IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2010-CP-00327-COA

DERRICK MITCHELL — APPELLANT

VS.

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR APPELLANT

BY: Derrick Mitchell

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P. O. Box 1419
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ORAL ARGUMENT NOT REQUESTED

PRO SE PRISONER BRIEF

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CERTIFICATE OF INTERESTED PERSONS

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

1. Derrick Mitchell, Appellant
2. Honorable Jim Hood, and staff, Attorney General.
3. Honorable Andrew K. Haworth., Circuit Court Judge.
4. Honorable Ben Creekmore, District Attorney

Respectfully Submitted,

BY: _____

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IN THE COURT OF APPEALS OF THESTATE OF MISSISSIPPI

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DERRICK MITCHELL APPELLANT

VS.

STATE OF MISSISSIPPI APPELLEE

STATEMENT OF ISSUES

ISSUE ONE

The trial court erred in failing to find that the Habitual offender motion charging Mitchell as a habitual offender under Miss. Code Ann. 99-19-83, as well as the order which allowed the indictment to be amended, was defective and void where the order fail to allege or charge, and the state failed to introduce proof of, the element of the dates of the sentencing and judgment in the prior convictions. The motion and order also fail to allege the court in which such prior conviction imposed.

ISSUE TWO

The trial court erred in failing to find that Mitchell was subjected to ineffective assistance of counsel, at the time of the plea of guilty and during sentencing proceedings in the court, when his attorney allowed the motion to amend the indictment to be filed and allowing the court to enter an order approving such motion legal requirements of setting out the date of sentencing in each prior conviction, in violation of his 6th Amendment rights to the United States Constitution and the Constitution of the State of Mississippi.

STATEMENT OF FACTS

Appellant, Derrick Mitchell, was indicted by Lafayette County, Mississippi, February 10, 2006, charging that Mitchell did unlawfully, willfully and feloniously, knowingly and intentionally possess a controlled substance which was cocaine with the intent to transfer.

The prosecution, after the indictment was filed and on January 3, 2007, moved for an amendment to the indictment to charge habitual offender status under Miss. Code Ann. Sec. 9-19-83.

The motion filed by the prosecution was served upon Mitchell's defense attorney, Honorable Ken Coghlan, Esq. on January 3, 2007.

The motion to amend the indictment did not specify or name the date of the sentencing in the prior convictions, the date of the convictions, the jurisdiction or court in which the prior convictions were had. The motion did not meet the statutorily required elements or the requirements of the rules of law and judicial decisions regarding charges under the habitual status.

The trial court filed an order on January 8, 2007, which merely tracked the language of the state's motion to amend as a carbon copy and never mentioned any requirements of law just as the state's motion.

Defense counsel never challenged the motion nor the order but advised Mitchell to plead guilty and accept 10 years as a habitual offender..

Petitioner Mitchell was subsequently sentenced by the Judge, as a habitual. The Court never indicated which habitual statute in which it was applying.

Mitchell was never made aware at any time that the state had not met the requirements of law. All legal documents in the case was presented to counsel and counsel never shared such information with Mitchell in any way, shape, form,, or fashion. Mitchell was completely at the mercy of his attorney during the proceedings.

ARGUMENT

ISSUE ONE

THE TRIAL COURT ERRED IN FAILING TO FIND THAT MITCHELL WAS DENIED DUE PROCESS OF LAW AND SUBJECTED TO PLAIN ERROR IN SENTENCING WHERE THE AMENDMENT TO THE INDICTMENT WAS DEFECTIVE AND FAILED TO MEET STATUTORY AND CONSTITUTIONAL REQUIREMENTS ON SETTING OUT REQUIRED INFORMATION AS TO DATE OF JUDGMENT IN PRIOR CONVICTIONS.

