IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

LAWANDA DILLON — APPELLANT

VS. — NO. 2009-CP-01228-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR APPELLANT

BY:

Lawanda Dillon #140180
Kemper CCF Female Unit
374 Stennis Industrial Pk Rd
Dekalb, MS 39328

ORAL ARGUMENT NOT REQUESTED

PRO SE PRISONER BRIEF

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STATE OF MISSISSIPPI **APPELLEE**

CERTIFICATE OF INTERESTED PERSONS

1. **Lawanda Dillon, Appellant pro se.**
2. **Honorable Jim Hood and staff, Attorney General**
3. **Honorable David E. Strong, Jr., Circuit Court Judge**
4. **Honorable Dewitt Bates, Jr., District Attorney**

Respectfully Submitted,

BY: Lawanda Dillon

Lawanda Dillon #140180
Kemper CCF Female Unit
374 Stennis Industrial Pk Rd
Dekalb, MS 39328

Appellant

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STATE OF MISSISSIPPI **APPELLEE**

STATEMENT OF CASE

Lawanda Dillon was indicted by the Lincoln County Grand Jury on April 9, 2007 on a charge of murder. On June 19, 2008, the indictment was amended to reduce the charge to manslaughter. Dillon was convicted on or about the 20th day of June, 2008, pursuant to a plea of guilty, and was sentenced to a term of 14 years to serve in the custody of the Mississippi Department of Corrections with 5 years of post release supervision.

Dillon filed her PCR in the trial court on February 10, 2009, seeking relief from the conviction and sentence on the basis that her plea was entered involuntarily and as the result of ineffective assistance of counsel. Additionally, the trial court never advised Dillon that she had the right to seek direct review of her sentence which was imposed upon an open plea of guilty. The trial court improperly labeled the plea as an Alford plea when the plea was an open plea of guilty.

The trial court, without conducting a hearing or requiring the state to file an answer, subsequently summarily denied relief and dismissed the PCR motion

which necessitated this appeal. The trial court never permitted Appellant to engage in discovery before actually entering an adverse order but referred to the fact that Appellant never pointed to any portion of the record which would support her claims.[1]

Appellant Dillon was represented in the trial court by Honorable Sylvia Owens of Tupelo, Mississippi.

STATEMENT OF INCARCERATION

Appellant Dillon is presently incarcerated and is being housed in the Mississippi Department of Corrections at Dekalb, Mississippi, in service of a 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 following the conviction and imposition by the trial court.

STATEMENT OF ISSUES

1. Appellant's guilty plea was an unknowing, involuntary, and unintelligent waiver of fundamental rights, entered in violation of the Fourteenth Amendment due process of law clause;

2. Counsel for defense was ineffective in plain violation of the Sixth Amendment, that is:

a. Violations of the Fifth Amendment;

[1] Appellant could not point to evidence in a record which the trial court never permitted her to have access to by not allowing her to seek discovery of the record under the provisions of Miss. Code Ann. Sec. 99-39-15.

b. Violations of Civil and Miranda Rights;

3. The Court committed reversal error by condoning the state's actions of filing a frivolous indictment for murder, while knowing such charge to be without merit, and subsequently moving the court to amend the indictment after using a frivolous murder indictment to muscle Appellant into pleading guilty and while working in conjunction with defense counsel, as a conspiracy, to secure a plea of guilty. Such actions violates Appellant's rights under the 5th and 6th Amendment to the United States Constitution.

4. Appellant was subjected to a denial of due process of law where the trial court failed to advise Dillon of the correct law in regards to appealing a sentence rendered upon an open plea of guilty to the Supreme Court. Appellant Dillon was never told that, under applicable law, her sentence could be appealed to the Supreme Court for direct review where the Court ignored the lesser penalty which could have been imposed in the form of up to a $500.00 fine and or imprisonment in the county jail for not more then one year or by both[2] and where the trial court gave no reason for such failure to consider such lesser sentence.

