action, at the time this actions was filed. Appellant remains in custody under strict supervision of the Mississippi department of Corrections, in regards to the conviction and prison sentence now at issue in this action, at this time and throughout the briefing of this case.

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APPELLANT'S SUPPLEMENTAL BRIEF

I. STATEMENT OF ISSUES ON APPEAL

A.

Whether Corey Lewis was subjected to a denial of due process of law where the trial court failed to advise Lewis of the right to appeal the sentence, which the court imposed, upon the plea of guilty directly to the Supreme Court where an appeal would have been based on the age of Appellant and the harsh sentence imposed.

B.

Whether Lewis was denied due process of law where he was convicted of the offense in the indictment without having admitted all elements required to prove such crimes. Having never stated that he knowingly committed such offense while knowing such actions to be illegal.

C.

Whether Corey Lewis was denied his Sixth Amendment Right to effective Assistance of Counsel where defense counsel failed to bring out the issues stated herein where, if raised, there would have been a different result.

D.

Whether Corey Lewis was denied his Sixth Amendment Right to effective Assistance of Counsel where defense counsel failed to advise Lewis that the sentence imposed on such crime would be a mandatory sentence when Lewis did not have a gun in the robbery and where Lewis was charged as an accessory since the co-defendants were riding in Lewis' vehicle.

E.

Whether Lewis was denied due process of law where he was sentenced to a mandatory term as an accessory when the law provides that only one convicted of armed robbery with a firearm may be sentenced to a mandatory sentence.

F.

Whether this case should be reversed and remanded to trial court where record is lacking in the required records even where this court ordered the record to be supplemented.

II. FACTS

The state filed an indictment against Lewis which charged that on June 15, 2004, Lewis willfully, unlawfully, feloniously committed armed robbery upon Basil Ellingburg and Charlotte Culpepper. The indictment also charged Lonnie Harper and Christian Robinson as co-defendants in the alleged offense. Lewis was a first time offender and was merely the driver of the car because it was his car and he did not know the intentions of his passengers or that a robbery was being committed. Lewis was subsequently provided with a court appointed attorney, Honorable

Donald W. Boykin, of Jackson, Mississippi, who advised Lewis to plead guilty. Lewis' attorney never told Lewis that the sentence which would be imposed as a consequence of the plea of guilty would be a mandatory sentence nor that Lewis should only be charge as an accessory or aiding or abetting the crime since he was not an active participant. Lewis' attorney actually coerced Lewis into pleading guilty where counsel was a court appointed attorney and had no interest in providing Lewis with a valid defense or adequate representation. Lewis was never told that the sentence could appealed to the Supreme Court on the basis that he was a first time offender and that the sentence was harsh considering the sentence imposed upon the co-defendants who were not first offenders and who actually committed the armed robbery. Lewis asserts that if he had known that the sentence could have been appealed then he would have appealed. Lewis would assert that the trial court never actually advised him that he had a right to appeal the sentence directly to the Supreme Court or the Court of Appeals of the State of Mississippi. Again, if Lewis had been told this he would have filed such appeal since he was a youthful offender and the court would never give a white defendant such a harsh sentence for a similar or the same offense.

III. SUMMARY OF ARGUMENT

When facts are clear from the record, re-filing an affidavit is unnecessary. Scott v. State, 878 So.2d 933, 948 (Miss. 2004).

Appellant Lewis was subjected to a denial of effective assistance of counsel where defense counsel advised Appellant to enter a plea of guilty to the charge without having actually fully investigated such charges or the evidence which the state supported such charge.

Appellant Lewis was never apprised that under applicable law, his sentence could be appealed to the Supreme Court for direct appeal.

