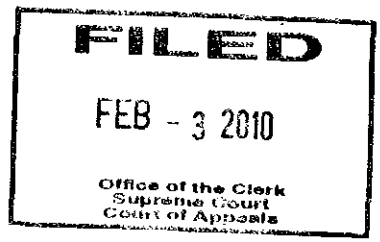
CASE NO. **2009-KP-00196-COA**

COURT OF APPEALS OF THE STATE OF MISSISSIPPI

CLAYTON TRAMMELL
APPELLANT

VS.

STATE OF MISSISSIPPI
APPELLEE



APPEAL FROM THE CIRCUIT COURT OF
WARREN COUNTY, MISSISSIPPI

APPELLANT'S OPENING BRIEF

ORAL ARGUMENT NOT REQUESTED

BY: Clayton Trammell

Clayton Trammell, #144941
SMCI 2
P. O. Box 1419
Leakesville, MS 39451

Appellant, pro se

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ORAL ARGUMENT NOT REQUESTED

I.

STATEMENT REGARDING ORAL ARGUMENT

Appellant does not specifically request oral argument in this case as it is believed that the issues are capable of being adequately briefed by the parties. However, in the event the Court believes oral arguments would be helpful or beneficial to the Court then Appellant does not oppose oral argument and would in the court's discretion, as that counsel be appointed to deliver such oral argument for Appellant

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II.

CERTIFICATE OF INTERESTED PERSONS

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

1. Appellant Clayton Trammell, Appellant pro se
2. Honorable Jim Hood, and staff, Attorney General
3. Honorable Frank G. Vollar, Circuit Court Judge
4. Honorable Angela Carpenter, Assistant District Attorney
5. Honorable Richard Smith Jr., District Attorney
6. Honorable Josie Mayfield Hudson, Defense Attorney at trial

Respectfully submitted,

BY: Clayton Trammell

Clayton Trammell, #144941
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III.

STATEMENT OF THE ISSUES

ISSUE ONE

Whether trial court erred in failing to grant Appellant's motion to suppress evidence of gun which was found during search of of Appellant's mother's home and where gun was not listed on search warrant, was not found in the room of the home where Appellant resided, was found in an area of the home not under Appellant's control, was not in plain view of the officer conducting the search and had to be hunted down within the closet in which gun was found.

ISSUE TWO

Whether trial court erred in failing to grant new trial in the interest of justice.

ISSUE THREE:

Whether evidence was insufficient to sustain conviction as a matter of law.

ISSUE FOUR:

Whether Jury was mislead by the instructions provided to the jury which never actually addressed central issues and whether trial court erred in denying the defendant's jury instructions over defendant's objections.

ISSUE FIVE:

The trial court erred in failing to grant Appellant's Motion for Appointment of Psychiatrist under Rule 9.06 U.R.C.C.C. to Determine Competency to Stand Trial. Counsel's failure to pursue the motion constitutes an unauthorized waiver of such hearing in violation of Rule 9.06.

ISSUE SIX:

Trial court erred in denying motion to suppress evidence seized pursuant to search warrant.

ISSUE SEVEN:

Whether Appellant was subjected to Ineffective Assistance of Counsel At Trial, in violation of the Sixth Amendment to the United States Constitution and whether such issue should be heard in this direct appeal where the record is clear and contains relevant proof of such claim.

ISSUE EIGHT.

Whether sentence was excessive where court imposed sentence, which exceeded Appellant's life expectancy, and where jury did not authorize life sentence to be imposed by it's verdict.[1]

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[1] The sentence of 30 years mandatory was tantamount to a life sentence which exceeded Trammell's life expectancy in view of Trammell's age and the fact that a life expectancy would be 59 years.

ISSUE NINE

Whether Appellant was denied his constitutional right to fair trial because of the cumulative effect of the claims stated herein and because of the failure of Appellant to be provided with effective assistance of counsel at trial.

IV.

STATEMENT OF INCARCERATION

The Appellant is presently incarcerated and is being housed in the Mississippi Department of Corrections at Leakesville, Mississippi, in service of the term imposed in this case. Appellant has been continuously confined, in regards to such sentence, since date of conviction and imposition by the trial court.

V.

STATEMENT OF CASE

On October 31, 2007, an indictment was filed in the Warren County Court, Ninth Judicial District charging Appellant Clayton Trammell, with one count of Armed Robbery[2] and two counts of Directing a Child to Commit a Felony.[3] Appellant was not prosecuted on the two counts of felony child abuse.

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[2] **97-3-79**. Robbery; use of deadly weapon.

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

[3] **97-1-6**. Directing or causing felony to be committed by person under age of seventeen years.

In addition to any other penalty and provision of law, any person over the age of seventeen (17) who shall direct or cause any person under the age of seventeen (17) to commit any crime which would be a felony if committed by an adult shall be guilty of a felony and upon conviction shall be fined not more than Ten Thousand

Appellant was represented at trial by Honorable Josie Hudson, Vicksburg, Mississippi. Upon conviction of all counts in the indictment Appellant was sentenced on December 3, 2008 to a total sentence of thirty (30) years in the custody of the Mississippi Department of Corrections. (c.p. 72) (Tr. 287).

