IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2009-CP-01824-COA

ALLEN HENDERSON APPELLANT

V.

STATE OF MISSISSIPPI APPELLEE

BRIEF FOR APPELLANT

BY: Allen Henderson

Allen Henderson., #N5175
EMCF
10641 Hwy. 80 West
Meridian, Ms 39307

ORAL ARGUMENT NOT REQUESTED

PRO SE PRISONER BRIEF

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CERTIFICATE OF INTERESTED PERSONS

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

1. Allen Henderson, Appellant pro se.
2. Honorable Jim Hood, and staff, Attorney General.
3. Honorable William E. Chapman, Circuit Court Judge.
4. Honorable Michael Guest, District Attorney.
5. Honorable Ross Barnett, Jr., Attorney for Appellant

Respectfully Submitted,

BY: Allen Henderson

Allen Henderson, #N5175
EMCF
10641 Hwy. 80 West
Meridian, Ms 39307

Appellant

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STATEMENT OF ISSUES

ISSUE ONE

Appellant Allen Henderson has suffered a violation of his 5th and 14th Amendment rights under the United States Constitution as well as the Constitution of the State of Mississippi where trial court imposed the maximum sentence allowed by statute for the offense in which plea was entered without having considered that there was no firm evidence to support that appellant actually killed Kayla Brcann Polk and there was evidence which pointed to the possibility that Polk died as the result of an epileptic seizure. Moreover, the trial court failed to consider the mental condition of the appellant and the fact the circumstances surrounding the manner in which the crime was alleged to have occurred implied and indicated a diminished mental capacity of the appellant.

ISSUE TWO:

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;

ISSUE THREE:

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

a. Violations of the Fifth Amendment;

b. Violation of Civil and Miranda Rights;

c. Waiving the appellants right to a competency hearing and determination in violation of Rule 9.06 of Miss. Uniform Rules of County and Circuit Court.

ISSUE FOUR:

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

ISSUE FIVE:

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's compliance with Rule 9.06, violates the provisions of Rule 9.06 of the Miss. Uniform Rules of County and Circuit Court practice.[1]

STATEMENT OF INCARCERATION

The Appellant is presently incarcerated and is being housed in the Mississippi Department of Corrections and assigned to the East Mississippi Correctional Facility in Meridian, Mississippi, in service of the prison term imposed. Appellant has been continuously confined in regards to such sentence since date of conviction and imposition of sentence by trial court.

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[1] **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.

STATEMENT OF CASE

That on the 27th day of July, 2006, when I left Kayla Polk at the Super 8 Motel, Room 231, in Pearl, Mississippi, Polk was alive and well when I left this room. The baby was with Polk at that time.

That when I subsequently returned to the hotel some hours later Polk was dead on the floor.

I had hoped Polk was still alive so I checked Polk. She was, in fact, dead and there was nothing I could do for her. I went into a state of shock and after making several calls and realizing there was nothing I could do for Polk, I decided, after waiting approximately 5 hours, to carry her body to an area where it could be found.

I then took Polk's body and the baby to the Airport Road area, an area which is busily traveled, and left Polk's body and the baby in her car.

I realize that I moved the body, which was a mistake, but Polk was already dead when I arrived back at the motel room. I did not kill Polk and I instructed my attorney of this continuously.

My attorney instructed me that I should go ahead and plead guilty to manslaughter. Before giving this advice my attorney never completed an investigation of the medical history of Polk.

The room in which I found Polk in was not ram shacked as of there had been a robbery.

There was furniture broken in the room but this condition at the time I actually rented this room.

I pleaded guilty only because my attorney told me too. I was not guilty of killing Polk. The only guilt I share is that I moved the body after Polk was already dead and after I found her that way.