This case should be reversed and remanded to the trial court for hearing where the supplemental record filed by the trial court failed to contain the transcript of the guilty plea colloquy as ordered by the Supreme Court and where such plea colloquy was designated by Appellant and motioned by the State. Moreover, the plea colloquy transcript is necessary where the Appellant challenges the voluntariness of the plea. Wilson v. State, 577 so.2d 394 (Miss. 1991); Gallott v. State, 530 So.2d 693 (Miss. 1988). The record provided, absent the plea transcript, fails to demonstrate that the trial court addressed the defendant personally before accepting the guilty and, therefore, fails to undergrid the defendant's assertion that the plea was involuntary and made without Appellant being advised of the elements of the plea on the record. Where the Appellant have designated the record on appeal, the State has moved that it be included, and this court have ordered it to be filed, Appellant have done all he could to secure the record to demonstrate his claims. Remand of this case for an evidentiary hearing should be required.

IV. ARGUMENT

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., Lewis 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.

V.

INEFFECTIVE ASSISTANCE OF COUNSEL

Appellant Corey Lewis was denied his Sixth Amendment right to effective assistance of counsel where his attorney, representing him during criminal charges of armed robbery, which should have been accessory to armed robbery, failed to adequately represent Appellant by failing to object where trial court accepted plea and imposed sentence without determining that Appellant knew elements or charges and without advising Appellant of the right to appeal the sentence. Moreover, defense counsel advised Appellant to plead guilty while knowing Appellant to be only an accessory or an aider and abettor to the actual offense. Defense counsel was fully aware that Appellant only owned the vehicle and had no weapon nor predisposition to commit such crime of armed robbery.

[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.

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).

Lewis would urge that he had the right to appeal the sentence and that he, as a youthful first offender, should have been considered for a suspended sentence. Moreover, defense counsel never mentioned to defendant Lewis or to the Court that the elements of armed robbery had not been met by the admissions made by Lewis since Lewis never admitted that he engaged in such actions knowingly and was unaware that he violated the law. The indictment alleged that Appellant, Lonnie Harper, Jr., and Christian Robinson took from the person of Charlotte Culpepper and Basil Ellingburg $849.00. At the guilty plea colloquy proceedings Appellant never admitted such actions. Moreover, Appellant was merely an accessory or an aider and abettor since the actual co-defendants were riding with Appellant without petitioner's knowledge that any crime was to take place. The law is clear that the sentence imposed upon Lewis was too harsh under the circumstances that Appellant was a first time offender and was not an actual participant in the crime. Defense counsel coerced Appellant to plead guilty. It is

clear that Lewis had a claim that was appealable and would have been appealed.

In Ward v. State, ___ So.2d ___ (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 advise Lewis of his adequate defense or investigate the facts prior to advising Lewis to enter a plea of guilty.

To successfully claim ineffective assistance of counsel, a 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 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 Appeals and all but a few state courts have now adopted the "reasonably effective assistance" standard in one formulation or another. See Trapnell v. United States, 725 F.2d 149, 151-152 (CA2 1983); App. B to Brief for United States in United States v. Cronic, O. T. 1983, No. 82-660, pp. 3a-6a; Sarno, [466 U.S. 668, 684] Modern Status of Rules and Standards in State Courts as to Adequacy of Defense Counsel's Representation of Criminal Client, 2 A. L. R. 4th 99-157, 7-10 (1980). Yet this Court has not had occasion squarely to decide whether that is the proper standard. With respect to the prejudice that a defendant must show from deficient attorney performance, the lower courts have adopted tests that purport to differ in more than formulation. See App. C to Brief for United States in United States v. Cronic, supra, at 7a-10a; Sarno, supra, at 83-99, 6. In particular, the Court of Appeals in this case expressly rejected the prejudice standard articulated by Judge Leventhal in his plurality opinion in United States v. Decoster, 199 U.S. App. D.C. 359, 371, 374-375, 624 F.2d 196, 208, 211-212 (en banc), cert. denied, 444 U.S. 944 (1979), and adopted by the State of Florida in Knight v. State, 394 So.2d, at 1001, a standard that requires a showing that specified deficient conduct of counsel was likely to have affected the outcome of the proceeding. 693 F.2d, at 1261-1262. For these reasons, we granted certiorari to consider the standards by which to judge a contention that the Constitution requires that a criminal judgment be overturned because of the actual ineffective assistance of counsel. 462 U.S. 1105 (1983). We agree with the Court of Appeals that the exhaustion rule requiring dismissal of mixed petitions, though to be strictly enforced, is not jurisdictional. See Rose v. Lundy, 455 U.S., at 515 -520. We therefore address the merits of the constitutional issue.