5. The acceptance of the guilty plea entered in this case, wherein issues of competency have been raised pursuant to Rule 9.06, prior to the court

[2] **97-3-25. Homicide; penalty for manslaughter.**

Any person convicted of manslaughter shall be fined in a sum not less than five hundred dollars, or imprisoned in the county jail not more than one year, or both, or in the penitentiary not less than two years, nor more than twenty years.

compliance with Rule 9.06 violates the provision of Rule 9.06 of the Miss. uniform Rules of Cty. And Circuit Court practice.[3]

6. Appellant suffered a violation of her due process rights where she was deprived of a fair trial when the State had knowledge appellant was not guilty of any crime and that the death of the victim occurred at a time while appellant was defending herself and the lives of her children by attempting to get away from the victim. Such action violates movant's constitutional rights under the 5th and 6th Amendments to the United States Constitution.

[3] **Rule 9.06 COMPETENCE TO STAND TRIAL**

If before or during trial the court, of its own motion or upon motion of an attorney, has reasonable ground to believe that the defendant is incompetent to stand trial, the court shall order the defendant to submit to a mental examination by some competent psychiatrist selected by the court in accordance with § 99-13-11 of the Mississippi Code Annotated of 1972.

After the examination the court shall conduct a hearing to determine if the defendant is competent to stand trial. After hearing all the evidence, the court shall weigh the evidence and make a determination of whether the defendant is competent to stand trial. If the court finds that the defendant is competent to stand trial, then the court shall make the finding a matter of record and the case will then proceed to trial. If the court finds that the defendant is incompetent to stand trial, then the court shall commit the defendant to the Mississippi State Hospital or other appropriate mental health facility. The order of commitment shall require that the defendant be examined and a written report be furnished to the court every four calendar months, stating:

A. Whether there is a substantial probability that the defendant will become mentally competent to stand trial within the foreseeable future; and

B. Whether progress toward that goal is being made.

The defendant's attorney, as the defendant's representative, shall not waive any hearing authorized by this rule, but is authorized to consent, on behalf of the defendant, to necessary surgical or medical treatment and procedures. If at any time during such commitment, the court decides, after a hearing, that the defendant is competent to stand trial, it shall enter its order so finding and declaring the defendant competent to stand trial, after which the court shall proceed to trial.

If at any time during such commitment, the proper official at the Mississippi State Hospital or other appropriate mental health facility shall consider that the defendant is competent to stand trial, such official shall promptly notify the court of that effect in writing, and place the defendant in the custody of the sheriff. The court shall then proceed to conduct a hearing on the competency of the defendant to stand trial. If the court finds the defendant is not competent to stand trial, it shall order the defendant committed as provided above. If the court finds the defendant is competent to stand trial, then the case shall proceed to trial.

If within a reasonable period of time after commitment under the provisions of this rule, there is neither a determination that there is substantial probability that the defendant will become mentally competent to stand trial nor progress toward that goal, the judge shall order that civil proceedings as provided in § § 41-21-61 to 41-21-107 of the Mississippi Code of 1972 be instituted.

Said proceedings shall proceed notwithstanding that the defendant has criminal charges pending against him/her. The defendant shall remain in custody until determination of the civil proceedings.

7. The trial court erred in accepting the plea as an Alford plea when Alford was inapplicable to this case where the state confessed in the sentencing hearing that there was evidence that the victim had physically abused Appellant and had thrown a bring through the car window before he was hit. Thus, the victim could have easily caused himself to be ran over the first time and the second could have been accidentally when Appellant was looking to see where the victim was and to determine whether she could render help.

8. Whether the Cumulative effect of the Ineffectiveness of counsel deprived Appellant Dillon of her constitutional right to a fair trial and, if convicted at trial, an effective direct appeal to the Mississippi State appellate court, in violation of the 5th and 6th Amendments to the United States Constitution.

SUMMARY OF ARGUMENT

The record clearly reflects that Appellant acted properly in self-defense where she was attached at her home he deceased at a time when the deceased was not supposed to be on the premises.