Being aggrieved by the verdict and sentence, Appellant Trammell perfected an appeal of the convictions and sentences of the Circuit Court of Warren County, Mississippi.

Appellant is now proceeding with the preparation and filing of his brief in the court pro se. which will contain a total of nine (9) separate claims for reversal.

I.

ARGUMENT

ISSUE ONE

Whether trial court erred in failing to grant Appellant's motion to suppress evidence of gun which was found during search of of Appellant's mother's home and where gun was not listed on search warrant, was not found in the room of the home where Appellant resided, was found in an area of the home not under Appellant's control, was not in plain view of the officer conducting the search and had to be hunted down within the closet in which gun was found.

Appellant, through counsel, moved the trial court to suppress the firearm which was found during a search of Appellant's mother's home. The gun was not a listed or described as an item subject to seizure on the search warrant and was not found in plain view of the police. As a matter of fact, and according to the record, the gun was actually found in an area of the home where Appellant had no dominion or control. The police who actually testified that he found the gun also testified that he do not recall asking the home owner, Appellant's mother, did the gun

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Dollars ($10,000.00) or imprisoned for not more than twenty (20) years, or both.

belong to her. (Tr. 145-146) However, another police, who was not present in the room where the gun was found at the time the gun was found, testified that he asked the home owner did the gun belong to her and she stated it did not. (Tr. 152) Defense counsel never called Mrs. Trammell to verify that the police never asked her whether the gun belonged to her and that it did belong to her and had been in the home with her for months before the alleged crime. The whereabouts of the gun was only known to Mrs. Trammell and could not have been used in any robbery since it was in her presentence during the time of the alleged robbery. Policeman John Merrit was not asked why he would have had to ask Mrs. Trammell about the gun when he was not the one who found it, was not present when it was found, and did not find anything in the area of the home in which he was searching. (Tr. 153) Merrit was never asked would it be normal protocol that he would ask these questions and not the person who actually found the item. Appellant would assert that the trial court erred in allowing the gun to be admitted as evidence under the facts provided herein and in the record.

In Carney v. State, 525 So.2d 776 (Miss. 1988), this Court recognized that "it is also apparent from the decisions of the Supreme Court of the United States that the "plain view" doctrine does not eliminate the requirement that seizure of contraband discovered while in "plain view" must comply with the Fourth Amendment requirements and in the absence of "exigent circumstances" be based on a valid warrant. Furthermore, the fact that the evidence the officers anticipated seizing at a particular place turns out to be in plain view when the officers arrive, cannot justify their seizure without obtaining a valid warrant. Isaacks v. State, 350 So.2d 1340, at 1345 (Miss. 1977); Salisbury v. State, 293 So.2d 434, 437 (Miss.1974).

Appellant presented the Court's authority in Carney to the trial court and in support of this claim. The issue was properly preserved for this appeal. The search warrant was illegal in it's attempt requirement to set out a gun within the items of evidence which it sought. The police knew from the start that the search was pertaining to an armed robbery. In drafting the search warrant, which Lt. Brown testified that he did, he never named a "gun" as be evidence which he sought in the search. Yet, however, as soon as he uncovered a gun, he seized it. If the police was looking for evidence of an armed robbery then a gun should have been the very first item of evidence which was listed. The robber allegedly stated in his note that he had a gun. The trial court should not have rewarded poor police work with court intervention of allowing evidence which the police did not earn. This Court should reject the trial court's finding that the gun was admissible. It was found in a part of the home not frequented, controlled, or occupied by Appellant and never identified by the police or any witness as being the gun used in the robbery.

This Court should reverse and remand this case to the trial court for a new trial without the use of the gun as proof.

ISSUE TWO

Whether trial court erred in failing to grant new trial in the interest of justice.

Appellant would assert to this Court that the trial court erred in failing to grant a new trial in the interest of justice where witness Angela Hamilton testified that she did not see a gun and that while the person who committed the crime kept his right hand in his pocket, she never questioned whether he had a gun although she stated that she believed he did. (Tr. 174-175) The witness never testified that she was in fear of her life or that the robber actually threatened her.

After the prosecution led the witness to testify, the witness stated that she was scared for her life. (Tr. 177)

Although Hamilton testified at the trial that she knew Appellant and that he was a regular customer at the store, the police testified that they had to learn Appellant's identity from Arthur Andrew. (Tr. 142) If Hamilton actually knew who the robber was from the moment of the crime then she did not share this information with the police. It is clear from the contents of the record and events of the trial that Hamilton identified Appellant for the first time at trial when she seen him sitting at the counsel table and after the prosecution educated and coached her into her identification of Appellant.