II

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

Because of the vital importance of counsel's assistance, this Court has held that, with certain exceptions, a person accused of a federal or state crime has the right to have counsel appointed if retained counsel cannot be obtained. See Argersinger v. Hamlin, 407 U.S. 25 (1972); Gideon v. Wainwright, supra; Johnson v. Zerbst, supra. That a person who happens to be a lawyer is present at trial alongside the accused, however, is not enough to satisfy the constitutional command. The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results. An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair. [466 U.S. 668, 686] For that reason, the Court has recognized that "the right to counsel is the right to the effective assistance of counsel." McMann v. Richardson, 397 U.S. 759, 771 , n. 14 (1970). Government violates the right to effective assistance when it interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense. See, e. g., Geders v. United States, 425 U.S. 80 (1976) (bar on attorney-client consultation during overnight recess); Herring v. New York, 422 U.S. 853 (1975) (bar on summation at bench trial); Brooks v. Tennessee, 406 U.S. 605, 612 -613 (1972) (requirement that defendant be first defense witness); Ferguson v. Georgia, 365 U.S. 570, 593 -596 (1961) (bar on

direct examination of defendant). Counsel, however, can also deprive a defendant of the right to effective assistance, simply by failing to render "adequate legal assistance," Cuyler v. Sullivan, 446 U.S., at 344 . Id. at 345-350 (actual conflict of interest adversely affecting lawyer's performance renders assistance ineffective). The Court has not elaborated on the meaning of the constitutional requirement of effective assistance in the latter class of cases - that is, those presenting claims of "actual ineffectiveness." In giving meaning to the requirement, however, we must take its purpose - to ensure a fair trial - as the guide. The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result. The same principle applies to a capital sentencing proceeding such as that provided by Florida law. We need not consider the role of counsel in an ordinary sentencing, which may involve informal proceedings and standardless discretion in the sentencer, and hence may require a different approach to the definition of constitutionally effective assistance. A capital sentencing proceeding like the one involved in this case, however, is sufficiently like a trial in its adversarial format and in the existence of standards for decision, see Barclay [466 U.S. 668, 687] v. Florida, 463 U.S. 939, 952 -954 (1983); Bullington v. Missouri, 451 U.S. 430 (1981), that counsel's role in the proceeding is comparable to counsel's role at trial - to ensure that the adversarial testing process works to produce a just result under the standards governing decision. For purposes of describing counsel's duties, therefore, Florida's capital sentencing proceeding need not be distinguished from an ordinary trial.

III

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

A

As all the Federal Courts of Appeals have now held, the proper standard for attorney performance is that of reasonably effective assistance. See Trapnell v. United States, 725 F.2d, at 151-152. The Court indirectly recognized as much when it stated in McMann v. Richardson, supra, at 770, 771, that a guilty plea cannot be attacked as based on inadequate legal advice unless counsel was not "a reasonably competent attorney" and the advice was not "within the range of competence demanded