The record reflects the state delivered to following statement as to described the events of the day immediately before the death of the deceased and when the deceased was killed. The prosecution witness, Joey Norton, (R. 172) presented that the concession to manslaughter in this case was made because of the extreme

likelihood that a jury would be willing to excuse the defendant, at least partially, based upon the evidence of past physical abuse by Boris Jackson and the evidence that supported Appellant's claim that he had broken out her car window just a minute before she ran over him.[4]

The evidence presented demonstrates that Appellant was not guilty of the crime of manslaughter or any crime since she was defending her life and the lives of her children when she was attacked by Jackson and that while Jackson was ran over more then one time in the dark, it was by accident. Appellant was suffering from a battered women's syndrome which caused her to become enraged at Jackson when she feared he would harm her and her children and which should have been presented by her attorney at trial. The Court's clinical psychologist, Williams Curtis Lott, testified that Appellant had no violent history or history of aggressive or violent behaviors. (R. 163). Appellant was subjected to ineffective assistance of counsel in being advised to plead guilty to a crime which she was clearly, from the record, not guilty of.

[4] The state presented this argument at the sentencing hearing which validated the fact that there was evidence that the deceased had not only physically abused Appellant in the past but he had also broken out her car window just before she had ran over him. Strangely, neither of the witnesses named by the state bothered to mention the fact that the deceased had been an abuser and had thrown the brick breaking the car glass. This presentation by the state also validates coorborates the the affidavits given by Zayrick Taylor, Zoretya Taylor, and Deletrick Taylor who was in the car with Appellant at the time of the incident. (R. 28-32)

ARGUMENT

ISSUE ONE

MEMORANDUM OF LAW AND ARGUMENT IN SUPPORT OF CLAIMS

Appellant would assert that her attorney was ineffective in failing to investigate her defense and to summon witnesses to testify. Defense counsel conspired wit the prosecution to secure a guilty plea to the offense of manslaughter by not objecting when the state filed a frivolous murder indictment to use as a tool to secure a manslaughter plea when there was no evidence to support a murder indictment or to request a murder indictment from the grand jury. Defense counsel knew the murder indictment was baseless but allowed the state to use such tactic as leverage against an unaware Dillon to persuade her to enter an open plea of guilty to manslaughter when this was the greatest crime in which the state could have pursued even at trial. Trial counsel was fully aware that movant's three children who was actually present at the scene of the alleged crime would have exonerated appellant of murder. Rather then objecting to the state's tactics in this case, defense counsel advise appellant to plead guilty to manslaughter in an open plea and without any agreement being in place. Such a plea, according to counsel, would be with the state's agreement to reduce the charge from murder to manslaughter. Based upon such actions, the plea of guilty was coerced and involuntary in this instance.

The fear of a life sentence, for not pleading guilty, destroyed Dillon's ability to think and balance the risk and benefits of going to trial. When the issue of voluntariness is raised, the burden of proof remains upon the State to prove voluntariness of guilty plea by clear and convincing evidence. See Courtney v. State, 704 So.2d 1352 1352 (Miss.App. 1997).

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., Sykes v. State, 533 So.2d 1118, 1124 (Miss. 1988); Reynolds v. State, 521 So.2d 914, 917 (Miss. 1988).

[5]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 [6] 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.

INEFFECTIVE ASSISTANCE OF COUNSEL

Appellant Dillon was denied her Sixth Amendment right to effective assistance of counsel where her attorney, representing her during the plea and sentencing proceedings, advised Dillon to plead guilty openly to manslaughter and the original indictment of greatest offense in which

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[6] 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.

Dillon should have initially been indicted under. Defense counsel worked with the prosecution to secure such plea.

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

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

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

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

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

In the instant case, defense counsel acted in concert with the prosecution to assist in securing a guilty plea openly. Defense counsel made no attempt to secure a particular agreement on sentence recommendation as would be proper in a plea of guilty.

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); Dillon v. State, 577 So.2d 840, 841 (Miss. 1991); McQuarter v. State, 574 So.2d 685, 687 (Miss. 1990); Waldrop v. State, 506 So.2d 273, 275 (Miss. 1987), aff'd after remand, 544 So.2d 834 (Miss. 1989); Stringer v. State, 454 So.2d 468, 476 (Miss. 1984), cert. denied, 469 U.S. 1230 (1985).

