COURT OF APPEALS OF THE STATE OF MISSISSIPPI

CASE NO. **2009-KP-00842-COA**

LARRY PRESS WELLS
APPELLANT

VS.

STATE OF MISSISSIPPI
APPELLEE

APPEAL FROM THE CIRCUIT COURT OF
HARRISON COUNTY, MISSISSIPPI
FIRST JUDICIAL DISTRICT

APPELLANT'S OPENING BRIEF

ORAL ARGUMENT NOT REQUESTED

BY: Larry Wells

Larry Wells, #82067
10451 Larkin Smith Dr.
Harrison County Jail
Gulfport, MS 39501

Appellant, pro se

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1.

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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CERTIFICATE OF INTERESTED PERSONS

The undersigned Appellant Larry Press Wells, 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 Larry Wells, Appellant pro se
2. Honorable Jim Hood, and staff, Attorney General
3. Honorable Jerry O. Terry, Circuit Court Judge
4. Honorable John Gargiulo, Assistant District Attorney
5. Honorable Cono Carranna, District Attorney
6. Honorable Glen Rishel, Defense Attorney at trial

Respectfully submitted,

BY: Larry Wells

Larry Wells, #82067
10451 Larkin Smith Dr.
Harrison County Jail
Gulfport, MS 39501

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3.

STATEMENT OF THE ISSUES

ISSUE NO. I

WHETHER VERDICT OF JURY WAS AGAINST OVERWHELMING WEIGHT OF EVIDENCE.

ISSUE NO. II

WHETHER THE HABITUAL ENHANCEMENT OF WELLS SENTENCE IS ILLEGAL WHERE THE STATE WAS PERMITTED TO SUCCESSIVELY AMEND THE INDICTMENT TO THE DETRIMENT OF THE DEFENDANT, THEREBY TAKING MORE THEN ONE BITE OF THE APPLE, AND WHERE EVIDENCE OF SECOND AMENDMENT WAS KNOWN AND AVAILABLE TO STATE AT THE TIME OF THE FIRST AMENDMENT. SUCH ERROR CONSTITUTES PLAIN ERROR WHICH EFFECTS THE SENTENCE AND MAY, THUS, BE PRESENTED FOR THE VERY FIRST TIME ON APPEAL.

ISSUE NO. III.

THE SECOND AND SUBSEQUENT DRUG ENHANCEMENT OF WELL'S SENTENCE IS ILLEGAL WHERE THE MOTION TO AMEND INDICTMENT AND SENTENCING ORDER FAIL TO MEET THE REQUIREMENTS OF LAW AND THEREFORE CONSTITUTES A VIOLATION OF DUE PROCESS OF LAW AND PLAIN ERROR AS WELL AS IMPROPERLY ALLOWED THE STATE A SECOND BITE OF THE APPLE IN SEEKING ENHANCEMENT WHEN THE SAME EVIDENCE WAS AVAILABLE AND USED IN THE INITIAL AMENDMENT TO CHARGE HABITUAL STATUS.

ISSUE NO. IV.

WHETHER THE TRIAL COURT ERRED IN ALLOWING THE INDICTMENT TO BE AMENDED.

ISSUE NO. V.

APPELLANT WELLS WAS DENIED HIS CONSTITUTIONAL AND STATUTORILY GUARANTEED RIGHT TO A SPEEDY TRIAL UNDER THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND THE CONSTITUTION OF THE STATE OF MISSISSIPPI.

ISSUE NO. VI.

WELLS SENTENCE OF SIXTY (60) YEARS WITHOUT PAROLE AS A HABITUAL OFFENDER AND AS A SECOND AND SUBSEQUENT DRUG OFFENDER, FOR POSSESSION OF A SMALL AMOUNT OF COCAINE, AND WHERE THE STATE FAILED TO PROVE INTENT, CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT.

ISSUE NO.VII.

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STATES CONSTITUTION AND APPLIED TO THE STATES BY THE 14TH AMENDMENT..

ISSUE NO. VIII.

APPELLANT WAS SUBJECTED TO INEFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL, IN VIOLATION OF THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

ISSUE NO. IX.

APPELLANT SUFFERED CUMULATIVE ERROR WHICH CAUSED HIM TO BE DEPRIVED OF HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL IN VIOLATION OF 5TH AND 14TH AMENDMENT TO THE UNITED STATES CONSTITUTION..

4.

STATEMENT OF INCARCERATION

The Appellant is presently incarcerated and is being housed in the Mississippi Department of Corrections where he is presently temporarily confined to the Harrison County, Mississippi, Jail, 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 of sentence thereof by the trial court.

5.

STATEMENT OF CASE

On October 1, 2007, an indictment was filed in the First Judicial District of Harrison County Circuit Court, Mississippi, charging Appellant with possession of cocaine, a schedule II substance, with intent to transfer. (c. p. 8). Appellant was represented at trial by Glen F. Rishel,

Jr. of Gulfport, Mississippi. Appellant was subsequently convicted and sentenced to a double enhance sentence of 60 years as a habitual offender[1] and second and subsequent drug offender[2]. (c. p 72)

Being aggrieved by the verdict and sentence, Appellant Wells perfected an appeal of the conviction and sentence of the Circuit Court of The First Judicial District of Harrison 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 fourteen (14) separate claims for reversal.

6.

ARGUMENT

ISSUE NO. I.

WHETHER VERDICT OF JURY WAS AGAINST OVERWHELMING WEIGHT OF EVIDENCE.

The verdict of the jury was against the overwhelming weight of the evidence and contrary to law, and the court should have granted Appellant Wells' Motions for directed verdict, or alternative a new trial. Appellant Wells' defense at trial was actual innocence. Appellant Wells

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[1] **99-19-81.** Sentencing of habitual criminals to maximum term of imprisonment.

Every person convicted in this state of a felony who shall have been convicted twice previously of any felony or federal crime upon charges separately brought and arising out of separate incidents at different times and who shall have been sentenced to separate terms of one (1) year or more in any state and/or federal penal institution, whether in this state or elsewhere, shall be sentenced to the maximum term of imprisonment prescribed for such felony, and such sentence shall not be reduced or suspended nor shall such person be eligible for parole or probation.

[2] **41-29-147.** Second and subsequent offenses.

Except as otherwise provided in Section 41-29-142, any person convicted of a second or subsequent offense under this article may be imprisoned for a term up to twice the term otherwise authorized, fined an amount up to twice that otherwise authorized, or both.