of attorneys in criminal cases." See also Cuyler v. Sullivan, supra, at 344. When a convicted defendant [466 U.S. 668, 688] complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness. More specific guidelines are not appropriate. The Sixth Amendment refers simply to "counsel," not specifying particular requirements of effective assistance. It relies instead on the legal profession's maintenance of standards sufficient to justify the law's presumption that counsel will fulfill the role in the adversary process that the Amendment envisions. See Richard v. Louisiana, 350 U.S. 91, 100 -101 (1955). The proper measure of attorney performance remains simply reasonableness under prevailing professional norms. Representation of a criminal defendant entails certain basic duties. Counsel's function is to assist the defendant, and hence counsel owes the client a duty of loyalty, a duty to avoid conflicts of interest. See Cuyler v. Sullivan, supra, at 346. From counsel's function as assistant to the defendant derive the overarching duty to advocate the defendant's cause and the more particular duties to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution. Counsel also has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process. See Powell v. Alabama, 287 U.S., at 68 -69. These basic duties neither exhaustively define the obligations of counsel nor form a checklist for judicial evaluation of attorney performance. In any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances. Prevailing norms of practice as reflected in American Bar Association standards and the like, e. g., ABA Standards for Criminal Justice 4-1.1 to 4-8.6 (2d ed. 1980) ("The Defense Function"), are guides to determining what is reasonable, but they are only guides. No particular set of detailed rules for counsel's conduct can satisfactorily take [466 U.S. 668, 689] account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Any such set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions. See United States v. Decoster, 199 U.S. App. D.C., at 371, 624 F.2d, at 208. Indeed, the existence of detailed guidelines for representation could distract counsel from the overriding mission of vigorous advocacy of the defendant's cause. Moreover, the purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation, although that is a goal of considerable importance to the legal system. The purpose is simply to ensure that criminal defendants receive a fair trial. Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. Cf. Engle v. Isaac, 456 U.S. 107, 133 -134 (1982). A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects

of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy." See Michel v. Louisiana, supra, at 101. There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way. See Goodpaster, [466 U.S. 668, 690] The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases, 58 N. Y. U. L. Rev. 299, 343 (1983). The availability of intrusive post-trial inquiry into attorney performance or of detailed guidelines for its evaluation would encourage the proliferation of ineffectiveness challenges. Criminal trials resolved unfavorably to the defendant would increasingly come to be followed by a second trial, this one of counsel's unsuccessful defense. Counsel's performance and even willingness to serve could be adversely affected. Intensive scrutiny of counsel and rigid requirements for acceptable assistance could dampen the ardor and impair the independence of defense counsel, discourage the acceptance of assigned cases, and undermine the trust between attorney and client. Thus, a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. In making that determination, the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case. At the same time, the court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. These standards require no special amplification in order to define counsel's duty to investigate, the duty at issue in this case. As the Court of Appeals concluded, strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic [466 U.S. 668, 691] choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments. The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on

informed strategic choices made by the defendant and on information supplied by the defendant. In particular, what investigation decisions are reasonable depends critically on such information. For example, when the facts that support a certain potential line of defense are generally known to counsel because of what the defendant has said, the need for further investigation may be considerably diminished or eliminated altogether. And when a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable. In short, inquiry into counsel's conversations with the defendant may be critical to a proper assessment of counsel's investigation decisions, just as it may be critical to a proper assessment of counsel's other litigation decisions. See United States v. Decoster, supra, at 372-373, 624 F.2d, at 209-210.

B

An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment. Cf. United States v. Morrison, 449 U.S. 361, 364 -365 (1981). The purpose of the Sixth Amendment guarantee of counsel is to ensure [466 U.S. 668, 692] that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding. Accordingly, any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution. In certain Sixth Amendment contexts, prejudice is presumed. Actual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice. So are various kinds of state interference with counsel's assistance. See United States v. Cronic, ante, at 659, and n. 25. Prejudice in these circumstances is so likely that case-by-case inquiry into prejudice is not worth the cost. Ante, at 658. Moreover, such circumstances involve impairments of the Sixth Amendment right that are easy to identify and, for that reason and because the prosecution is directly responsible, easy for the government to prevent. One type of actual ineffectiveness claim warrants a similar, though more limited, presumption of prejudice. In Cuyler v. Sullivan, 446 U.S., at 345 -350, the Court held that prejudice is presumed when counsel is burdened by an actual conflict of interest. In those circumstances, counsel breaches the duty of loyalty, perhaps the most basic of counsel's duties.