Although a witness, Beau Luke Doiron, told police he seen the victim get out of her car, on the day she was found dead, with a man weighting approximately 260 pounds, and approximately 6 feet tall, and that he heard a loud noise coming from the hotel room shortly after that, defense counsel never investigate this witness information. Even the police stated that this description.[2]

There was never a firm finding of the actual cause of death made that I am aware of.

I pleaded guilty to this crime only because my attorney advised me to and this plea was made over my objection. I am not guilty of any crime associated with the murder of Polk is she was, in fact, murdered. I am only guilty of moving the dead body and I did this because I panicked.

STANDARD OF REVIEW

In reviewing a trial court's decision to deny a motion for post-conviction relief the standard of review is clear. The trial court's denial will not be reversed absent a finding that the trial court's decision was clearly erroneous. Kirksey v State, 728 So.2d 565, 567 (Miss. 1999).

In the instant case, well-settled law dictates tht the trial court's decision was clearly erroneous since the trial court never reached the merits of the fundamental due process claims advanced in the Post Conviction Motion but summarily denied motion on basis of Miss. Code

[2] The description provided by the witness did come closer to fitting the description of Winford Connerly, the estranged boyfriend of Polk. Winford was never questioned as suspect in the murder since he had an alibi for a portion of the time in which Polk could have been killed.

Ann. §99-39-5(2). This court has previously held that claims such as presented here constitutes and exception to such bar.

SUMMARY OF ARGUMENT

Allen Henderson's conviction, by a plea of guilty, is invalid where such conviction was reached by coerced information and advice from counsel. The trial court erred in failing to grant Henderson post conviction relief on the claims presented where the record supports Allen's claims.

ARGUMENT

ISSUE

APPELLANT'S GUILTY PLEA CONSTITUTED AN UNKNOWING, INVOLUNTARY, UNINTELLIGENT. AND COERCED WAIVER OF FUNDAMENTAL CONSTITUTIONAL RIGHTS, ENTERED IN VIOLATION OF THE FOURTEENTH AMENDMENT DUE PROCESS OF LAW CLAUSE.

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.

Appellant aver that he entered a guilty plea because of fear on the information provided to him by his attorney, in direct violation of Rule 8.04(A)(3) of the Uniform Rules of circuit Court Practice. See Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709 (1969). Appellant states that he was not mentally nor emotionally stable and competent to make the decision to plead guilty and that his attorney applied pressure to secure the pleas of guilty which should have been rejected by the court when petitioner demonstrated unwillingness during the plea colloquy and in response to questions asked by the court.

In Boykin v. Alabama, the Court stated:

"Against this background, the Court holds that the Due Process Clause of the Fourteenth Amendment requires the outright reversal of petitioner's conviction. This result is wholly unprecedented. There are past holdings of this Court to the effect that a federal habeas corpus petitioner who makes sufficiently credible allegations that his state guilty plea was involuntary is entitled to a hearing as to the truth of those allegations. See, e. g., Waley v. Johnston, 316 U.S. 101 (1942); cf. Machibroda v. United States, 368 U.S. 487 (1962). These holdings suggest that if equally convincing allegations were made in a petition for certiorari on direct review, the petitioner might in some circumstances be Page 247 entitled to have a judgment of affirmance vacated and the case remanded for a state hearing on voluntariness. Cf. Jackson v. Denno, 378 U.S. 368, 293-394 (1964). However, as has been noted, this petitioner makes no allegations of actual involuntariness. "

If the plea of guilty entered in this case by Henderson was involuntary as defined by existing law, then not only the Petitioner's sentence, but also his guilty plea, must be vacated. This is true even though Henderson only sought to vacate his sentences and

did not specifically seek to vacate his guilty plea. See Courtney v. State, 704 So.2d 1352 (Miss. App. 1997), citing Stevenson v. State, 506 (Miss. 1996); Patterson v. State, 969 (Miss. 1995).