For purposes of this section, an offense is considered a second or subsequent offense, if, prior to his conviction of the offense, the offender has at any time been convicted under this article or under any statute of the United States or of any state relating to narcotic drugs, marihuana, depressant, stimulant or hallucinogenic drugs.

moved for a directed verdict at the end of State presentation of evidence and at the close of State case ((Tr. 197). The argument presented in support of the motion provide the following:

MR. RISHEL: Your Honor, as you know since the State has rested, the defense moves for a directed verdict in that a motion for directed verdict tests the legal sufficiency of evidence. The Court must consider all of the evidence in a light most favorable to the State, and the State must be given the benefit of all favorable inferences that may reasonably be drawn from the evidence.

If the facts and inferences so considered point in favor of the defendant of any element of the offense with sufficient force so that reasonable men could not have found beyond a reasonable doubt that the defendant was guilty, then granting the motion is required.

In support of the motion, we would point out first that taking the evidence in the light most favorable to the State and giving them the benefit of any reasonable inferences

that they can draw from the evidence, the crime that my client can be charge with and convicted of is possession of a controlled substance. The State -- and he could also be charged with petty larceny.

It seems to me that my client -- well, first, let's look at the evidence. The fact of the matter is no one saw my client buy any controlled substance from anyone. He was not searched prior to the time that he got into the car with the undercover officer. So there is two reasonable inferences that can be drawn from what occurred after my client got out of the vehicle and went around those bushes: One, he bought some drugs; or two, he took $20 and spent it on something or just hid it somewhere, because he had $40, and he basically just stole $20 from the State of Mississippi and then came back to the vehicle. Now, he -- and he already had the crack cocaine on his person when he came back to the vehicle. Consequently, the only issue

then becomes, well, did he try -- was his intent to sell the -- to convey that or distribute it to officer Guynes.

Well, if that was his intent, he did a lousy job of it, because the man is sitting right there next to him. All he had to do is hand it to him. But he didn't. He put it in a crack pipe and began -- and attempted to smoke it. Now, the State is going to say, well, he's just trying to get this other guy to smoke it so they can smoke it together and then he'll know that this guy is okay and he can complete this deal. Well, complete what? He still had $20 of the State's money of his person. He didn't have -- if he had the cocaine that he put into the pipe, the less than a tenth of a gram, then he didn't have enough money to buy this $40 thing that this officer was trying to buy.

The fact of the matter is, is that the more reasonable inference from all of this evidence is that my client recognized that

this guy was giving him $40; he could use the money for himself, whatever purposes he may have for it. And that if he could somehow get this guy to smoke this dope with him, well, then he would in fact be -- he would in fact be able to get away from this guy and do whatever he needed to do, because they would both be high on cocaine.

But the fact of the matter is, is there is no proof that my client intended to do anything with this cocaine other than smoke it, because that's certainly what he attempted to do before he was stopped.

There's also the fact that the undercover officer mentioned that he kept telling -- asking my client where is mine; where is mine? Referring to his cocaine. Where is mine? My client didn't give him any. Well, if he intended to give it to him, which would be, you know, possession with intent, then he could have simply. The man was right there in the same truck with him.

So I think that the -- if the Court were to consider all of that and give the State the most reasonable inferences that he can draw from this evidence, the result is that the defendant is guilty of possession of cocaine, and that the -- and that he's guilty of taking $20 that belonged to the State of Mississippi, and he attempted to take $40 that belonged to the State of Mississippi. And I think that's the only reasonable conclusion you could reach on this set of facts. Nobody saw my client purchase cocaine. Nobody saw my client with the cocaine in his possession other than Guynes who said that he put it into a crack pipe to smoke it, and that no one -- at no time did he attempt to give this to Mr. Guynes or sell it to anybody. Officer Guynes' testimony is the only testimony that my client did anything wring that day.

`So we would ask Your honor to grant a directed verdict as far as the indictment is

concerned that my client is in possession of a controlled substance with intent to deliver and intent to distribute it.

THE COURT: **Are you saying that the motion should be granted as to the intent to transfer, but guilt -- but let it go to the jury as far as possession is concerned, simple possession? That's what I'm hearing.**

MR. RISHEL: **I understand. I suppose -- Yes, sir. I'm asking for two things: One, that it be a directed verdict because they indicted him for one crime which is possession with intent, which is an entirely separate crime, separate and independent of possession. And that if Your Honor is -- does not think that the evidence would support that but would in fact support a striking the intent, then we would ask Your Honor to do that. But we think we're entitled to a directed verdict because the evidence just simply doesn't rise to the demands of the law as fat as possession wit**

intent is concerned.

THE COURT: **Mr. Smith?**

MR. SMITH: **Yes, Your Honor, I think Mr. Rishel correctly stated the standard for a directed verdict, and I would argue that the evidence in this case clearly meets that burden, and that each of the elements is met of the crime of possession with intent, including the intent portion. The possession part of the indictment is met, as Mr. Rishel stated, by a sworn police officer, Officer Guynes, saying I saw crack cocaine in the defendant's hand and then saw him place it in the crack pipe.**

Where I think we differ on what we heard today was that he said he saw him put it in the pope for Officer Guynes to smoke, and that in itself would be an intent to transfer. And that he, Officer Guynes, testified that when he put it in the pipe, he said you're going to take a hit first before I give you the rest of it.

THE COURT: **All right. All of the**

arguments that have been made her by both counsel are arguments that can certainly be made to the jury. The jury will have to weigh the testimony and apply what credibility to the testimony that they deem appropriate, and also every inference that they wish to draw from the evidence that was produced. Both of you have good arrangements. We'll see how you do as far as convincing the jury that the State has failed to prove their case, a prima facie case, and see how well the State can prove or argue to the jury that guilty has been proven beyond a reasonable doubt. So therefore, the motion will be overruled.

According to the testimony, Larry Wells did have cocaine in his possession but the proof and testimony brings out that Wells had or convoyed no intent to distribute the substance. When Guynes attempted to persuade Wells to do so he refused..

When seeking to prove intent to sell, transfer or deliver, the state must establish more than a mere suspicion of intent. McCray v. State, 486 So.2d 1247, 1251 (Miss. 1986).

The only evidence of Wells intent to distribute cocaine is the word of Officer Guynes who is heard on the audio recording practically begging Wells to give him the cocaine when

Wells was not doing so but had put the cocaine in the pipe to smoke it Officer Guyner was attempting to get Wells to give him the drugs so that he could establish transfer and distributing. Despite Officer Guyner attempts to convince Wells to pass him the pipe, Wells never did. As the trial court stated, Appellant had a good argument. (Tr. 202). A direct verdict on the issue should have been granted. Appellant would assert that the record is not sufficient to support his conviction for possession of cocaine with intent to distribute. Our Supreme Court has consistently held that:

> When reviewing a challenge to the sufficiency of the evidence, (an appellate court) will reverse and render only if the facts and inferences "point in favor of the defendant on any element of the offense with sufficient force that reasonable men could not have found beyond a reasonable doubt that the defendant was guilty. . . ." Brown v. State, 1030 (¶25) (Miss. 2007) (quoting Bush v. State, 843 (¶16) (Miss. 2005). The evidence will be deemed sufficient if "having in mind the beyond a reasonable doubt burden of proof standard, reasonable fair-minded (jurors) n the exercise of impartial judgment might reach different conclusions on every element of the offense ..." Brown, 965 So.2d at 1030 (¶25) (quoting Bush, 895 So.2d at 843 (¶16). The relevant question is whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. "Brown, 965 So.2d at 1030 (quoting Bush, 895 So.2d at 843 (¶16). This Curt considered the evidence in the light most favorable to the State. Bush, 895 So.2d at 843 (¶16). The State receives the benefit of all favorable inferences that may reasonable be drawn from the evidence. Wilson v. State, 363 (Miss. 2006) (citing Hawthorne v. State, 22 (Miss. 2003).