Moreover, it is difficult to measure the precise effect on the defense of representation corrupted by conflicting interests. Given the obligation of counsel to avoid conflicts of interest and the ability of trial courts to make early inquiry in certain situations likely to give rise to conflicts, see, e. g., Fed. Rule Crim. Proc. 44(c), it is reasonable for the criminal justice system to maintain a fairly rigid rule of presumed prejudice for conflicts of interest. Even so, the rule is not quite the per se rule of prejudice that exists for the Sixth Amendment claims mentioned above. Prejudice is presumed only if the defendant demonstrates that counsel "actively represented conflicting interests" and that

"an actual conflict of interest adversely affected his lawyer's performance." Cuyler v. Sullivan, supra, at 350, 348 (footnote omitted). [466 U.S. 668, 693] Conflict of interest claims aside, actual ineffectiveness claims alleging a deficiency in attorney performance are subject to a general requirement that the defendant affirmatively prove prejudice. The government is not responsible for, and hence not able to prevent, attorney errors that will result in reversal of a conviction or sentence. Attorney errors come in an infinite variety and are as likely to be utterly harmless in a particular case as they are to be prejudicial. They cannot be classified according to likelihood of causing prejudice. Nor can they be defined with sufficient precision to inform defense attorneys correctly just what conduct to avoid. Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another. Even if a defendant shows that particular errors of counsel were unreasonable, therefore, the defendant must show that they actually had an adverse effect on the defense. It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding. Virtually every act or omission of counsel would meet that test, cf. United States v. Valenzuela-Bernal, 458 U.S. 858, 866 -867 (1982), and not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding. Respondent suggests requiring a showing that the errors "impaired the presentation of the defense." Brief for Respondent 58. That standard, however, provides no workable principle. Since any error, if it is indeed an error, "impairs" the presentation of the defense, the proposed standard is inadequate because it provides no way of deciding what impairments are sufficiently serious to warrant setting aside the outcome of the proceeding. On the other hand, we believe that a defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case. This outcome-determinative standard has several strengths. It defines the relevant inquiry in a way familiar to courts, though the inquiry, as is inevitable, is anything but precise. The standard also reflects the profound importance of finality in criminal proceedings. [466 U.S. 668, 694] Moreover, it comports with the widely used standard for assessing motions for new trial based on newly discovered evidence. See Brief for United States as Amicus Curiae 19-20, and nn. 10, 11. Nevertheless, the standard is not quite appropriate. Even when the specified attorney error results in the omission of certain evidence, the newly discovered evidence standard is not an apt source from which to draw a prejudice standard for ineffectiveness claims. The high standard for newly discovered evidence claims presupposes that all the essential elements of a presumptively accurate and fair proceeding were present in the proceeding whose

result is challenged. Cf. United States v. Johnson, 327 U.S. 106, 112 (1946). An ineffective assistance claim asserts the absence of one of the crucial assurances that the result of the proceeding is reliable, so finality concerns are somewhat weaker and the appropriate standard of prejudice should be somewhat lower. The result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome. Accordingly, the appropriate test for prejudice finds its roots in the test for materiality of exculpatory information not disclosed to the defense by the prosecution, United States v. Agurs, 427 U.S., at 104 , 112-113, and in the test for materiality of testimony made unavailable to the defense by Government deportation of a witness, United States v. Valenzuela-Bernal, supra, at 872-874. The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.
In making the determination whether the specified errors resulted in the required prejudice, a court should presume, absent challenge to the judgment on grounds of evidentiary insufficiency, that the judge or jury acted according to law. [466 U.S. 668, 695] An assessment of the likelihood of a result more favorable to the defendant must exclude the possibility of arbitrariness, whimsy, caprice, "nullification," and the like. A defendant has no entitlement to the luck of a lawless 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

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.

D

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 Corey Lewis 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 Lewis aware of the fact that the sentence which would be imposed would be a mandatory sentence and that the law required that only the individual actually convicted of the armed robbery itself should suffer a mandatory sentence.