"[T]he power to grant a new trial should be invoked in cases in which the evidence preponderates heavily against the verdict." Id. (quoting Amiker v. Drugs for Less, Inc., 796 So.2d 942, 947 (¶18) (Miss. 2000). If the verdict is against the overwhelming weight of the evidence, the proper remedy is to grant a new trial.

In the instant case the evidence preponderance heavily against the verdict. Until the trial there was no evidence that the alleged victim had identified Appellant and even less evidence that the alleged victim was placed in fear of her life or was confronted by a robber with a gun. It has been explained by one court before that the power to grant a new trial in the interest of justice is predicated on the assumption that the Judge who presides at trial is in the best position to evaluate errors therein. The Trial Judge must decide whether substantial justice has been done, whether it is likely that the verdict has been affected, and must look to his own common sense, experience and sense of fairness rather than to precedents in arriving at a decision. This power conferred upon a court to order a new trial is discretionary in nature." *Micallef v. Miehle Co.*, 39 N.Y.2d at

381 (internal quotation marks and citations omitted). See also *Pyptiuk v. Kramer*, 295 A.D.2d 768, 770, 744 N.Y.S.2d 519, 522 (3d Dep't 2002)

The power to grant a new trial in the interest of justice calls for the exercise of informed discretion, much like the question whether a verdict is against the fair weight of the evidence. The power reflects the trial judge's unique ability to determine whether error or misconduct occurred during trial and may have tainted the verdict. While the commission of legal error is a matter that an appellate court may consider *de novo*, the trial judge is generally more familiar with the course of the trial proceedings and may be in a better position to identify and evaluate certain types of error.

Moreover, the special perspective of the trial court may furnish better insight into whether a series of questionable rulings may raise doubts about the overall fairness of the outcome, even if none of the questionable rulings individually may amount to reversible error.

This Court should find that a new trial should be granted in the interest of justice.

ISSUE THREE:

Whether evidence was insufficient to sustain a conviction as a matter of law.

The verdict of the jury was against the overwhelming weight of evidence and contrary to law, and the court should have granted Appellant Trammell's Motions for directed verdict, or alternative a new trial. Appellant Trammell's defense at trial was actual innocence. Appellant Trammell moved for a directed verdict at the end of State presentation of evidence and at the close of State case due to the fact that the State failed to prove Appellant Trammell committed the crime beyond a reasonable doubt.

This theory was further defined in Hamburg v. State, 248 So.2d. 430 (Miss. 1971), that "one who is the owner in possession of the premises ... is presumed to be in constructive possession of the articles found in or on the property possessed." Id. at 432. This presumption is rebuttable, however, and does not relieve the state of its burden to prove guilt beyond a reasonable doubt. Id. Thus, "where the premises upon which the contraband is found is not in the exclusive possession of the accused, the accused is entitled to acquittal, absent some competent evidence connecting him with the contraband." Powell v. State, 355 So.2d. 1378, 1379 (Miss. 1978). See also Keys v. State, 478 So2d. 266, 268 (Miss. 1085). See Jones v. State, 693 So2d. 375-76 (Miss. 1997).

In Jones, supra, the Supreme Court found the evidence of constructive possession was insufficient, where Jones was a passenger in a car in which marijuana was found, and reversed and rendered his conviction because the trial court erred in not granting Jones' motion for directed verdict. Id. at 377.

In Naylor v. State, 730 So.2d. 561, the Supreme Court reversed and rendered his conviction because the state failed to prove that Naylor had constructive possession of cocaine found at another person residence.

Finally, when the state rested its case, Appellant Trammell moved for a directed verdict due to the fact that no evidence had been presented by the state showing that he had committed the robbery.

Appellant Trammell asserts that the state never met its burden of proof showing that he had actual knowledge of the gun used in the robbery which was found at his mother's residence in the hall closet and not even in his room..

Appellant Trammell asserts that the verdict of the jury was against the overwhelming lack of evidence of guilt and contrary to law. In the case of Cherry v. State, 386 So2d. 203, The court reversed and rendered the conviction due to the fact that the verdict of the jury was contrary to the overwhelming weight of evidence. Quoting Burks v. United States, 437 U.S.1, 98 S.Ct. 2141, 57 L.Ed 2d 1 (1978).

The conviction and sentence for the offense against Appellant Trammell should l be vacated and Appellant Trammell should be discharged to avoid a miscarriage of justice. The conviction and sentence, on the basis of the evidence presented, is in violation of Trammell's U.S.C.A. 5, 14 & Miss. Const. Art. 3§14 due process. In U.S. v. Cervantes, 219 F3d 882, 887 (9th Cir. 2000), the court held Appellant mere proximity to drugs, her presence on property where (drug) is located, and her association with person who controls property are insufficient to support conviction for possession.