Proof of possession with an intent to distribute or sell should not be based solely upon surmise or suspicion. There must be evidentiary facts which will rationally produce in the minds of jurors a certainty, a conviction beyond reasonable doubt that the defendant did in actual fact intend to distribute or sell the cocaine, not that he might have such intent. It must be evidence in which a reasonable jury can sink its teeth. Miller v. State 634 So.2d 127, 129 (Miss. 1994) (quoting Stringfield v. State, 588 So.2d 438, 440 (Miss. 1991).

In the instance case there was no such evidentiary facts to support proof of intent to distribute. The proof was lacking and the verdict by jury was therefore against the overwhelming weight of the evidence.

This case should be reversed and remanded to the trial court and new trial ordered. In the alternative this court should find that the trial court should have found tat the evidence constituted an offense of possession or petty larceny.

ISSUE NO. II

WHETHER THE HABITUAL ENHANCEMENT OF WELLS SENTENCE IS ILLEGAL WHERE THE STATE WAS PERMITTED TO SUCCESSIVELY AMEND THE INDICTMENT TO THE DETRIMENT OF THE DEFENDANT, THEREBY TAKING MORE THEN ONE BITE OF THE APPLE, AND WHERE EVIDENCE OF SECOND AMENDMENT WAS KNOWN AND AVAILABLE TO STATE AT THE TIME OF THE FIRST AMENDMENT. SUCH ERROR CONSTITUTES PLAIN ERROR WHICH EFFECTS THE SENTENCE AND MAY, THUS, BE PRESENTED FOR THE VERY FIRST TIME ON APPEAL.

Rule 11.03 of the Miss. Unif. Rules of Circuit and County Court practice provides the following:

> Rule 11.03 ENHANCEMENT OF PUNISHMENT
>
> In cases involving enhanced punishment for subsequent offenses under state statutes:
>
> 1. The indictment must include both the principal charge and a charge of previous convictions. The indictment must allege with particularity the nature or description of the offense constituting the previous convictions, the state of federal jurisdiction of any previous conviction, and the date of judgment.
>
> 2. Separate trials shall be held on the principal charge and on the charge of previous convictions. In the trial on the principal charge, the previous convictions will not be mentioned by the state or the court except as provided by the Mississippi Rules of Evidence.

3. If the defendant is convicted or enters a plea of guilty on the principal charge, a hearing before the court without a jury will then be conducted on the previous convictions.

The motion to amend the indictment filed against Appellant provides the following in regards to the habitual offender status:

That he, the said LARRY PRESTON WELLS, is an habitual criminal who is subject to being sentenced as such pursuant to Section 99-19-81, Miss. Code of 1972, as amended, in that he, the said LARRY PRESTON WELLS has been convicted at least twice previously of felonies or federal crimes upon charges separately brought and arising out of separate incidents at different times and has been sentenced to separate terms of imprisonment of one (1) year or more in a state and/or more in a state and/or federal penal institution, to wit:

(1) On may 10, 1993, he, the said LARRY PRESTON WELLS, was convicted n the Circuit Court of Harrison County, Mississippi, in Cause Number 26-654 of the felony of Transfer of a Controlled Substance, and, on May 10, 1993, in said Court, was sentenced to a term of three (3) years in the custody of the Mississippi Department of Corrections; and,

(2) On May 10, 1993, he, the said LARRY PRESTON WELLS, was convicted in the Circuit Court of Harrison County, Mississippi, in Cause Number 27, 445 of the felony of Uttering Forgery, and, on May 10, 1993, in said Court, was sentenced to a term of three (3) years in the custody of the Mississippi Department of Corrections; against the peace and dignity of the State of Mississippi. (R. 10-11)

The Order amending the indictment provides the following:

ORDER AND ADJUDGED that the Indictment in the cause be and it is hereby amended to reflect the habitual status of LARRY PRESTON WELLS as follows:

THAT he, the said LARRY PRESTON WELLS, is an habitual criminal who is subject to being sentenced as such pursuant to Section 99-19-81, Miss. Code of 1972, as amended, in that he, the said LARRY PRESTON WELLS has been convicted at least twice previously of felonies or federal crimes upon charges separately brought and arising out of separate incidents at different times and had been sentenced to separate terms of imprisonment of one (1) year or more in a state and/or federal penal institution, to wit:

(1) On May 10, 1993, he, the said LARRY PRESTON WELLS, was convicted in the Circuit Court of Harrison County, Mississippi, in Cause Number 26, 654 of the felony of Transfer of a Controlled Substance, and, on May 10, 1993, in said Court, was sentenced to a term of three (3) years in the custody of the Mississippi Department of Corrections; and,

(2) On May 10, 1993, he, the said LARRY PRESTON WELLS, was convicted in the Circuit Court of Harrison County, Mississippi, in Cause Number 27, 445 of the felony of Uttering Forgery, and, on May 10, 1993, in said Court, was sentenced to a term of three (3) years in the custody of the Mississippi Department of Corrections; against the peace and dignity of the State of Mississippi. (R. 24-25)

Rule 11.03 is clear that the indictment must allege with particularity the ... state or federal jurisdiction, the motion to amend the indictment and the order allowing the amendment fail to set out the jurisdiction of the prior convictions by failing to set out that such convictions occurred in the First or Second Judicial District of Harrison County, Mississippi. The motion merely states that the convictions occurred in the Circuit Court of Harrison County, Mississippi, in Cause No. 26-654 and Cause No. 27-445. According to Rule 11.03, which is a valid Rule of law, this was not sufficient to meet the requirements of alleging habitual offender status.