ISSUE TWO

COUNSEL FOR DEFENSE WAS INEFFECTIVE IN PLAIN VIOLATION OF THE SIXTH AMENDMENT, THAT IS, (A) VIOLATION OF THE FIFTH AMENDMENT AND (B) VIOLATION OF CIVIL RIGHTS AND MIRANDA RIGHTS

Appellant contends that his attorney, Barnett, convinced him that he should plead guilty and that if he did not he would be convicted and imprisoned for a long period of time. Appellant would assert that he was not competent to enter such plea and that his attorney never sought the appropriate tests, investigation, findings, consultation with witnesses, and investigation of likely suspects such as the estranged boyfriend of the victim Polk, and mental qualifications of petitioner before advising a plea of guilty.

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).

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 [3] 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 Henderson was denied his Sixth Amendment right to effective assistance of counsel where his attorney, representing him during the plea and sentencing proceedings, advised Henderson to plead guilty openly to manslaughter and child abandonment when there was evidence supporting a conclusion that Polk expired as a result of an psychogenic elliptic seizure. Defense counsel never investigated the medical history of Polk before advising petitioner to plead guilty. Defense counsel never pursued the evidence that there was no strangulation marks on the neck of Polk to substantiate that Polk actually was strangled and that the marks on Polks neck confirmed a bruise which indicated that such resulted from a fall rather then being strangled.[4] Defense counsel never investigated Henderson's case before simply

[3] 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.

[4] The State, because of the lack of evidence of murder, mainly the lack of any evidence of strangulation, would not pursue the murder charge. Counsel mislead petitioner to plead guilty to manslaughter when there was actually no

advising Henderson to plead guilty to murder. Henderson continued to tell his attorney that he did not kill Polk and that she was alone when he left the room but was deceased when he returned. Henderson was guilty of nothing except moving a dead body which is why the state indicted Henderson for tampering with evidence but dropped the charge after defense counsel was able to manipulate petitioner plead guilty to manslaughter. Mr. Barnett's assistance was less then adequate since had he been functioning properly as an attorney, Henderson's plea would not have been made to manslaughter.

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).*

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evidence of manslaughter and the state never proved any elements of manslaughter. Dr. Steven Haynes opinion was inclusive as to whether the cause of death was strangulation. Such report did not state for sure that the death was caused by such actions.

In the instant case, Additionally, defense counsel failed to know the law in regards to applying for competency examination and proceedings where the defendant has exhibited unusual and erratic behavior which may be evident that the defendant is suffering from mental problems. Defense counsel had an obligation to make this motion and secure this examination where Henderson had been charged with murder and child abandonment. Failure to take such action constituted ineffective assistance of counsel.

To successfully claim ineffective assistance of counsel, the defendant must meet the two-prong test set forth in Strickland v. Washington, 466 U.S. 668, 687 (1984). This test has also been recognized and adopted by the Mississippi Supreme Court. Alexander v. State, 605 So.2d 1170, 1173 (Miss. 1992); Knight v. State, 577 So.2d 840, 841 (Miss. 1991); Henderson v. State, 577 So.2d 840, 841 (Miss. 1991); McQuarter v. State, 574 So.2d 685, 687 (Miss. 1990); Waldrop v. State, 506 So.2d 273, 275 (Miss. 1987), aff'd after remand, 544 So.2d 834 (Miss. 1989); Stringer v. State, 454 So.2d 468, 476 (Miss. 1984), cert. denied, 469 U.S. 1230 (1985).