ISSUE FOUR:

Whether Jury was mislead by the instructions provided to the jury which never actually addressed central issues and whether trial court erred in denying the defendant's jury instructions over defendant's objections

The instructions given were not adequate and misled the jury. In Richardson v. Missouri Pacific R. Co., 186 F3d 1273 (1999), this court held jury instruction may not serve to mislead jury in any way and reversal is required when instruction mislead jury. In Ho v. Carey, 332 F3d 587 (2003), the court held when a jury instruction omits a necessary element of the crime, constitutional error has occurred and require reversal.

Appellant should have been allowed an opportunity to present a defense jury instruction on his theory of the case read to the jury by the court. Jury instructions D-1, D-4, D-6 and D-8

were refused by the Court and caused actual prejudice to Appellant and impaired Appellant's defense theory of his cause. (Tr. 252-254) In Brown v. State, 890 2d 901, the court held the the Appellant is entitled to a defense theory of case. In U.S. v. Barrnett, 197 F3d. 138, the court held it to be reversible error not to instruct jury on theory of defense. See U.S. v. Smith, 223 F3d. 554 (2000). Denial of explicit jury instructions violate Appellant's rights of due process of law. U.S.C.A. 5 & 14. The defendant dictated valid reasons into the record as to why these instructions should have been granted.

The trial Court committed reversible error in failing to grant instruction D-1, D-4, D-6 and D-8 and the case should be remanded for new trial.

ISSUE FIVE

The trial court erred in failing to grant Appellant's Motion for Appointment of Psychiatrist under Rule 9.06 U.R.C.C.C. to Determine Competency to Stand Trial.[4] Counsel's failure to pursue the motion constitutes an unauthorized waiver of such hearing in violation of Rule 9.06.

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[4] **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

The trial court was duty bound to conduct an evidentiary hearing on the motion filed by Appellant given the knowledge of the mental and emotional condition of the Appellant. It is the defendant's position that once the motion was presented to the court then the court had a duty to conduct a hearing to determine that defendant was competent 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. 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 trial conducted in this case was conducted upon the basis of a true finding of competency and that the Appellant was able to assist in his defense. Just for this reason alone, with considering other issues raised in this brief, this Court should find that the trial and conviction was conducted in violation of Mississippi Statutory law and the due process clause to the United States Constitution, as well as the Mississippi Constitution. Reversal should be

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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.

required and a new trial conducted after a hearing in conducted on the issue of competency to stand trial and assist in the defense.

ISSUE SIX

Trial court erred in denying motion to suppress evidence seized pursuant to search warrant.

Defense counsel made a Motion to Suppress Evidence (T. 40). The Motion to suppress commenced from the search of another person's residence where a gun was found in "a little small closet in the living room area of the residence" (T139) and not in Appellant's bedroom. Residence belonged to Appellant's mother.

Appellant Trammell shows that the evidence seized should have been suppressed and inadmissible in his trial due to the fact that the affidavit for search warrant was improper and illegal. In Adams v. State, 202 Miss. 68, 30 So2d 593 (1947), this court held evidence obtained under search warrant which was illegal and inadmissible.

When applying for the search warrant there was nothing stated in the affidavit or underlying facts and circumstances that indicated the search warrant extended to a gun. No gun was seen at the robbery. The search warrant identified: a black long sleeve shirt with white writing and black jeans. The warrant included a long sleeve black shirt (4) with no mention of white writing. The police seized a "black long sleeve T Shirt" rather than a long sleeved shirt. Defense made no mention of this oversight in her argument to suppress. Appellant Trammell shows that evidence seized should have been suppressed and inadmissible in his trial due to the fact that the affidavit for search warrant was improper and illegal. In Adams v. State, 202 Miss. 68, 30 So2d 593 (1947), this court held evidence obtained under search warrant which was illegal and inadmissible.

When applying for the search warrant there was nothing stated in the affidavit or underlying facts and circumstances that stated that a gun was included.. "It is elementary that in passing on the validity of a warrant, the reviewing court may consider only information brought to the magistrate's attention. "Giordenello v. U. S., 357 U.S. 480,486,78 S.Ct. 1245, 1250, 2L.Ed.2d 1503.

In Giordenello, the government pointed out that the officer who obtained the warrant had kept petitioner under surveillance for about one month prior to the arrest. The court of course ignored this evidence, since it had not been brought to the magistrate's attention.

There was nothing to connect Appellant Trammell to the gun and the evidence seized as a result of an improper affidavit. Such evidence was inadmissible in Appellant Trammell's trial and the motion to suppress should have been granted. In Gates v. Illinois, 462, U.S. 213, 103 S. Ct. 2317, the court granted motion to suppress evidence seized pursuant to search warrant because affidavit for search warrant was improper. In Aguilar v. Texas, 378 U.S. 108, 84 S. Ct. 1509, 12 L.Ed 723, the court held affidavit did not sustain probable cause for issuance of warrant.