In Washington v. State, 478 So.2d 1028, 1031, 1032 (Miss. 1985), the court found, under Rule 6.04, the predecessor of Rule 11.03 that:

> The indictment must include both the principal charge and a charge of previous convictions. The indictment must allege 1032 with particularity the nature or description of the offense constituting the previous felonies, the state and federal jurisdiction of previous conviction, and the date of judgment.
>
> Established case law of this jurisdiction has long established that where prior felony convictions are used to enhance punishment for a subsequent offense, specifictiy concerning the jurisdiction of the prior convictions, the date of the judgment, and the nature and description of the offense must be included in the indictment or affidavit. Lay v. State, 310 So.2d 908 (Miss. 1975); Watson v. State, 291 So.2d 741 (Miss. 1974); Burnett v. State, 285; Ladnier v. State 273 So.2d 169 (Miss. 1973); McGowan v. State 269 So.2d 645 (Miss. 1972); Branning v. State, 224 So.2d 579 (Miss. 1969). 39 Am. Jur.2d Habitual Criminals, etc. § 20 (1968).

The Motion to amend the indictment which the prosecution filed on October 11, 2007 was tantamount to an indictment and was required to meet the same requirements. Where the Motion failed to set forth the proper judicial district of the Harrision County Circuit Court in which the prior convictions occurred in then the jurisdiction prerequisite of Rule 11.03(1) was not satisfied. An element of this rule was not complied with and as a matter of law the habitual portion of the sentence, as well as any other enhancement which was based upon such faulty

jurisdiction, must fail as a matter of law. Rule 11.03 is a valid Rule of law. This rule of law is written in mandatory language and requires that the indictment, in this case the maotion to amend the indictment, "must" allege with particularity... "the state or federal jurisdiction of the previous conviction." This Court should find that the habitual enhancement and the second and drug offender enhancement should be vacated and set aside.

This Court should find that the state's motion failed to meet the requirements of rule 11.03 and therefore fail to allege habitual status requiring the habitual offender "day for day" referred to by the court (R. 72) be vacated and that re-sentencing be directed.

On November 9, 2007, a hearing was conducted in the trial court on the state's motion to amend indictment and charge habitual status. The following proceedings were heard during such hearing.

> **MR. GARGIULO: Your Honor, the state would show that this defendant has been convicted at least twice previously of felonies of charges brought separately arising out of separate incidents at different times.**
>
> **To wit; on May 10, 1993, he was convicted in the Circuit Court of Harrison Counry, Mississippi in Cause Number 26-654 of the felony of transfer of a controlled substance. And on May 10, 1993, in the court of this jurisdiction he was sentenced to a term of three years in the custody of the Mississippi Department of Corrections.**
>
> **In addition on May 10, 1993, the defendant was convicted in the Circuit Court of Harrison County, Mississippi in Cause**

Number 27-445 of the felony of uttering forgery, and on May 10, 1993, he was sentenced to a term of three years in the Department of Corrections.

As such, Your Honor, the state requests that it enter its order, and I will present a form order that I've already showed a copy to the defense amending the indictment to reflect tis defendant's habitual status.

THE COURT: All right. Anything further on the motion, Mr. Gargiulo?

MR. GARGIULO: The state would rest, Your Honor. (Tr. 3-4)

The state failed, even during the hearing on the motion to amend, to specifically allege that the prior convictions were adjudicated in the First Judicial District of Harrison County, Mississippi[3]. Rule 11.03 requires that this be specified and alleged with particularity in order to show jurisdiction in the prior convictions. The trial court cannot read this un-alleged prosecution jurisdictional charge into the case without becoming a part of the prosecution team. This failure by the state to plead jurisdiction constitutes a fatal error and since it is jurisdictional, it should be allowed to be heard for the first time on appeal. This court should reverse the findings on habitual and enhanced status.

[3] Harrison County, Mississippi, consist of the First and Second Judicial District. An offense must be charged in one or the other jurisdictions and the charging instrument must allege this. Otherwise a proper jurisdiction has not been charged.

ISSUE NO. III

THE SECOND AND SUBSEQUENT DRUG ENHANCEMENT OF WELL'S SENTENCE IS ILLEGAL WHERE THE MOTION TO AMEND INDICTMENT AND SENTENCING ORDER FAIL TO MEET THE REQUIREMENTS OF LAW AND THEREFORE CONSTITUTES A VIOLATION OF DUE PROCESS OF LAW AND PLAIN ERROR AS WELL AS IMPROPERLY ALLOWED THE STATE A SECOND BITE OF THE APPLE IN SEEKING ENHANCEMENT WHEN THE SAME EVIDENCE WAS AVAILABLE AND USED IN THE INITIAL AMENDMENT TO CHARGE HABITUAL STATUS.

As previously stated, Rule 11.03 of the Miss. Unif. Rule of Circuit and County Court practice provides the following:

> Rule 11.03 ENHANCEMENT OF PUNISHMENT
>
> In cases involving enhanced punishment for subsequent offenses under state statutes:
>
> 1. The indictment must include both the principal charge and a charge of previous convictions. The indictment must allege with particularity the nature or description of the offense constituting the previous convictions, the state of federal jurisdiction of any previous conviction, and the date of judgment.
>
> 2. Separate trials shall be held on the principal charge and on the charge of previous convictions. In the trial on the principal charge, the previous convictions will not be mentioned by the state or the court except as provided by the Mississippi Rules of Evidence.
>
> 3. If the defendant is convicted or enters a plea of guilty on the principal charge, a hearing before the court without a jury will then be conducted on the previous convictions.

The Motion to amend the indictment to charge Wells as a Second and subsequent drug offender, filed against Appellant on April 24, 2009 provides the following in regards to the alleged second and subsequent drug offender status:

After he, the said LARRY PRESTON WELLS, had previously been convicted on May 10, 1993, of the crime and felony of Transfer of a Controlled Substance, said conviction having been in the Circuit Court of Harrison County, Mississippi, being Cause No. 26, 654, in violation of Section 41-29-147, Miss. Code of 1972, as amended, under which Section other State of Mississippi intends to seek twice the maximum punishment for the crime of Possession of a Controlled Substance with the intent to transfer or distribute, to-wit" cocaine, a Schedule II Controlled Substance, which is sixty (60) years, in the Mississippi Department of Corrections, and against the peace and dignity of the State of Mississippi. (R. 39)

The Court's order allowing the indictment to be amended provides that:

That the Indictment in the above styled and numbered cause is hereby amended to include the following language:

After, he, the said LARRY PRESTON WELLS A.K.A. LARRY PRESS WELLS had previously been convicted on May 10, 1993, of the crime and felony of Transfer of a Controlled Substance, said conviction having been in the Circuit Court of Harrison County, Mississippi, being Cause No. 26, 654, in violation of Section 41-29-147, Miss. Code of 1972, as amended, under which Section the State of Mississippi intends to seek twice the maximum punishment for the crime of Possession of a Controlled Substance with the intent to transfer or distribute, to-wit: Cocaine, a Schedule II Controlled Substance, which is sixty (60) years, in the Mississippi Department of Corrections, and against the peace and dignity of he state of Mississippi. (R. 43-44)

The order of the trial court was filed on April 30, 2009. Neither the Motion to Amend the indictment nor the order allowing such amendment complies with Rule 11.03(1) in that there is

no specific allegation, with particularity of the state or federal jurisdiction as being the First or Second Judicial District of Harrison county, Mississippi. Thus, for the same reasons as the motion being invalid in it's attempt to charge wells as a habitual offender above, this motion was also fatally defective in it's attempt to charge Wells as being a second and subsequent offender.