The motion to amend the indictment and charge Mitchell as a habitual offender provided the following:

The defendant Derrick Mitchell is indicted in this case for the crime of sale of cocaine. The defendant was previously convicted in this court of two separate and distinct felonies which arose at different times, which are otherwise wholly unrelated, one to the other, and which were separately prosecuted. In cause number LK98-265B the defendant was convicted of the felony crime of possession of cocaine with intent to distribute and was sentenced to serve a term of three years incarceration in the custody of the Mississippi Department of Corrections. In cause number

LK98-265B the defendant served more than one year in prison. In cause number LK98-33 ID the defendant was convicted of the felony crime of sexual battery and was sentenced to serve a term of three years incarceration in the custody of the Mississippi Department of Corrections. **In** cause number LK98-331D the defendant served more than one year in prison. The crime of sexual battery is a violent crime within the meaning of §99-19-83. Because of the convictions and sentences listed above, the defendant Derrick Mitchell is a habitual offender under §99-19-83, and the only lawful sentence in this cause in the event of his conviction is life in the penitentiary without the possibility early release, probation or parole.

The State prays that the indictment will be amended to allege that the defendant Derrick Mitchell is a habitual offender under §99- 19-83 and is required to be sentenced to life in the penitentiary without the possibility early release, probation, or parole.

The habitual amendment motion filed against Mitchell on January 3, 2007, by the State of Mississippi clearly failed to meet the requirements of law and created plain error in it's attempt to charge Mitchell as a habitual offender. The motion never mentioned nor set out the dates of sentencing or dates of judgment in each of the prior convictions and the Court or jurisdiction in which such alleged prior convictions had occurred. Reading the motion it is clear that charges made in the motion to amend fail to allege any date of the previous sentences which the state sought to use against Mitchell to forfeit the remainder of Mitchell's earthly life. This cannot be disputed.

On January 8, 2007, the trial court, as a routine procedure, filed it's Order to Amend the Indictment to Allege Defendant is a Habitual Offender subject to mandatory sentence of life without parole. The Court's Order was as follows:

The defendant Derrick Mitchell is indicted in this case for the crime of sale of cocaine. The defendant was previously convicted in this court of two

separate and distinct felonies which arose at different times, which are otherwise wholly unrelated, one to the other, and which were separately prosecuted. In cause number LK98-265B the defendant was convicted of the felony crime of possession of cocaine with intent to distribute and was sentenced to serve a term of three years incarceration in the custody of the Mississippi Department of Corrections. In cause number LK98-265B the defendant served more than one year in prison. In cause number LK98- 331D the defendant was convicted of the felony crime of sexual battery and was sentenced to serve a term of three years incarceration in the custody of the Mississippi Department of Corrections. In cause number LK98-33 ID the defendant served more than one year in prison. The crime of sexual battery is a violent crime within the meaning of §99-19-83.

Because of the convictions and sentences listed above, the indictment is amended to allege that the defendant Derrick Mitchell is a habitual offender under §99-19-83, and the only lawful sentence in this cause in the event of his conviction is life in the penitentiary without the possibility early release, probation, or parole.

Except for the amendment to the indictment to allege that the defendant is a habitual offender, the allegations of the indictment as originally filed remain unchanged.

The trial court, in the Order regarding amending the indictment, never mentioned the date of the alleged convictions, date of sentencing, nor the Court and Jurisdiction of the prior convictions. Said actions clearly amounted to plain error and could not be waived by the plea of guilty which Mitchell subsequently entered to the habitual charge. Mitchell's conviction on the principle charge may stand but the

attempt to amend the indictment, along with the Order which purposely amended the indictment, is constitutionally and statutorily faulty.

The law on this issue dictates that the state dropped the ball by failing to allege and prove the date in which each of the prior convictions occurred, the date of sentencing, the Court in which the prior convictions occurred in. Ard v. State, 403 So.2d 875, 876 (Miss. 1981).

> In Ard the Supreme Court held that:
>
> > It is readily seen that the indictment does not meet the requirements of the statute as interpreted in Usry in that it does not state the court in which he was convicted, the date of the judgment, the nature or the description of the offense for which he was convicted, nor that he was sentenced to serve "one (1) year or more in any state and/or federal penal institution, whether in this state or elsewhere...."
>
> Ard v. State, 403 So.2d 875, 876 (Miss. 1981).

In Watson v. State, 921 So.2d 741, 743 (Miss. 1974) the Court held that the indictment must substantially set forth the date of judgment of the prior judgment and the nature and description of the offense constituting the previous convictions. Also see Benson v. State, 551 So.2d 188 (Miss. 1989).