Denial of motion to suppress evidence violate Appellant rights of U.S.C.A.4 & Miss. Const. Art. 3 & 23. This constitutes reversible error and sentence and conviction should be vacated and Appellant Trammell shall be discharged. "It is elementary that in passing on the validity of a warrant, the reviewing court may consider only information brought to the magistrate's attention. "Giordenello v. U. S., 357 U.S. 480,486,78 S.Ct. 1245, 1250, 2L.Ed.2d 1503.

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Denial of motion to suppress evidence violate Appellant rights of U.S.C.A.4 & Miss. Const. Art. 3 & 23. This constitutes reversible error and sentence and conviction should be vacated and Appellant Trammell shall be discharged.

ISSUE SEVEN

Ineffective Assistance of Counsel At Trial, in violation of the Sixth Amendment to the United States Constitution.

The touchstone for ineffective assistance is "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." Strickland v. Washington, 466 U. S., at 686 (1984). Strickland's two-part test must be satisfied for ineffective assistance of counsel; the defendant must show that: (1) his counsel's performance was deficient, and (2) the deficiency prejudiced the defense. Irby v. State, 893 So.2d 1042, 1048 (¶25) (Miss. 2004) (citing Carr v. State, 873 So.2d 991, 1003 (¶27) (Miss. 2004)). There is a presumption that an attorney's performance is competent, "with a strong presumption that the conduct fell within the wide range of professional assistance." Johns, 926 So.2d at 194 (¶30) (citing Hiter v. State, 660 So.2d 961, 965 (Miss. 1995)). The Strickland standard demands a showing that counsel's errors were so serious that they deprived the defendant of a fair trial. Id. at 195 (¶31). The deficiency and prejudice are measured by looking at the totality of the circumstances. Hiter, 660 So.2d at 965 (citing Carney v. State, 525 So.2d 776, 780 (Miss. 1988)). In order to overcome the presumption of competence, "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." Johns, 926 So.2d at 195 (¶31) (citing Schmitt v. State, 560 So.2d 148, 154 (Miss. 1990)).

While the defendant is not entitled to representation without mistakes, it is equally true that a defendant is entitled to competent representation. Mohr v. State, 584 So.2d 426, 430 (Miss. 1991). "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. . . ." Lambert v. State, 462 So.2d 308, 316 (Miss. 1984) (quoting Strickland, 466 U.S. at 689). Further, the United States Supreme Court has stated that, in adjudicating a claim of actual ineffectiveness of counsel, the rules are not mechanical, and the adjudicating court does not need:

> 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. . . . 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.

Strickland, 466 U.S. at 697.

The circuit court, after careful examination of the trial and post-conviction relief transcripts, enumerated the errors elicited from Williams at the evidentiary hearing in its detailed fifty-two page opinion. It was noted that at the evidentiary hearing, Robert did not stand up and affirmatively plead not guilty. Robert did not testify that his attorney was incompetent. There was no testimony that anybody but Robert committed the offense, and no one else confessed to the murder. The circuit judge found that the alleged deficiencies were mainly trial tactics and concluded that he was not convinced that, but for the alleged deficiencies, the outcome of the trial would have been different.

To prevail on an ineffective assistance of counsel claim the complaining party must satisfy the well-established two prong test. First the party must show that counsel's performance was objectively deficient. Then the party must show that, but for counsel's deficient performance, there is a reasonable probability that the result of the trial would have been different. Gilliard v. State, 462 So.2d 710, 714 (Miss. 1985).

In the case at bar, Appellant's counsel absolutely failed to asserts Appellant's right. Clayton Trammell was subjected to ineffective assistance of counsel. 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 reconsideration of claim of ineffectiveness where the Appellant alleged that his attorney did not know the relevant law.

This Court should conclude that here counsel rendered ineffective assistance of counsel and that such ineffectiveness prejudices Appellant's conviction in such a way as to mandate a reversal of conviction as well as the sentence imposed. Defense counsel was charged with knowing the law and being familiar with the record and evidence.

In Jackson v. State, 815 So. 2d 1196 (Miss. 2002), the Supreme 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 Appellant must prove, under the totality of the circumstances, that (1) his attorney's performance was deficient and (2) the deficiency deprived the Appellant of a fair trial. Hiter v. State, 660 So.2d 961, 965 (Miss.1995). This review is highly deferential to the attorney, with a strong presumption that the attorney's conduct fell within the wide range of reasonable professional assistance. Id. at 965. With respect to the overall performance of the attorney, "counsel's choice of whether or not to file certain motions, call witnesses, ask certain questions, or make certain objections fall within the ambit of trial strategy" and cannot give rise to an ineffective assistance of counsel claim. Cole v. State, 666 So.2d 767, 777 (Miss.1995).
>
> [7] [8] [9] ¶ 9. 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 Appellant must show that there is a reasonable probability that, but for his attorney's errors, he would have received a different result in the trial court. Nicolaou v. State, 612 So.2d 1080, 1086 (Miss.1992). Finally, the court must then determine whether counsel's performance was both deficient and prejudicial based upon the totality of the circumstances. Carney v. State, 525 So.2d 776, 780 (Miss.1988).