In imposing the sentence upon Appellant, following the verdict of the jury, the trial court made the following entry:

> **THE COURT: Okay. I have accepted the verdict of the jury and the findings that they made, and that is that you are guilty of the charge of possession of a controlled substance with intent to transfer. Now it's required of me t impose the sentence, and the sentence that I must impose in accordance with the laws of he State of Mississippi are these: That upon the showing that you have been previously convicted of drug activity or drug-related crimes, that the Court must enhance the penalty from that of the specified penalty under the statute, which is 30 years, that it must be enhanced to double the penalty, which means 60 years. And also under the laws of the State of Mississippi, I am required to follow the dictates of the habitual aspect of the laws; that once a person has been convicted of two or more crimes that -- and they have served at least one year on those crimes, that I'm required to sentence you in accordance with that without the benefit of parole of pardon.**
>
> **So based upon the two statutory requirements, I hereby**

sentence you to the custody of the Department of Corrections of the State of Mississippi for a period of 60 years, and that is without the benefit of parole.

The Trial Court never made any finding on the habitual status, nor the status of Wells being a second and subsequent drug offender, before pronouncing the sentence. There was no finding by the Court that Wells had, in fact, been twice convicted and sentenced in the Circuit Court of Harrison County, Mississippi, first or second judicial district. The sentence was not correctly imposed and did not rest upon a valid indictment citing and alleging the appropriate jurisdiction with particularity as the law requires. As a matter of law the indictment, order imposing the sentence, as well as the sentencing proceedings, is not in compliance with Rule 11.03.

The Court has previously held such an error as a failure to comply with Rule 11.03 as being a plain error. Vince v. State, 844 So.2d 510, 516 (Miss. App. 2003); Usry v. State, 378 So.2d 635, 639 (Miss. 1979). The error, being previously being found to be plain error may be raised for the first time on appeal.

Appellant would assert that the requirements of the rule to charge enhancement as a second and subsequent drug offender is the same as those requirements to charge habitual offender status. In each instance, Rule 11.03(1) requires that jurisdiction be properly alleged with particularity. See: Ard v. State, 403 So.2d 875, 876 (Miss. 1981).

During the hearing conducted by the trial court in regards to the motion to amend the indictment to habitual status, the trial court indicted the state would not be permitted to bring up any other convictions other then those which were being used at that time. (Tr. pp. 11) Appellant

would assert here that this entry and finding by the trial court should have closed the door to the state attempting the bring any further amendments to the indictment as the indictment regard punishment. At that time the state was free to make both amendments at the same time but failed to do so. The state waited from November 9, 2007, to April 30, 2009, before filing the second motion to amendment the indictment as a second and subsequent drug offender. Considering the information which the trial court advised Appellant on November 9, 2007, this Court should find that the second amendment was estopped by the state's failure to seek it from the beginning or at the same time.

This Court should find that the motion filed by the State seeking to amend the indictment as a second and subsequent drug offender was improper in it's attempt to cite jurisdiction as well as it's tardiness where the information was available, and actually used, during the initial amendment on November 9, 2007. The second amendment by the state constitutes a second bite of the apple which the state was not entitled to. The enhanced sentence from 30 to 60 years based upon such amendment should be vacated and re-sentencing ordered.

ISSUE NO. IV:

WHETHER THE TRIAL COURT ERRED IN ALLOWING THE INDICTMENT TO BE AMENDED.

The trial court allowed the state to amend the indictment on two different occasions. The State first moved to amend the indictment on October 11, 2007. (c. p. 11) That motion was granted on November 19, 2007 to charge Appellant as a habitual offender. (c. p. 24).

The State next filed to amend the indictment on April 2, 2009 to charge Appellant as a second and subsequent drug offender. The trial court allowed the 41-29-147 amendment by

order signed April 29, 2009 and filed April 30, 2009. (c.p. 43-44). Both these amendments were to the detriment of the defendant. In other words, Wells were prejudiced by each such amendment. The driving force in this argument is that the prosecution was fully aware of the evidence in the second amendment at the time the state launched the first amendment and could have filed to amend in both instances at the same time rather then waiting years in between. It is not like this evidence for the second amendment of the indictment was something which intervened. That wasn't the case. Can the state just keep on knitting and picking by amending the it gets the notion to apply a little more pressure. Rule 7.09 clearly do not permit the state this luxury and he trial court was incorrect in allowing the legal lynching to continue. It the state can do this then the bottom line would be that Rule 7.09 gives the state unleashed amendments to amend and amend and amend as many times as desired and over a longer period as desired to inflict maximum torture upon the defendant.

Appellant would assert that the trial court erred in allowing the state to amend the indictment on two separate occasions to seek additional punishments. The state should have sought both amendments at the same time. The second amendment was prejudicial to Appellant and should have been stopped by the initial amendment which never sought a 41-29-147 amendment. It have been held that a party should have only one bit of the apple proceedings in presenting issues. Lewis v. State, 797 So.2d 248, 249 (Miss. App. 2001). The state was afforded multiple and successive opportunities to amend the indictment on every occasion it gets a notion so as to prejudice the defendant. A prosecution should not be afforded successive and repeated opportunities to amend the indictment to prejudice the defendant on punishment.

Rule 7.09 of the Miss. Uniform Rules of Circuit and County Court Practice provides that:

AMENDMENT OF INDICTMENT

> All indictments may be amended as t form but not as to the substance of the offense charged. Indictments may also be amended to charge the defendant as an habitual offender or to elevate the level of he offense where the offense is one which is subject to enhanced punishment for subsequent offenses and the amendment is to assert prior offenses justifying such enhancement (e. g., driving under the influence, Miss. Code Ann. §63-11-30). Amendment shall be allowed only if the defendant is afforded a fair opportunity to present a defense and is not unfairly surprised.

This rule refer to amendment. It do not provide for amendments, as referring to more than one. Smith v. State, 434 So.2d 212, 220 (Miss. 1983); Graves v State, 708 So.2d 858 (Miss 1997). The state should not have been given a second chance to amend the indictment where the second amendment reasons were well known t the state when the initial motion was made. Debussi v. State, 453 so2d 1030, 1034 (Miss. 1984).

This court should find that the second amendment of the indictment was an abuse of discretion. Moreover, this claim constitutes plain error which Appellant should be allowed to raise for the first time on appeal where it involves an error of sentencing.

ISSUE NO. V.