In addition to case law, Appellant would point out that Rule 6.04, Miss. Unif. Crim. R. Cir. Court Pra. provides the following relevant:

> In cases involving enhanced punishment for subsequent offenses under state statutes, including but not limited to, the Habitual Criminal Statute, Miss. Code Ann Sections 99-19-81 and 99-19-83 and the uniform Controlled Substances Law, Miss. Code Ann. Section 41-29-147:

> (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 offenses constituting the previous conviction, and the date of judgment.[1]

Rule 6.04 has the force and effect of a statute where it is a rule of law adopted by the Miss. Supreme Court.

This Court should find that the motion to amend the indictment and the Order purporting to amend the indictment which is attached hereto and contained in the record was defected instruments on the subject of the habitual offender status where the instrument failed to comply with the requirements of law as set forth under rule 6.04 of the Miss. Unif. Rules of County and Cir. Court practice. Moreover, if the motion and order was defective, which there were according to law, then the enhancement of the sentence on the basis of this defective motionnand order should be voided. Mitchell v. State, 561 So.2d 1037, 1039 (Miss. 1990); Ormoud v. State, 599 So.2d 951, 963 (Miss. 1992); Vance v. State, 844 So.2d 510, 516-17 (Miss. App. 2003).

[1] This rule specifically requires date of "judgment" as opposed to date of "conviction". The inclusion of conviction in the rule requires that the indictment include both the principal charge and a charge of previous conviction. It do not ask for date of previous conviction but only the date of judgment. Conviction and sentence is often carried out on separate dates.

ISSUE TWO

THE TRIAL COURT ERRED IN FAILING TO FIND THAT MITCHELL WAS SUBJECTED TO INEFFECTIVE ASSISTANCE OF COUNSEL IN THE TRIAL COURT AND SPECIFICALLY DURING SENTENCING PROCEEDINGS IN THE COURT, IN VIOLATION OF HIS 6TH AMENDMENT RIGHTS TO THE UNITED STATES CONSTITUTION AND THE CONSTITUTION OF THE STATE OF MISSISSIPPI.

To prevail on a claim of ineffective assistance of counsel the defendant must satisfy the well-established two prong test set forth in Strickland v. Washington, 466 U.S. 668, 689, 104 S.Ct. 2052, 2065, 80 L.Ed.2d 674 (1984). 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, Mitchell's counsel allowed Mitchell to be sentenced as a habitual offender without any possibility of parole on the basis of a faulty and unconstitutional amendment to the indictment.

It is clear that Mitchell was prejudiced by his attorney's failure to raise the issue outlined here as well as the many other deficiencies set forth in this case. Defense counsel wanted Mitchell to plead guilty.

This Court should conclude that here counsel rendered ineffective assistance of counsel and that such ineffectiveness prejudices Mitchell's sentence in such a way as to

mandate a reversal of the habitual portion of the sentence imposed. Defense counsel was charged with knowing the law and being familiar with the record and evidence.

Mitchell's sentence as a habitual offender was the result of ineffective assistance of counsel in the trial court. The sentence imposed upon Mitchell as a result of such conviction was illegal where the state failed to come forward with a proper motion and the Court erred in accepting what the state presented. This Court should grant the post conviction relief motion in this case and vacated the habitual portion of the indictment which was the result of the amendment.

The defense attorney allowed plain error to be committed where counsel never objected to the defective motion nor order indictment which has been demonstrated by Appellant in his previous ground as being an error of law.

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 defendant must prove, under the totality of the circumstances, that (1) his attorney's performance was deficient and (2) the deficiency deprived the defendant of a fair trial. Hiter v. State, 660 So.2d 961, 965 (Miss.1995). 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 defendant must show that there is a reasonable probability that, but for his attorney's errors, he

> would have received a different result in the trial court. Nicolaou v. State, 612 So.2d 1080, 1086 (Miss.1992). Finally, the court must then determine whether counsel's performance was both deficient and prejudicial based upon the totality of the circumstances. Carney v. State, 525 So.2d 776, 780 (Miss.1988).

In the instant case now before this Court, Derrick Mitchell would assert that his attorney failed to bring to the attention of the court, by proper objections, that the state's motion to amend the indictment was defective. Defense counsel stood still and did absolutely nothing while the state proceeded on a defective motion to amend the indictment seeking a sentence on the basis of prior convictions which the state did not know the date of sentencing or the Court and Jurisdiction of the conviction.