. Defense counsel failed to make an objection to this prejudicial testimony and fail to move for time to prepare defense to confront this testimony.

1. Counsel failed to call witnesses who were able to alibi Appellant for the time of the robbery.

2. Counsel failed to request that defective search warrant, Affidavit for search warrant and underlying facts and circumstances, be marked as exhibits or to be entered into evidence, to show Appellant's right under U.S.C.A.4 had been violated.

3. Counsel failed to raise issue of witness, Arthur Andrews, whose own attorney requested a competency hearing on the grounds that he was too severely brain damaged to assist in preparing a defense. (Vol 1 Pg 8). His case was sent back to youth court. (T.227) Defense attorney, Richard Smith, said in closing argument: I wish I had had a better witness than Arthur Andrews. (T. 267)

4. Counsel failed to present evidence to defeat constructive possession of a gun that was found at another person's residence not in plain view, not within control of Appellant, not in Appellant's possession. The Sixth Amendment of the U.S. provides: "In all criminal prosecution the accused shall enjoy the right to have the Assistance of Counsel for his defense." By the 14th Amendment this right is made obligatory upon the [states. Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9.L.Ed.2ed 799]

Counsel's performance was so defective it caused a fundamentally unfair outcome of trial. This is reversible error. This is violation of Appellant U.S.C.A. 6 & Miss. Const. Art. 3§26. Conviction and sentence shall be vacated and Appellant shall be discharged. See Strickland v. Washington, 466 U.S. 668, 687.

Appellant Trammell respectfully ask this court to review the facts of this case with the decisions rendered reverse the conviction and discharge the Appellant

In Ward v. State, 708 So.2d 11 (Miss. 1998) (96-CA-00067), the Supreme Court held the following:

> Effective assistance of counsel contemplates counsel's familiarity with the law that controls his client's case. See **Strickland v. Washington**, 466 U.S. 668, 689, 104 S.Ct. 2052, 2065, 80 L.Ed.2d 674 (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 Appellant's case; remanding for consideration of claim of ineffectiveness where the Appellant alleged that his attorney did not know the relevant law).

In the instant case, Clayton Trammell's defense counsel failed in his duties to adequately represent Trammell during the trial and prior to the trial when counsel failed in the Motion to Suppress and never called witnesses to alibi Appellant.

To successfully claim ineffective assistance of counsel, the Appellant must meet the two-prong test set forth in Strickland v. Washington, 466 U.S. 668,687 (1984). This test has also been recognized and adopted by the Mississippi Supreme Court. Alexander v. State, 605 So.2d 1170, 1173 (Miss. 1992); Knight v. State, 577 So.2d 840, 841 (Miss. 1991); Barnes v. State, 577 So.2d 840,841 (Miss. 1991); McQuarter v. State, 574 So.2d 685, 687 (Miss. 1990); Waldrop v.

State, 506 So.2d 273, 275 (Miss.1987), aff'd after remand, 544 So.2d 834 (Miss. 1989); Stringer v. State, 454 So.2d 468, 476 (Miss. 1984), cert. denied, 469 U.S. 1230 (1985).

The Mississippi Supreme Court visited this issue in the decision of Smith v. State, 631 So.2d 778, 782 (Miss. 1984). The Strickland test requires a showing of (1) deficiency of counsel's performance which is, (2) sufficient to constitute prejudice to the defense. McQuarter 506 So.2d at 687. The burden to demonstrate the two prongs is on the Appellant. 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; Gillard v. State, 462 So.2d 710, 714 (Miss. 1985). The Appellant must show that there is a reasonable probability that for his attorney's errors, Appellant 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. 688, 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 Appellant must show from deficient attorney performance, the lower courts have adopted tests that purport to differ in more than formulation. See App. C to Brief for United States in United States v. Cronic, supra, at 7a-10a; Sarno, supra, at 83-99, 6. In particular, the Court of Appeals in this case expressly rejected the prejudice standard