APPELLANT WELLS WAS DENIED HIS CONSTITUTIONAL AND STATUTORILY GUARANTEED RIGHT TO A SPEEDY TRIAL UNDER THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND THE CONSTITUTION OF THE STATE OF MISSISSIPPI.

Appellant Wells was arrested on May 24, 2007 for possession of cocaine with intent to distribute. Appellant Wells was indicted by the Harrison County First Judicial grand jury on October 1, 2007. (C.P. 8) Appellant Wells filed motion for speedy trial on October 25, 2007.

(C.P. 17-22) Appellant Wells trial began April 29, 2009 (one year, eleven months, and five days after his arrest).

For the ease of this Honorable Court's analysis of the argument, in the case *sub judice,* the applicable time line went as follows:

SPEEDY TRIAL TIME LINE

Event	Date	Time Elapsed
Arrest (C.P. 5)	May 24, 2007	0 days
Indictment (C.P. 8)	October 1, 2007	128 days
Motion for Fast and Speedy trial or to Dismiss Charges for Failure to Provide a Fast and Speedy Trial (C.P. 19-23,RE. 22-26).	October 25, 2007	149 days
Waiver of Arraignment (C.P. 23)	November 5, 2007	162 days
Continuance by Prosecution (C.P. 26)	February 18, 2008	300 days
-Court's order apparently reset case for	May 12, 2008	

Continuance by defense (C.P. 29)	May 12, 2008	385 days
- Court's order apparently reset case for	October 6, 2008	
Continuance by the defense (C.P. 33)	January 29, 2009	498 days
Defense waived speedy trial right from this point.....	**January 29, 2009**	
-Court's order apparently reset case for	March 23, 2009	
Continuance by the defense (C.P. 36)	March 25, 2009	552 days
-Court's order apparently reset case for	April 28, 2009	
Trial commenced	April 29, 2009	586 days

The Sixth Amendment of the United States Constitution guarantees the right to a speedy trial, which is a fundamental right. ***State v. Woodall***, 801 So. 2d 679, 681 (Miss. 2001). Unlike the statutory right provided to a criminal defendant via the Statutes of the State of Mississippi, a defendant's constitutional right to a speedy trial arises when an indictment or information is returned against him, or when "actual restraint [are] imposed by arrest and holding to a criminal chat e." ***Bailey v. State***, 463 So. 2d 1059, 1062 (Miss. 1985); *See also* ***U.S. v. Marion***, 404 U.S. 307 (1971). The Mississippi Supreme Court has held that the placing of a detainer against an individual "suffices to make him an accused." ***Perry v. State***, 419 So. 2d 194, 198 (Miss. 1982).

In ***Barker v. Wingo***, the United States Supreme Court established the test for judging the merits of speedy trial claims. ***Barker v. Wingo***, 407 U.S. 514 (1972). There, the United States Supreme Court declined to it a bright line rule, but instead adopted a four-factor balancing test "in which the conduce of both the prosecution and the defendant are weighed." *Id.* at 529. The four factors are: (i) length of the delay, (ii) the reason for the delay, (iii) the defendant's assertion of his right, and (iv) prejudice to the defendant. *Id.* at 530.

B. Length of the Delay

Any delay of over eight months is presumptively prejudicial and triggers the balancing of the other three ***Barker*** factors. ***Woodall,*** 801 So. 2d at 682. The lodging of a detainer against a person otherwise in custody suffices to make the prisoner an accused. ***Bailey,*** 463 So. 2d at 1062. An indictment was returned against Well on October 1, 2007, which was one hundred and eighty-six (186) days from the date Wells were charged and arrested. Wells waived arraignment on November 5, 2007 Therefore, a balance of the other three factors of the ***Barker*** to should be conducted.

C. Reason for the Delay

Under the ***Barker*** test, "'different weights' are to be 'assigned to different reasons' for delay" ***Doggett v. United States,*** 505 U.S. 647, 657 (1992)(quoting ***Barker,*** 407 U.S. at 531). The trial court granted three continuances. One for the prosecution. The first continuance was requested by the prosecution on February 18, 2008. The second continuance was requested by the defendant. The third and final continuance was ordered by the court on March 25, 2009, due to the fact that defendant had been hospitalized

Official negligence and court congestion are "more neutral" reasons that weigh "less heavily," but are nevertheless counted against the government in tennis of balancing. ***Barker,*** 407 U.S. at 531.

This factor weighs in favor of Wells.

D. The Defendant's Assertion of his Right

The duty to bring a defendant to trial always rests with the State. ***Stevens v. State,*** 808 So. 2d 908, 917 (Miss. 2002); ***Sharp v. State,*** 786 So, 2d 372, 381 (Miss. 2001). While the State bears the burden to bring the defendant to trial, the defendant has some responsibility to assert the

speedy trial right. ***Wiley v. State,*** 582 So. 2d 1008, 1012 (Miss. 1991). Appellant Wells asserted his speedy trial right by the filing of the motion for speedy trial on October 25, 2007. This factor should weight in favor of Appellant. Therefore, this Honorable Court should grant appellant the proper remedy for the violation of his constitutional rights.

E. Prejudice

There are three interests that an individual's speedy trial rights are intended to protect: "(i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired." *See* ***Jenkins v. State,*** 607 So. 2d 117 (Miss. 1992).

In ***Doggett,*** the United States Supreme Court concluded that "the speedy trial inquiry must weigh the effect of delay on the accused's defense just as it has to weigh any other form of prejudice." ***Doggett,*** 505 U.S. at 655. The ***Doggett*** Court further concluded that "affirmative proof of particularized prejudice is not essential to every speedy trial claim." *Id.* at 655. Excessive delay may compromise the trial in ways that neither side can prove, so that the longer the delay becomes, the prejudice it may cause, even without proof, should take an increasing role in the mix of relevant factors. *Id.* at 656.

In the case *sub judice,* Well's defense against the second and suibsequent drug offender enhancement was exceedingly disadvantaged by the delay in bringing him to trial. Because of the delay, the state was allowed time to bring the second amendment to the indictment which enhanced Wells sentence from 30 to 60 years. If the trial had not been delayed far past the required time then Wells would never have been subjected to the second

and subsequent drug offender amendment to the indictment. The state made this amendment days before the actual trial and long after the speedy trial clock had ran.

F. Conclusion

Upon a balancing of the ***Barker*** factors, this Honorable Court should conclude that the Appellant was denied his constitutionally-mandated right to a speedy trial. All four factors weigh in favor of the Appellant; therefore, this Honorable Court should grant appellant the proper remedy for the violation of his constitutional rights.