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

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

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

> In assessing attorney performance, all the Federal Courts of Appeals and all but a few state courts have now adopted the "reasonably effective assistance" standard in one formulation or another. See Trapnell v. United States, 725 F.2d 149, 151-152 (CA2 1983); App. B to Brief for United States in United States v. Cronic, O. T. 1983, No. 82-660, pp. 3a-6a; Sarno, [466 U.S. 668, 684] Modern Status of Rules and Standards in State Courts as to Adequacy of Defense Counsel's Representation of Criminal Client, 2 A. L. R. 4th 99-157, 7-10 (1980). Yet this Court has not had occasion squarely to decide whether that is the proper standard. With respect to the prejudice that a defendant must show from deficient attorney performance, the lower courts have adopted tests that purport to differ in more than formulation. See App. C to Brief for United States in United States v. Cronic, supra, at 7a-10a; Sarno, supra, at 83-99, 6. In particular, the Court of Appeals in this case expressly rejected the prejudice standard articulated by Judge Leventhal in him plurality opinion in United States v. Decoster, 199 U.S. App. D.C. 359, 371, 374-375, 624 F.2d 196, 208, 211-212 (en banc), cert. denied, 444 U.S. 944 (1979), and adopted by the State of Florida in Knight v. State, 394 So.2d, at 1001, a standard that requires a showing that specified deficient conduct of counsel was likely to have affected the outcome of the proceeding. 693 F.2d, at 1261-1262. For these reasons, we granted certiorari to consider the standards by which to judge a contention that the Constitution requires that a criminal judgment be overturned because of the actual ineffective assistance of counsel. 462 U.S. 1105 (1983). We agree with the Court of Appeals that the exhaustion rule requiring dismissal of mixed petitions, though to be strictly enforced, is not jurisdictional. See Rose v. Lundy, 455 U.S., at 515 -520. We therefore address the merits of the constitutional issue.
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> II
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> In a long line of cases that includes Powell v. Alabama, 287 U.S. 45 (1932), Johnson v. Zerbst, 304 U.S. 458 (1938), and Gideon v. Wainwright, 372 U.S. 335 (1963), this Court has recognized that the Sixth Amendment right to counsel exists, and is needed, in order to protect the fundamental right to a fair trial. The Constitution guarantees a fair trial through [466 U.S. 668, 685] the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment,

including the Counsel Clause: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in him favor, and to have the Assistance of Counsel for him defence." Thus, a fair trial is one in which evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding. The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel's skill and knowledge is necessary to accord defendants the "ample opportunity to meet the case of the prosecution" to which they are entitled. Adams v. United States ex rel. McCann, 317 U.S. 269, 275 , 276 (1942); see Powell v. Alabama, supra, at 68-69.

Because of the vital importance of counsel's assistance, this Court has held that, with certain exceptions, a person accused of a federal or state crime has the right to have counsel appointed if retained counsel cannot be obtained. See Argersinger v. Hamlin, 407 U.S. 25 (1972); Gideon v. Wainwright, supra; Johnson v. Zerbst, supra. That a person who happens to be a lawyer is present at trial alongside the accused, however, is not enough to satisfy the constitutional command. The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results. An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair. [466 U.S. 668, 686] For that reason, the Court has recognized that "the right to counsel is the right to the effective assistance of counsel." 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 to investigation decisions are reasonable depends critically on such information. For example, when the facts 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 Mintain a fairly rigid rule of presumed prejudice for conflicts of interest. Even so, the rule is not quite the per se rule of prejudice that exists for the Sixth Amendment claims mentioned above. Prejudice is presumed only if the defendant demonstrates that counsel "actively represented conflicting interests" and that "an actual conflict of interest adversely affected him lawyer's performance." Cuyler v. Sullivan, supra, at 350, 348 (footnote omitted). [466 U.S. 668, 693] Conflict of interest claims aside, actual ineffectiveness laims 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 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 jury acted according to law. [466 U.S. 668, 695] An assessment of the likelihood of a result more favorable to the defendant must exclude the possibility of arbitrariness, whimsy, caprice, "nullification," and the like. A defendant has no entitlement to the luck of a lawless decisionmaker, even if a lawless decision cannot be reviewed. The assessment of prejudice should proceed on the assumption that the decisionmaker is reasonably, Conscientiously, and impartially applying the standard that govern the decision. It should not depend on the idiosyncracies of the particular decisionmaker, such as unusual propensities toward harshness or leniency. Although these factors may actually have entered into counsel's selection of strategies and, to that limited extent, may thus affect the performance inquiry, they are irrelevant to the prejudice inquiry. Thus, evidence about the actual process of decision, if not part of the record of the