The Mississippi Supreme Court visited this issue in the decision of Smith v. State, 631 So.2d 778, 782 (Miss. 1984). The Strickland test requires a showing of (1) deficiency of counsel's performance which is, (2) sufficient to constitute prejudice to the defense. McQuarter 506 So.2d at 687. The burden to demonstrate the two prongs is on the defendant. Id; Leatherwood v. State, 473 So.2d 964, 968 (Miss. 1994), *reversed in part, affirmed in part*, 539 So.2d 1378 (Miss. 1989), and he faces a strong rebuttable presumption that counsel's performance falls within the broad spectrum of reasonable professional assistance. McQuarter, 574 So.2d at 687; Waldrop, 506 So.2d at 275; Gilliard v. State, 462 So.2d 710, 714 (Miss. 1985). The defendant must show that there is a reasonable probability that for him attorney's errors, defendant would have received a different result. Nicolaou v. State, 612 So.2d 1080, 1086 (Miss. 1992); Ahmad v. State, 603 So.2d 843, 848 (Miss. 1992).

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

In assessing attorney performance, all the Federal Courts of 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. 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 his; 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. 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 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, it is clear that Lawanda Dillon has suffered a violation of him constitutional rights to effective assistance of counsel, in violation of the 6th Amendment to the United States Constitution. Defense counsel should have objected to the indictment on the basis that the evidence did not support murder or grounds to indict for such crime. Defense counsel never made any objection or demur to the indictment. This fact, coupled with the fact that counsel failed to investigate and interview the witnesses which could and would have supported mitigating circumstances that Dillon was acting

out of defense for herself and her children at the time of the death of the victim, would have been reasonable doubt for a jury. This court should recognize such violations and grant PCR on this claim.

This 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 him attorney of the applicable maximum and minimum sentences a question of fact arises concerning whether the attorney's conduct was deficient].

Further counsel contravened the law by submitting the guilty plea of the appellant without moving for a competency hearing. The defendant further asserts that he was denied effective assistance of counsel in that defense counsel, as the defendant's representative could not directly or indirectly waive any hearing authorized by this rule. The action of defendant's counsel to submit a motion to enter a guilty plea prior to the competence hearing was prohibited and directly in

contravention of the 6th amendment to the United States Constitution. It is therefore the position of the appellant that at the time the plea was taken she was without effective assistance of counsel and could not understand the ramification of said plea.

During the course of the guilty plea, the record is devoid of the Court having discussed the competency of the appellant prior to the acceptance of the guilty plea. It was incumbent upon counsel to mandate a finding and she failed to so act.

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

ISSUE TWO

APPELLANT WAS DEPRIVED OF DUE PROCESS OF LAW WHERE TRIAL COURT FAILED TO ADVISE DILLON OF HER RIGHT TO APPEAL THE SENTENCE.

The trial court failed to advise Lawanda Dillon that she had no right to appeal the actions of the Court in the sentence it arrived at in regards to the plea. Even upon a plea of guilty the law would allow Dillon a direct appeal of the sentence imposed. The trial court judge made fundamental error where the Court failed to advise Dillon of this avenue of review of the sentence in regards to the

plea of guilty. The law is clear that a defendant who pleads guilty has a right to directly appeal the sentence to the Supreme Court. Trotter v. State, 554 So. 2d 313, 86 A.L.R.4th 327 (Miss. 1989).[7]

The law supports the assertion here that the trial court was incorrect in the advice provided to Dillon regarding the appeal. A defendant is not barred from appealing by having pleaded guilty. Neblett v. State, 75 Miss. 105, 21 So. 799 (1897); Jenkins v. State, 96 Miss. 461, 50 So. 495 (1909).

Thus, the trial court was clearly incorrect, as a matter of law, in advising Dillon that there was no right to appeal from the sentence.