It is widely established that the sole remedy for a Sixth Amendment speedy trial violation is the dismissal of the charges with prejudice. ***Bailey,*** 463 So. 2d at 1064. *See also* ***Ross v. State,*** 605 So. 2d 17 (Miss. 1992); ***Strunk v. United States,*** 412 U.S. 434 (1973). Because of this, appellant asks this Honorable Court to reverse appellant's conviction and release him from the custody of the Mississippi Department of Corrections. In the instant case, the trial judge, more than once, refused or failed to properly consider the speedy trial arguments of the Appellant. Moreover, for the delays, the state has provided no good faith explanation and, therefore, cannot any its burden.

The State's failure to bring the Appellant to trial within the appropriate time, and, additionally, provide good faith explanations as to why it failed to bring the Appellant on for trial after the filing of the motion for speedy trial clearly weighs against the State. For the violation of the Appellant's statutory right to a speedy trial, the judgment of the trial court should be reversed and a judgment of dismissal rendered.

ISSUE NO. VI.

WELLS SENTENCE OF SIXTY (60) YEARS WITHOUT PAROLE AS A HABITUAL OFFENDER AND AS A SECOND AND SUBSEQUENT DRUG OFFENDER, FOR POSSESSION OF A SMALL AMOUNT OF COCAINE, AND WHERE THE STATE FAILED TO PROVE INTENT, CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT.

Larry Wells asserts that a sentence of sixty (60) years without parole is unduly harsh and constitutes cruel and unusual punishment. As alleged in the first motion to amend the indictment, the prosecution submitted evidence that Larry Wells had two prior felonies, both being from 1993 for transfer of a controlled substance and uttering forgery and had been sentenced to previous terms of three (3) years in the custody of the Mississippi Department of Corrections in regards to each. (C.P. 11-12) Furthennore the prosecution alleged the very same charge of transfer of a controlled substance in his second amendment to the indictment.

Appellant asserts that a sixty (60) year sentence without parole for possessing essentially a small amount of cocain for his very own use[4] is unconstitutionally severe and clearly disproportionate to the offense. U.S. Const. Eighth and Fourteenth Amendments, Miss. Const. Art. 3 § 28.

The United States Supreme Court in ***Solem v. Helm,*** 463 U.S. 277, 292 (1983), set out three factors for courts to consider when conducting a proportionality analysis. The criteria are:

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[4] As previously pointed out, the state failed to prove intent. Wells never passed the substance to the police and the testimony of the police was manufactured without any evidentiary support in order to implicate Wells in an intent to distribute.

(1) the gravity of the offense and the harshness of the penalty;

(2) the sentences imposed on other criminals in the same jurisdiction; and

(3) the sentences imposed for commission of the same crime in other jurisdictions.

In *Solem*, the Court held a life sentence without parole to be unconstitutional for the crime of writing a $100 bad check on a nonexistent bank account, even though the defendant had been convicted of six prior felonies including three for burglary. *Id.*

The Mississippi Supreme Court has consistently applied ***Solem*** in reviewing the imposition of habitual sentences. The case of ***Clowers v. State,*** 522 So.2d 762, 764 (Miss.1988), is a good example. In ***Clowers,*** the defendant was an habitual offender with a new conviction of forging a $250 check. As an habitual offender, Clowers was subject to the mandatory maximum sentence of fifteen years without parole. *Id.* The trial court imposed a sentence of less than fifteen years on the grounds that the mandatory maximum sentence would be disproportionate to the crime. *Id.*

The ***Clowers*** court affirmed the trial court, acknowledging that "a criminal sentence [even though habitual] must not be disproportionate to the crime for which the defendant is being sentenced." *Id.* at 765. Also, even though a trial judge may lack the usual discretion in sentencing an habitual offender, it "does not necessarily mean the prescribed sentence meets federal constitutional proportionality requirements." *Id.* See also ***Hoops v. State,*** 681 So.2d 521, 538 (Miss. 1996).

In ***Oby v. State,*** 827 So.2d 731 (Miss.App. 2002), where a violent habitual drug dealer's life sentence was affirmed as being proportionate, the Court reiterated the important

point that in a ***Solem*** review, a "correct proportionality analysis for a habitual offender sentence does not consider the present offense alone, but within the habitual offender statute." In other words, a reviewing court, and the trial court, should review an offender's past offenses together with the present offense.

In ***McGruder v. Puckett,*** 954 F.2d 313, 317 (5th Cir. 1992), the court recognized the ***Solem*** three-part test be applied "when a threshold comparison of the crime committed to the sentence imposed leads to an inference of gross disproportionality." The violent habitual defendant in ***McGruder*** was sentenced to life imprisonment after his last offense of auto burglary. McGruder's prior convictions were armed robbery, burglary, escape, and auto burglary, and the Fifth Circuit held that McGruder's life sentence was not grossly disproportionate to his current offense. The ***McGruder*** court made it clear that an habitual sentence analysis is based on the sentence rendered in response to the severity of the current offense taking the prior offenses into consideration secondarily.

Well's criminal record, as evidenced by what is included in the record, was not nearly as bad as McGruder's. Well's prior offenses were sale of marihuana and possession of methamphetamine and possession of methamphetamine precursors.

In ***Rummel v. Estelle,*** 445 U.S. 263, 267 (1980), the defendant had two prior felonies of credit card fraud and uttering a forgery, and was convicted of a third felony of false pretenses. Rummel was sentenced to life in prison, a mandatory recidivist sentence for non-violent offenders. The Court held that Rummel's sentence was not unconstitutionally

disproportionate to the offense "even though the total loss from the three felonies was less than $250," in part because he was eligible for parole after twelve (12) years. Larry Wells has no hope for parole, due to being sentenced as an habitual offender and a second and subsequent drug offender.

In ***Bell v. State,*** 769 So.2d 247, (1[8-16) (Miss. App. 2000), a drug dealer was tried and sentenced as a non-violent habitual offender. The trial judge reviewed Bell's prior convictions and afforded Bell the opportunity to present mitigating evidence. According to the court in *Bell,* the trial judge is required to justify, on the record, any sentence that appears harsh or severe for the charge. Citing ***Davis v. State,*** 724 So. 2d 342(¶10) (Miss. 1998), the *Bell* Court recognized that, Thin essence, the Mississippi Supreme Court set forth a requirement that the trial judge justify any sentence that appears harsh or severe for the charge." *Bell,* 769 So. 2d at 1115.

The previous convictions of Bell were acknowledged by the trial judge at the sentencing hearing prior to Bell receiving his habitual sentence. The *Bell* court "considered the gravity of the offense with the harshness of the sentence before imposing the thirty year sentence" which was a proper use of "the broad discretionary authority granted to it." Bell's sentence was not seen as disproportionate, so no further review under ***Solemn*** was conducted. *Id.* at 1116.