The Supreme Court 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, 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 his attorney of the applicable maximum and minimum sentences is a question of fact which raises concerns 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.

VI.

THE PLEA OF GUILTY IS INVALID

Appellant entered a plea of guilty to armed robbery. Such plea of guilty was made without Lewis fully admitting the elements or proof and without the trial court making Lewis aware that the sentence imposed on such offense could be appealed independently of the fact that a plea was entered.

The record should clearly show that during the plea colloquy Lewis did not admit to the elements of armed robbery which admission is required by law and which must be admitted before a plea of guilty may be accepted in an armed robbery conviction. Based upon what Lewis would recall which occurred in the courtroom, Lewis would assert that he never clearly stated to the court that any such actions were committed while he knew such actions would violate the law nor while he was armed and intentionally put another

person in fear of his/her life while taking anything of value from the presence or possession of such person. More to the point, Lewis never stated that he had a weapon or that he knew the sentence imposed on the conviction would be mandatory. The Court never explained to Lewis the fact that he should be an accessory. The plea was not voluntarily and intelligently entered under these circumstances and was accepted in violation of the 5th and 14th Amendment to the United States Constitution and the Constitution of the State of Mississippi..

VII.

APPELLANT WAS DEPRIVED OF DUE PROCESS OF LAW WHERE TRIAL COURT FAILED TO ADVISE LEWIS OF HIS RIGHT TO APPEAL THE SENTENCE

The trial court failed to advise Corey Lewis that he had the right to appeal the actions of the Court in regards to the sentence it imposed upon a first time offender who was not directly involved in the crime. Appellant would assert that the sentence imposed constitutes a denial of equal protection since it exceeds sentences which the same court imposes upon white defendant's in regards to similar crimes. Lewis should have been told that he could appeal the sentence for direct review on this issue while still preserving his post conviction remedy rights. The Court never stated why it imposed a prison term upon Lewis as opposed too a probation or house arrest. 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). The other court has

since established this right in many other cases. Jennings v. State 896 So.d 374, 377 (Miss. Ct. A pp. 2004.

VIII.

Whether this case should be reversed and remanded to trial court where record is lacking in the required records even where this court ordered the record to be supplemented.

The conviction rendered in this case was imposed pursuant to a plea of guilty where Appellant appeared before the court. The claim presented in this cause include claims which presents that the plea of guilty was not knowingly and voluntarily made, that there was ineffective assistance of counsel during the plea proceedings, that the plea of guilty was invalid where Lewis never admitted the elements necessary to demonstrate armed robbery.

That in making the findings rendered by the trial court on the post conviction motion the applicable law require that: "(T)he original motion together with all files, records transcripts and correspondence relating to the judgment under attack shall be examined promptly by the judge to whom it is assigned." Miss. Code Ann. §99-39-11(1). The trial court rendered it's order denying relief in this case on May 29, 2009. There was no evidentiary hearing conducted and there is no order requiring that the record be reconstructed. (R. 29).

The appeal was perfected to this court which designated, among other documents the plea transcript and the petition to enter a plea of guilty to the charge. The State

subsequently filed a motion seeking these same documents to be included after the record was filed which did not contain such records. The Supplemental record was filed to this court on June 30, 2010, which contained 6 pages and consisted of only the petition to enter plea of guilty.2 No guilty plea transcript is included in the Supplemental record on appeal.

In Beamon v. State, 9 So.2d 375 (Miss. 2009) the court firmly held that it is Appellant's duty to cause the record to contain the information needed to support his claim. Here Appellant have made all the necessary motions to secure the plea transcript. Even the court has ordered it. This court should not hold Appellant accountable for the transcript not being placed in the record to support the claim. Moreover, where the record have been properly requested by Appellant and ordered by this court, such missing record should be in favor of the claims as being admitted.