proceeding under review, and evidence about, for example, a particular judge's sentencing practices, should not be considered in the prejudice determination. The governing legal standard plays a critical role in defining the question to be asked in assessing the prejudice from the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt. When a defendant challenges a death sentence such as the one at issue in this case, the question is whether there is a reasonable probability that, absent the errors, the sentencer - including an appellate court, to the extent it independently reweighs the evidence - would have concluded that the balance of aggravating and mitigating circumstances did not warrant death. In making this determination, a court hearing an ineffectiveness laim 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 unreasonableness 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 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 Allen Henderson has suffered a violation of him constitutional rights to effective assistance of counsel, in violation of the 6th Amendment to the United States Constitution. Defense counsel should have made Henderson aware of the law and should have gave Henderson the right to make an intelligent decision as to where he would plead guilty. The decision cannot be intelligent where Henderson was not provided with all the relevant information regarding the penalty and the admissions he was entering. This fact, coupled with the fact that counsel failed to investigate and interview the witnesses as to the prior medical history of Polk, which could and would have supported mitigating circumstances that Polk did from an elliptic seizure and not from strangled. Moreover, defense counsel never attempted to secure an independent examination of the body and the cause of death. This Court should recognize such violation and grant post conviction relief to Allen Henderson who is entitled to relief from the conviction and sentence on this basis.

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 a question of fact arises concerning whether the attorney's conduct was deficient].

Further counsel contravened the law by submitting the guilty petition of the movant without moving for a competency hearing. The defendant further asserts that he was denied effective assistance of counsel in that Attorney Barnett, 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 petition to enter a guilty plea prior to the competency hearing was prohibited and directly in contravention of the 6th amendment to the United States Constitution. It is therefore the position of the defendant that at the time the plea was taken he 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 movant prior to the acceptance of the guilty plea. It was incumbent upon counsel to mandate a finding and he failed to proceed in the proper manner as to protect the right of the appellant when he failed to make a motion

for competency hearing or to object to the trial court's failure to order such hearing before accepting a plea of guilty.

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

ISSUE THREE

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

The trial court failed to advise Allen Henderson that he had the 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 Henderson a direct appeal of the sentence imposed provided such appeal is filed in a timely fashion. The trial court judge made fundamental error where the Court failed to advise Henderson 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).

The law supports the assertion here that the trial court was incorrect in the advise furnished to Henderson 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 Henderson that there was no right to appeal from the sentence.

ISSUE FOUR

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

The Court was duty bound to conduct an evidentiary hearing given the knowledge of the mental and emotional condition of the defendant. It is the defendant's position that once the motion to plead guilty was presented to the court then the court, at that time, had a duty to conduct a hearing to determine that defendant was incompetent to stand trial and to order the defendant to submit for a mental examination , the Court was statutorily bound to comply with the rule prior to trial and/or plea. 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 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 said hearing herein therefore the guilty plea accepted was not based upon a true finding of competency, 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.

CONCLUSION

Appellant Henderson respectfully submits that based on the authorities cited herein and in support of his brief, that this Court should vacate the guilty pleas, convictions and the sentences 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 and the state should be required to file an answer to the motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that I, Allen Henderson, have this date served a true and correct copy of the above and foregoing Brief for Appellant, by United States Postal Service, first class postage prepaid, to: Honorable Jim Hood, Attorney General, P. O. Box 220, Jackson, Mississippi 39205; Honorable Michael Guest, District Attorney, P. O. Box 68 Brandon, MS 39043; Honorable William Chapman, Circuit Court Judge, P. O. Box 1626, Canton, Mississippi..

This, the 9 day of July, 2010.

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