ISSUE THREE

THE APPELLANT WAS DENIED DUE PROCESS OF LAW BY THE CONTRAVENTION OF RULE 9.06 OF THE MISSISSIPPI UNIFORM

The Court was duty bond to conduct an evidentiary hearing given the knowledge of the mental and emotional condition of the defendant. It is the defendant's position that the law requires that a hearing be conducted on such question before a plea may be accepted. A motion in this regard is not necessary in order that this action be invoked. **In Howard v. State,** 701 So.2d 274, 280 (Miss. 1997), the Supreme Court ruled that once it has invoked Rule 9.06 by ordering a mental examination of a defendant before or during the trial, the trial

[7] The remedy should be that Dillon be allowed to proceed with a direct out-of-time appeal of the sentence since the court erred in this case.

court, after the examination, must conduct a competency hearing after which the Court must weigh the evidence and render a determination of whether the defendant is competent to stand trial. The court failed to conduct an adequate hearing herein and therefore the guilty plea accepted was not based upon a true finding of competence, knowing and voluntariness in violation of Mississippi Statutory law and the due process clause to the United States Constitution, as well as the Mississippi Constitution.[8]

ISSUE FOUR

The trial court erred in accepting the plea as an Alford plea when Alford was inapplicable to this case where the state confessed in the sentencing hearing that there was evidence that the victim had physically abused Appellant and had thrown a bring through the car window before he was hit. Thus, the victim could have easily caused himself to be ran over the first time and the second could have been accidentally when Appellant was looking to see where the victim was and to determine whether she could render help.

At the outset of the plea proceedings, the trial court announced that Appellant was entering a plea of guilty to manslaughter for which she had been set

[8] While the defense did call Dr. William Chris Lott to testify, such testimony was not sufficient where there was a lack of testimony of any board certified clinical psychologist who specialized in battered women's syndrome. Dr. Lott only stated that he had talked to Appellant. Furthermore, the trial court would only allow Dr. Lott to testify briefly on the examination and findings. (R. 162-163). Appellant would assert that such brief presentation was not sufficient to satisfy the requirements of Rule 9.06.

for trial in regards to on the same day. (R. 148) This case is one of those rare occasions when an accused indicates the desire to plead guilty and expose herself to incarceration, yet she simultaneously protests that she is factually innocent of the crime. Such a conundrum clearly creates a constitutional dilemma. Nothing short of a full inquiry by the trial court concerning the reason for such a plea as well as a determination that pleading guilty is a rational choice by the accused and is, in fact, in the accused's "best interest" should be determined.

A "best-interest" guilty plea is often simultaneously referred to as an "*Alford* plea" in recognition of the United States Supreme Court's decision in *North Carolina v. Alford*, 400 U.S. 25 (1970). In Alford, Henry C. Alford pled guilty to second-degree murder in a North Carolina state court proceeding. After exhausting the state post-conviction review, Alford filed for habeas corpus relief in federal court. The district court denied relief, but on review, the Fourth Circuit Court of Appeals, in a divided vote, granted relief. The United States Supreme Court analyzed Alford's guilty plea within the parameters of the Fifth and Fourteenth Amendments' prohibitions against a deprivation of liberty without due process of law. Ultimately, the United States Supreme Court found that Alford was not entitled to relief.

While the United State Supreme Court found that Alford was not entitled to relief, a discussion of the facts in *Alford* is appropriate to demonstrate that it was inapplicable in this case. Charged with first-degree murder, Alford realized that, if convicted, he risked being sentenced to death or, under the most lenient possible outcome, life imprisonment. Id. at 26-27. However, the prosecution offered Alford the opportunity to plead guilty to a reduced charge of second-degree murder in lieu of pursuing a conviction for first-degree murder. Alford agreed to plead guilty to second-degree murder.[9]