The court have previously held in Gallott v. State, 530 So.2d 693 (Miss. 1988) and Wilson v. State, 577 So. 2d 394 (Miss. 1991), that the trial court is required to make the plea transcript a part of the record in order to forestall the spin-off of collateral

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[2] The Petition to enter a plea of guilty which was filed by the trial court as the supplemental record on appeal is not the equivalent to the guilty plea colloquy transcript where the transcript consists of an on the record discussion between the defendant and the trial court as opposed to the petition which only contains written pre-drafted statements created by counsel and signed by the petitioner without any judicial oversight. The guilty plea transcript is a more reliable source of the record and should be made a part of the record in any appeal which challenges the guilty plea, the effectiveness of the assistance received in arriving at such plea, or any other claim which is associated with the plea. The state's brief appears to refer to the plea transcript in it's argument but such argument is cited to a transcript which is invisible to the record. It's not there.

proceedings that seek to probe murky memories by a post conviction attack on the voluntariness of the plea. In Gallott, 530 So.2d at 694, the Court found that:

> This case presents an excellent example of the appropriate use of the summary disposition provision of Sec. 99-39-11(2), Miss. Code Ann. 1972 (Supp.1987). Judge Eubanks conducts one of the most thorough and explicit plea hearings this Court has had the opportunity to read. He has the commendable practice of filing with the circuit clerk a transcript of the guilty plea within days after the plea is taken. 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.

Such finding by the Court would seem to make clear that where there is no record of the plea hearing, as here, an evidentiary hearing should be conducted in regards to the claims presented in the motion.

In Wilson, the Court held that:

> A guilty plea must be made voluntarily in order to satisfy the defendant's constitutional rights. A plea is voluntary if the defendant knows what the elements are of the charge against him including an understanding of the charge and its relation to him, what effect the plea will have, and what the possible sentence might be because of his plea. Schmitt, supra, at 153. Where a defendant is not informed of the maximum and minimum sentences he might receive, his guilty plea has not been made either voluntarily or intelligently. Vittitoe v. State, 556 So.2d 1062 (Miss.1990).
>
> Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969), stands for the proposition that a complete record should be made to ensure that the defendant's guilty plea is voluntary. There, the defendant pled guilty to five indictments for armed robbery but the record was silent concerning any questions which the judge had asked him about his plea. In holding that the case should be reversed since the record did not disclose whether the plea had been voluntarily made, the Supreme Court said,

> What is at stake for an accused facing death or imprisonment demands the utmost solicitude of which courts are capable in canvassing the matter with the accused to make sure he has a full understanding of what the plea connotes and of its consequences. When the judge discharges that function, he leaves a record adequate for any review that may be later sought ... and forestalls the spin-off of collateral proceedings that seek to probe murky memories.

CONCLUSION

Based upon the facts contained in the record and the presentation contained in this brief, Appellant would urge this Honorable Court to reverse and remand this case to allow the trial court to conduct a hearing on the motion or to direct that Lewis' sentence should not be mandatory where Lewis did not commit the armed robbery but was only there and was an accessory after the fact. This Court should reverse and remand to require the trial court to determine whether Lewis was misrepresented by counsel in violation of the 6th Amendment to the United States Constitution. Additionally, this Court should reverse and remand this case to the trial court where the record do not contain the transcript of the plea when the Court have previously granted a motion to supplement and include the transcript in the record. At the least, this Court should reverse and remand this case to allow the record to be reconstructed or rehabilitated by conducting an evidentiary hearing on the issues set out in this Supplemental brief.

Respectfully submitted,

BY: Corey Lewis

Corey Lewis, #121534
MCCF
P. O. Box 5188
Holly Springs, MS 38634-5188

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above and foregoing Brief for Appellant, have been mailed to: Honorable Robert Smith, District Attorney, P. O. Box 22747, Jackson; Honorable Jim Hood, P. O. Box 220, Jackson, MS 39205; Honorable W. Swan Yerger, Circuit Court Judge, P. O. Box 327, Jackson, MS 39205.

This, the 29 day of July, 2010.

Respectfully submitted,

BY: Corey Lewis

Corey Lewis, #121534
MCCF
P. O. Box 5188
Holly Springs, MS 38634-5188