In the present case, Larry Wells was convicted of possession of a small amount of cocaine where the only credible evidence demonstrates that Wells was using the cocaine for

himself. . Yet, without commenting on the apparent harshness of the sentence, the court sentenced Larry Wells, in accordance with Miss. Code Ann. §99-19-81 and Miss. Code Ann. §41-29-147, to sixty (60) years mandatory imprisonment, without the possibility of parole, which is a sentence tantamount to a sentence of life imprisonment.

Applying the ***Solem*** test here, it is clear that the gravity of possession such a small amount of cocaine is petty. A ***Solem*** analysis leads to the legally sound conclusion that Wells sentence is patently unconstitutionally disproportionate to his offense and should be vacated. If the Court does not reverse the conviction altogether, at a minimum, Wells case should be remanded for resentencing, with him present, to include a proportionality hearing is required by ***Bell,*** *supra.*

ISSUE NO. VII.

THE TRIAL COURT ERRED IN DENYING WELLS MOTION TO SUPPRESS EVIDENCE WHICH WAS ILLEGALLY OBTAINED Y THE STATE WHEN THE TRIAL COURT DENIED THE APPELLANT HIS RIGHT NOT TO INCRIMINATE HIMSELF AS GUARANTEED BY THE 5TH AMENDMENT TO THE UNITED STATES CONSTITUTION AND APPLIED TO THE STATES BY THE 14TH AMENDMENT.

Defense counsel moved to suppress evidence in the form of a tape recording which was taken during the alleged crime. The trial court overruled the motion while finding that the tape had no incriminating evidence. The tape was taken after the Wells was under arrest and after Wells had told the police that he had cocaine but refused to give the police any when the police asked "where is mine." The defense argued that an arrest should have been made at the very time the police indicated he believed Wells had cocaine. At that point the police was of the belief that a crime was being committed and he had a duty to make an arrest. (Tr. 105-107) The state

introduced the tape as evidence but failed to reduce such tape to a transcript before asking the court to admit it into evidence. (Tr. 109) A transcript of the tape recording should have been made for the purpose of the trial court record as well as for review of the tape by this Court on appeal. Absent a transcript then the trial court should not have admitted the tape into evidence. The motion to suppress should have been granted.

The denial of motion to suppress evidence in this case, where the state failed to introduce a transcript of the evidentiary tape in which it sought to proceed with, violated Appellant's rights of U.S.C.A.4 & Miss. Const. Art. 3 & 23. This constitutes reversible error and sentence and conviction should be reversed and remanded to the trial court for a new trial. The state urged the trial court should reject the argument on the tape not being transcribed because the defendant was free to secure a transcript. (Tr. 109-110) The problem with this argument is that the state sought to introduce the tape into evidence, not the defense. It was the state's duty to make a full five minute transcript of the tape if it had any intentions of making it a part of the evidence. Not having a transcript of tape which, as the trial court recognized, could hardly be understood as to who was talking, only confused the jury. This Court should find that the tape should not have been introduced without a transcript.

This is reversible error because admittance of out-of-court statement and denial of impeaching information violated Appellant rights of U.S.C.A.5 confrontation clause, and conviction and sentence shall be vacated, and a new trial shall be granted.

ISSUE NO. VIII.

APPELLANT WAS SUBJECTED TO INEFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL, IN VIOLATION OF THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The claim of ineffective assistance of counsel requires that 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 assert the numerous defects in the indictment and procedures in which the state employed to enhance Appellant's sentence not once but twice. Counsel never presented to the trial court that the prosecution should have been estopped from seeking two separate enhancement, far apart in the proceedings, by use of the same underlying evidence which was readily available at the time of the initial motion to amend the indictment. Such repeated actions should have been subject to the prohibition of a second bite of the apple. Counsel for the defense never pursued this claim when it would have been a successful claim in view of the fact that the state knew about the additional grounds for the second amendment to the indictment at the first amendment was sought Had counsel asserted this right through the filing of a timely and proper motion in the trial court then this case would not have resulted in a double enhancement. Counsel never objected to the defectives of the motions to amend on the basis that the state failed to allege a proper jurisdiction by demonstrating the actual judicial district in Harrison County, Mississippi, in which the prior convictions were rendered. Counsel was ineffective in failing to bring this issue out in the trial court so that, if

denied, it would have been a claim which could have been confronted directly in this Court on appeal rather then being challenged secondary. Larry Wells 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.

It is clear that Appellant Wells was prejudiced by his attorney's failure to raise these issues in the trial court below.

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).

During the actual trial in this case defense counsel never objected to amendment to the indictment's allegations and the incompleteness of the jurisdictional statement contained in the attempt to charge the prior convictions. The defense attorney advised the trial court judge that he should find no basis to make an objection. Yet there was clear basis to object when the prior convictions supporting the habitual status as well as the prior conviction alleging to support the second and subsequent drug offense charges never alleged the judicial district in which the prior convictions were rendered according to law this was fatal error which would have invalidated the state's attempts. Yet defense counsel never seen this. Clearly this amounted to ineffective assistance of counsel which satisfied the two prong test in Strickland v. Washington, 466 U.S. 668, 689, 104 S.Ct. 2052, 2065, 80 L.Ed. 2d 674 (1984).

Counsel performance was so defective it caused 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 Wells respectfully ask this court to review the facts of this case with the decisions rendered in Naylor, Jones, Powell, Berry, and Nathanson, and reverse on this issue where it is crystal clear that defense counsel was ineffective.

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, Larry Wells' defense counsel failed in his duties to adequately represent Wells during the trial. The only way that court would be able to find that defense counsel was not ineffective would be to find that the failure of a state to allege jurisdiction.

When the law clearly request it, do not matter. To find this would be to find that the state can do anything it desire. 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 Larry Wells 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 NO. VIII.

APPELLANT SUFFERED CUMULATIVE ERROR WHICH CAUSED HIM TO BE DEPRIVED OF HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL IN VIOLATION OF 5TH AND 14TH AMENDMENT 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 Wells 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 Wells 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 Wells did not receive a fair trial in this case when the trial judge effectively advised Wells that he had no choice but to impose a mandatory habitual sentence when the prior convictions actually were not alleged validly, in accord with the requirements of law, and should not have been used under the allegations of the facts contained therein and the missing language of jurisdiction. Wells had a legal right to a valid set of allegations of the prior charges which correctly describe all of the legal jurisdictions. The state cannot fail in it's duty to follow the rules requiring a proper statement and allegation of the alleged prior conviction and the court ignore this failure. If the state makes a mistake, as made here, it should close the door to enhanced punishment and operate as a waiver of such attempt. If the defendant fail to plead a claim or make an objection then the full impact of the waiver rule would apply. It should be no different with the State.

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 Wells submits that his conviction and sentence should be reversed rendered. In the alternative, Appellant Wells' 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,

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CERTIFICATE OF SERVICE

This is to certify that I, Larry Wells, 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:

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This, the 4 day of January, 2010

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