During the guilty plea hearing in the Alford case, , a police officer testified and summarized the prosecution's case against Alford. There were no eyewitnesses to the victim's murder, but two witnesses presented testimony that "shortly before the killing[,] Alford took his gun from his house, stated his intention to kill the victim, and returned home with the declaration that he had carried out the killing." Defense counsel had interviewed various witnesses that Alford intended to call at trial to establish his innocence, but none of those witnesses supported Alford's defense. To the contrary, statements from those witnesses strongly indicated that Alford was guilty. The United States Supreme

[9] Here, however, it is quite different. The prosecution in the case at bar agreed that it made the concession to accept the guilty plea for manslaughter "because of extreme likelihood that a jury would be willing to excuse the defendant, at least partially, based upon the evidence of past physical abuse by Boris Jackson and the evidence that supported her claim that he had broken out her car window just a minute before she ran over him." (R. 15).

Court characterized the evidence against Alford as "strong evidence of actual guilt."

Next, Alford "took the stand and testified that he had not committed the murder but that he was pleading guilty [to second-degree murder] because he faced the threat of the death penalty if he did not do so." Id. at 28. Based on Alford's steadfast denial that he murdered the victim, the trial court judge asked Alford whether he was certain he wanted to plead guilty to second-degree murder. Id. at 29. Alford responded affirmatively. Id. Alford's history included a prior conviction for murder, nine armed robbery convictions, and three other assorted felony convictions. The trial court judge took Alford's substantial criminal history into consideration and subsequently sentenced Alford to thirty years' imprisonment, the maximum possible penalty for second-degree murder pursuant to North Carolina state law at that time. Id.

The United States Supreme Court noted that Alford "intelligently conclude[d] that his interests require[d] entry of a guilty plea" and the record before the trial court judge contained "strong evidence of actual guilt." Id. at 37. "Whether he realized or disbelieved his guilt, he insisted on his plea because in his view he had absolutely nothing to gain by a trial and much to gain by pleading." Id. Stated differently, "[c]onfronted with the choice between a trial for first-degree

murder, on the one hand, and a plea of guilty to second-degree murder, on the other, Alford quite reasonably chose the latter and thereby limited the maximum penalty to a 30-year term." Id. The United States Supreme Court held that the trial court judge did not "commit constitutional error in accepting" Alford's guilty plea to second-degree murder. Id. at 38.

Although there are numerous Mississippi decisions involving *Alford* pleas, such pleas are relatively rare. It is essential to be certain that these rare pleas are permissible based on the standards involved. As previously mentioned, the circumstances of the guilty plea in *Alford* involved an accused's protestation of innocence in the face of "strong" evidence of guilt. While there was some evidence of Appellant Dillon's guilt from witnesses who never remember nor mentioned that Jackson threw a brink on Dillon's car just before he was ran over, it is certainly not as strong as the evidence of guilt in *Alford*. There were only two witnesses to the events that led to the charge that Dillon faced. The record at the plea hearing is simply void of any other incriminating evidence against Dillon.

Dillon did not confess or give any statements that were adverse to her interests. She maintained that the victim threw a brick into her vehicle, that she was afraid and that she acted on instinct. While there was some evidence that

Dillon failed to maintain control of her vehicle, there was no evidence that she intentionally ran Jackson down and that she took any action without provocation.

Another critical aspect of an *Alford* plea is that the accused must "intelligently conclude that his interests require entry of a guilty plea . . . because in his view he had absolutely nothing to gain by a trial and much to gain by pleading." Id. at 37. The Ohio Supreme Court has stated that "[t]he essence of an *Alford* plea is that a [d]efendant's decision to enter the plea against his protestations of factual innocence is clearly and unequivocally supported by evidence that he exercised that calculus for the purpose of avoiding some more onerous penalty that he risks by, instead, going to trial on the charges against him." *State v.* Gossard, 2003 WL 21658565 at *3 (Ohio Ct. App. 2d 2003). The Ohio Supreme Court has also adopted a test to determine whether a record affirmatively demonstrates that an *Alford* plea has been voluntarily and intelligently made. *State v.* Piacella, , 855 (Ohio 1971). The fifth factor requires that "the record affirmatively discloses that . . . [the defendant] was motivated either by a desire to seek a lesser penalty or a fear of the consequences of a jury trial, or both." Id. This Court should adopt Ohio's test. That is, a definitive component of an *Alford* "best-interest" plea is a reasonably articulable basis that pleading guilty is in the accused's "best-interest."