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

II

In a long line of cases that includes Powell v. Alabama, 287 U.S. 45 (1932), Johnson v. Zerbst, 304 U.S. 458 (1938), and Gideon v. Wainwright, 372 U.S. 335 (1963), this Court has recognized that the Sixth Amendment right to counsel exists, and is needed, in order to protect the fundamental right to a fair trial. The Constitution guarantees a fair trial through [466 U.S. 668, 685] the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment, including the Counsel Clause: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his 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 Appellant be first defense witness); Ferguson v. Georgia, 365 U.S. 570, 593 -596 (1961) (bar on direct examination of Appellant). Counsel, however, can also deprive a Appellant 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 Appellant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the Appellant 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 Appellant by the Sixth Amendment. Second, the Appellant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the Appellant of a fair trial, a trial whose result is reliable. Unless a Appellant 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 Appellant [466 U.S. 668, 688] complains of the ineffectiveness of counsel's assistance, the Appellant 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 Michel 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 Appellant entails certain basic duties. Counsel's function is to assist the Appellant, 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 Appellant derive the overarching duty to advocate the Appellant's cause and the more particular duties to consult with the Appellant on important decisions and to keep the Appellant 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 Appellant. 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 Appellant'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 Appellant 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 Appellant 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 Appellant 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 Appellant 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 Appellant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the Appellant and on information supplied by the Appellant. 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 Appellant has said, the need for further investigation may be considerably diminished or eliminated altogether. And when a Appellant 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 Appellant 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 Appellant 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 Appellant 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 Appellant 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 Appellant shows that particular errors of counsel were unreasonable, therefore, the Appellant must show that they actually had an adverse effect on the defense. It is not enough for the Appellant 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 Appellant 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 Appellant 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 Appellant must exclude the possibility of arbitrariness, whimsy, caprice, "nullification," and the like. A Appellant has no entitlement to the luck of a lawless decisionmaker, even if a lawless decision cannot be reviewed. The assessment of prejudice should proceed on the assumption that the decisionmaker is reasonably, conscientiously, and

impartially applying the standards that govern the decision. It should not depend on the idiosyncrasies of the particular decisionmaker, such as unusual propensities toward harshness or leniency. Although these factors may actually have entered into counsel's selection of strategies and, to that limited extent, may thus affect the performance inquiry, they are irrelevant to the prejudice inquiry. Thus, evidence about the actual process of decision, if not part of the record of the proceeding under review, and evidence about, for example, a particular judge's sentencing practices, should not be considered in the prejudice determination. The governing legal standard plays a critical role in defining the question to be asked in assessing the prejudice from counsel's errors. When a Appellant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt. When a Appellant challenges a death sentence such as the one at issue in this case, the question is whether there is a reasonable probability that, absent the errors, the sentencer - including an appellate court, to the extent it independently reweighs the evidence - would have concluded that the balance of aggravating and mitigating circumstances did not warrant death. In making this determination, a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury. Some of the factual findings will have been unaffected by the errors, and factual findings that were affected will have been affected in different ways. Some errors will have had a pervasive effect on the inferences to [466 U.S. 668, 696] be drawn from the evidence, altering the entire evidentiary picture, and some will have had an isolated, trivial effect. Moreover, a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support. Taking the unaffected findings as a given, and taking due account of the effect of the errors on the remaining findings, a court making the prejudice inquiry must ask if the Appellant 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 Appellant 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 Appellant as a result of the alleged deficiencies. The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed. Courts should strive to ensure that ineffectiveness claims not become so burdensome to defense counsel that the entire criminal justice system suffers as a result.

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

Under the standards set forth above in Strickland, and by a demonstration of the record and the facts set forth in support of the claims in this case, it is clear that Clayton Trammell has suffered in violation of his constitutional rights to effective assistance of counsel, in violation of the 6th Amendment to the United States Constitution. This Court should reverse and remand for a new trial on this claim.

ISSUE EIGHT

Whether sentence was excessive where court imposed sentence, which exceeded Appellant's life expectancy, and where jury did not authorize life sentence to be imposed by it's verdict.

As stated above, Clayton Trammell was charged with armed robbery. In an armed robbery conviction the trial court is prohibited from imposing a life sentence where the jury fail to render such sentence in it's verdict. Here the trial court, while attempting on the suffice to show that the sentence was less then life, imposed such a sentence. As a matter of law, and fundamental constitutional requirements, Trammell is entitled to have his sentence remanded to the trial court for a proportionality hearing which Trammell never received before being sentenced to a term of 30 years for armed robbery, without a sentence proportionality analysis.

In Luckett v. State, supra, the court stated:

> A defendant convicted under this statute may not be sentenced to life imprisonment unless the jury fixes the penalty at life imprisonment. In cases where the jury does not fix the penalty at life imprisonment, the judge must sentence the defendant to a definite term reasonably expected to be less than life. Lee v. State, 322 So2d 751 (Miss. 1975);see also Cunningham v.State, 467 So.2d 902 (Miss. 1985). In fixing the sentence, the trial court should make a record of, and consider, the age and life expectancy of the defendant and any other pertinent facts which would aid in fixing a proper sentence.

In Stewart v. State, 372 So.2d 257, 259 (Miss. 1979), a case which was cited by the Luckett decision, this court stated following:

> Defendant contends that the imposition of a 75 year sentence is excessive under the statute, and the sentence amounts to cruel and unusual punishment in violation of the Constitutions of the United States and the State of Mississippi. We reject the argument that the sentence constitutes cruel and unusual punishment in violation of the Constitutions, but hold that the sentence is excessive because it is for a longer period of time than permitted by statute. We have conflicting decisions on the latter question. See Lee v. State, 322 So.2d 751 (Miss.1975), and McAdory v. State, 354 So.2d 263 (Miss.1978). In Lee, the defendant was convicted of forcible rape and sentenced to life imprisonment. We affirm the conviction but remanded for imposition of proper sentence and stated: The appellant next contends the sentence of life imprisonment by the court was beyond the limits of Mississippi Code Annotated section 97-3-65 (Supp.1974). With regard to punishment it states: ". . . upon conviction shall be imprisoned for

> life in the state penitentiary if the jury by its verdict so prescribes; and in cases where the jury fails to fix the penalty at life imprisonment the court shall fix the penalty at imprisonment in the state penitentiary for any term as the court, in its discretion, may determine." With this contention we agree. The jury returned a verdict of guilty. It did not fix the penalty at life imprisonment in the penitentiary thereby, in accord with the statute, leaving the question of sentence within the court's discretion. The issue presented is whether a trial judge under this section may impose a sentence of life when the jury has "failed" to do so. We think not. In Bullock v. Harpole, 233 Miss. 486, 102 So.2d 687 (1958). we had this to say concerning a similar statute: "It can be readily seen, as stated in the Dickerson case, Supra (Dickerson v. State, 202 Miss. 804, 32 So.2d 881), that the statutes place the death sentence within the sole province of the jury, and no such sentence can be imposed by any judge unless he has the authority of the jury therefor." (233 Miss. at 494, 102 So.2d at 690.) The statute before us places the imposition of a life sentence within the sole province of the jury and, in our opinion, no such sentence can be imposed by a judge unless he has the authority from the jury so to do. The statute presupposes, absent a jury recommendation of life imprisonment, that the judge will sentence the defendant to a definite term reasonably expected to be less than life. We therefore affirm and remand for proper sentence.

Here the trial court has imposed a sentence upon Trammell which, as a matter of law, is excessive.

This court should find that the sentence of 30 years imposed upon Trammell, at the age of 31, was an excessive sentence when combined with Trammell's age (total of 61 years) at the time of sentencing exceeded his life expectancy of 50.5 years. The court specifically asked Trammell, "do you understand that on each of your three counts the maximum penalty is life in prison **if set by a jury**, and **anything less than life as set by this Court**, and a $10,000-dollar fine?" And, Trammell answered the court by saying, "yes, sir. Tr. 18. Therefore, Trammell was expecting to receive sentences totaling less than life if sentenced by the court. The said sentence was arbitrary and conspicuous without prior notice, which is a violation of his due process of law rights under the Fifth and Fourteenth Amendment of the U. S. Constitution.

Trammell illegal Judgment should be vacated for resentencing to a term of sentence less than life.

ISSUE NINE

Appellant suffered cumulative error which caused him to be deprived of his constitutional right to a a fair trial violation of the 5th and 14th Amendments to the United States Constitution.

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 Appellant Trammell of his constitutional right 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); Williams v. State, 445 So.2d 798, 814 (Miss. 1984).

In cases similar 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 Appellant. 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 Appellant 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 Appellant, and therefore the more atrocious the crime, the less need is there for any infringement of these safeguards."* Tennison v. State, *79 Miss. 708, 713, 31 So. 421, 422 (1902), cited and quoted with approval in* Johnson v. State, *supra.*

The importance to which the Honorable Mississippi Supreme Court has jealously guarded and accused 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 Appellant 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 the form of our government, Johnson v. State, supra, there shall be no procedural bar to these assignments of error, which collectively denied Appellant Trammell his constitutional fundamental right to a fair trial, being raised for the first time in a post-conviction setting. Gallion, 469 So.2d 1247 (Miss. 1985).

Appellant Trammell did not receive a fair trial in this case when the trial judge order Appellant to be represented by an attorney

This Court should reverse and render this case on the basis that the trial court deprived Appellant of his fundamental right to due process of law and a fair trial in forcing Appellant to proceed to trial with an attorney whom he had previously fired and in forcing Appellant to proceed to trial in cuffs and shackles.

CONCLUSION

For the reasons and authority cited herein, Appellant Trammell submits that his conviction and sentence should be reversed rendered. In the alternative, Appellant Trammell's Conviction and sentence should be reversed to the trial court with instructions that a new trial be granted consistent with the laws of the State of Mississippi. .

Respectfully submitted,

By: Clayton Trammell

Clayton Trammell, #144941
SMCI 2
P. O. Box 1419
Leakesville, MS 39451

CERTIFICATE OF SERVICE

This is to certify that I, Clayton Trammell, have this date served a true and correct copy of the above and foregoing Opening Brief for Appellant, by United States Postal Service, first class postage prepaid, upon:

Honorable Jim Hood
Attorney General
P. O. Box 220
Jackson, MS 39205

Honorable Richard Smith
District Attorney
P. O. Box 648
Vicksburg, MS 39181

Honorable Frank G. Vollor
Circuit Court Judge
P. O. Box 351
Vicksburg, MS 39181

This, the 3rd day of February, 2010.

Respectfully submitted,

By: Clayton Trammell

Clayton Trammell, #144941
SMCI 2
P. O. Box 1419
Leakesville, MS 39451