The prosecution did not drop any charges against Dillon in exchange for her guilty plea. Additionally, Dillon did not plead guilty to a lesser-included offense than what the evidence would show. While she was indicted for murder, the prosecution agreed that this charge was not appropriate If he opted for trial and the jury found him guilty, Dillon faced a sentence of up to twenty years in the custody of the Mississippi Department of Corrections. Moreover, Dillon could have appealed her conviction for review. By pleading guilty, Dillon faced the exact same possible outcome but with no statutory opportunity to appeal. In *Alford*, the option of pleading guilty to second-degree murder and receiving a maximum sentence of thirty years is obviously in one's best interest when compared to going to trial and receiving, at worst, the death penalty or, at best, life in prison. Here, the possible sentence after a trial on manslaughter was no different than the possible sentence after pleading guilty to manslaughter. It is clear that neither Dillon nor any reasonable person could conclude that his guilty plea was in her best interest.

One could argue that by pleading guilty and avoiding the time and expense of a trial, the sentencing judge might be persuaded to be lenient when sentencing a defendant. However, it is impermissible for a sentencing judge to punish a defendant more harshly for the sole reason that the defendant exercised his or her

constitutional right to a trial by jury. "[I]t is absolutely impermissible for a trial judge to impose a heavier sentence based in whole or in part upon a defendant's exercise of his constitutionally protected right to trial by jury." *Gillum v.* State, 468 So.2d 856, 864 (Miss. 1985). The possible expectation of leniency at sentencing for pleading guilty is logically connected to the concept that, having confessed guilt, the defendant is expressing a willingness to accept responsibility for his or her actions and is already on the path toward rehabilitation. Such a concept is inapplicable to Dillon's because Dillon claimed actual innocence.

In the case now which is being presented by Appellant, there is neither "strong" evidence of Dillon's guilt, nor any basis to conclude that Dillon's decision to plead guilty was somehow in her best interest. When an accused seeks to plead guilty but maintains he is factually innocent,[10] the trial judge must be on high alert. Prior to acceptance of such a guilty plea, the record must be populated

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[10]LAWANDA DILLON,

> after having been first duly sworn, testified as follows, to-wit: Your Honor, I want to apologize to the Court and...I'm sorry. I'm really sorry. (Brief pause for defendant to regain composure.) This was a accident. God knows it was a accident. I loved Boris and I never meant to hurt him. I am so sorry. Your Honor, I never feared nobody until I got with Boris. I always kept my feelings in. I never feared nobody till I got with Boris. I loved him and just like I try to be a mother to my kids, I tried to stand by Boris and help take care of his kids, whatever he do right by being man. I never meant to intentionally hurt Boris. For Ms. Linda I'm so sorry. I'm so sorry. (R. 165)

Dillon never confessed that she intentionally killed Jackson but maintained her innocence.

with evidence indicating both strong proof of actual guilt and a rational basis for the conclusion that acceptance of such a plea is truly in the accused's "best interest." Only then does the guilty plea qualify as voluntary and intelligent, thereby meeting the constitutional standards expressed in *Alford*.

Clearly, the plea of guilty and the trial court's acceptancey of such a plea under the guise of an Alford plea violated Dillon's constitutional rights under the 5th and 14th Amendment to the United States Constitution. This Court should reverse and remand and direct that the plea and sentence be vacated.

ISSUE FIVE

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

WHEREFORE THESE PREMISES CONSIDERED, Appellant Dillon respectfully submits that based on the authorities cited herein and in support of her 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 to determine whether the plea was actually in the best interest of Dillon considering the confession which the state made during the sentencing

hearing. .

Respectfully submitted,

BY: Lawanda Dillon

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above and foregoing Brief for Appellant, has been mailed to:

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This, the 23 day of November, 2009.

Respectfully submitted,

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