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 defendant's case; remanding for consideration of claim of ineffectiveness where the defendant alleged that his attorney did not know the relevant law).

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

1990); Waldrop v. State, 506 So.2d 273, 275 (Miss.1987), aff d after remand, 544 So.2d 834 (Miss. 1989); Stringer v. State, 454 So.2d 468, 476 (Miss. 1984), cert. denied, 469 U.S. 1230 (1985).

The Mississippi Supreme Court visited this issue in the decision of Smith v. State, 631 So.2d 778, 782 (Miss. 1984). The Strickland test requires a showing of (1) deficiency of counsel's performance which is, (2) sufficient to constitute prejudice to the defense. McQuarter 506 So.2d at 687. The burden to demonstrate the two prongs is on the defendant. Id. Leatherwood v. State, 473 So.2d 964, 968 (Miss. 1994), reversed in part, affirmed in part, 539 So.2d 1378 (Miss. 1989), and he faces a strong rebuttable presumption that counsel's performance falls within the broad spectrum of reasonable professional assistance. McQuarter, 574 So.2d at 687; Waldrop, 506 So.2d at 275; Gillard v. State, 462 So.2d 710, 714 (Miss. 1985). The defendant must show that there is a reasonable probability that for his attorney's errors, defendant would have received a different result. Nicolaou v. State, 612 So.2d 1080, 1086 (Miss. 1992); Alunad 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 defendant must show from deficient attorney performance, the lower courts have adopted tests that purport to differ in more than formulation. See App. C to Brief for United States in United States v. Cronic, supra, at 7a-10a; Sarno, supra, at 83-99, 6. In particular, the Court of Appeals in this case expressly rejected the prejudice standard articulated by Judge Leventhal in his plurality opinion in United States v. Decoster, 199 U.S. App. D.C. 359, 371, 374-375, 624 F.2d 196, 208, 211-212 (en banc), cert. denied, 444 U.S. 944 (1979), and adopted by the State of Florida in Knight v. State, 394 So.2d, at 1001, a standard that requires a showing that specified deficient conduct of counsel was likely to have affected the outcome of the proceeding. 693 F.2d, at 1261-1262. For these reasons, we granted certiorari to consider the standards by which to judge a contention that the Constitution requires that a criminal judgment be overturned because of the actual ineffective assistance of counsel. 462 U.S. 1105 (1983). We agree with the Court of Appeals that the exhaustion rule requiring dismissal of mixed petitions, though to be strictly enforced, is not jurisdictional. See Rose v. Lundy, 455 U.S., at 515 -520. We therefore address the merits of the constitutional issue.

II.

In a long line of cases that includes Powell v. Alabama 287 U.S. 45 (1932), Mitchell 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; Mitchell v. Zerbst, supra. That a person who happens to be a lawyer is present at trial alongside the accused, however, is not enough to satisfy the constitutional command. The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results. An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair. [466 U.S. 668, 686] For that reason, the Court has recognized that "the right to counsel is the right to the effective assistance of counsel." McMann v. Richardson, 397 U.S. 759, 771 , n. 14 (1970). Government violates the right to effective assistance when it interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense. See, e. g., Geders v. United States, 425 U.S. 80 (1976) (bar on attorney-client consultation during overnight recess); Herring v. New York, 422 U.S. 853 (1975) (bar on summation at bench trial); Brooks v. Tennessee, 406 U.S. 605, 612 -613 (1972) (requirement that defendant be first defense witness); Ferguson v. Georgia, 365 U.S. 570, 593 - 596 (1961) (bar on direct examination of defendant). Counsel, however, can also deprive a defendant of the right to effective assistance, simply by failing to render "adequate legal assistance," Cuyler v. Sullivan, 446 U.S., at 344 . Id. at 345-350 (actual conflict of interest adversely affecting lawyer's performance renders assistance ineffective). The Court has not elaborated on the meaning of the constitutional requirement of effective assistance in the latter class of cases - that is, those presenting claims of "actual ineffectiveness." In giving meaning to the requirement, however, we must take its purpose - to ensure a fair trial - as the guide. The

benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result. The same principle applies to a capital sentencing proceeding such as that provided by Florida law. We need not consider the role of counsel in an ordinary sentencing, which may involve informal proceedings and standardless discretion in the sentencer, and hence may require a different approach, to the definition of constitutionally effective assistance. A capital sentencing proceeding like the one involved in this case, however, is sufficiently like a trial in its adversarial format and in the existence of standards for decision, see Barclay [466 U.S. 668, 687] v. Florida, 463 U.S. 939, 952 -954 (1983); Bullington v. Missouri, 451 U.S. 430 (1981), that counsel's role in the proceeding is comparable to counsel's role at trial - to ensure that the adversarial testing process works to produce a just result under the standards governing decision. For purposes of describing counsel's duties, therefore, Florida's capital sentencing proceeding need not be distinguished from an ordinary trial.

III.

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

A.

As all the Federal Courts of Appeals have now held, the proper standard for attorney performance is that of reasonably effective assistance. See Trapnell v. United States, 725 F.2d, at 151-152. The Court indirectly recognized as much when it stated in McMann v. Richardson, supra, at 770, 771, that a guilty plea cannot be attacked as

based on inadequate legal advice unless counsel was not "a reasonably competent attorney" and the advice was not "within the range of competence demanded of attorneys in criminal cases." See also Cuyler v. Sullivan, supra, at 344. When a convicted defendant [466 U.S. 668, 688] complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness. More specific guidelines are not appropriate. The Sixth Amendment refers simply to "counsel," not specifying particular requirements of effective assistance. It relies instead on the legal profession's maintenance of standards sufficient to justify the law's presumption that counsel will fulfill the role in the adversary process that the Amendment envisions. See 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 defendant entails certain basic duties. Counsel's function is to assist the defendant, and hence counsel owes the client a duty of loyalty, a duty to avoid conflicts of interest. See Cuyler v. Sullivan, supra, at 346. From counsel's function as assistant to the defendant derive the overarching duty to advocate the defendant's cause and the more particular duties to consult with the defendant on important decisions and to keep the defendant informed .of important developments in the course of the prosecution. Counsel also has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process. See Powell v. Alabama, 287 U.S., at 68 -69. These basic duties neither exhaustively define the obligations of counsel nor form a checklist for judicial evaluation of attorney performance. In any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances. Prevailing norms of practice as reflected in American Bar Association standards and the like, e. q., ABA Standards for Criminal Justice 4-1.1 to 4-8.6 (2d ed. 1980) ("The Defense Function"), are guides to determining what is reasonable, but they are only guides. No particular set of detailed rules for counsel's conduct can satisfactorily take [466 U.S. 668, 689) account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Any such set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical

decisions. See United States v. Decoster, 199 U.S. App. D.C., at 371, 624 F.2d, at 208. Indeed, the existence of detailed guidelines for representation could distract counsel from the overriding mission of vigorous advocacy of the defendant's cause. Moreover, the purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation, although that is a goal of considerable importance to the legal system. The purpose is simply to ensure that criminal defendants receive a fair trial. Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. Cf. Engle v. Isaac, 456 U.S. 107, 133 -134 (1982). A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy." See Michael v. Louisiana, supra, at 101. There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way. See Goodpaster, [466 U.S. 668, 690]

The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases, 58 N. Y. U. L. Rev. 299, 343 (1983). The availability of intrusive post-trial inquiry into attorney performance or of detailed guidelines for its evaluation would encourage the proliferation of ineffectiveness challenges. Criminal trials resolved unfavorably to the defendant would increasingly come to be followed by a second trial, this one of counsel's unsuccessful defense. Counsel's performance and even willingness to serve could be adversely affected. Intensive scrutiny of counsel and rigid requirements for acceptable assistance could dampen the ardor and impair the independence of defense counsel, discourage the acceptance of assigned cases, and undermine the trust between attorney and client. Thus, a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. A convicted defendant making a claim of ineffective assistance must identify the acts or

omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. In making that determination, the court should keep in mind that counsel's function, as elaborated in prevailing professional norms,is to make the adversarial testing process work in the particular case. At the same time, the court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. These standards require no special amplification in order to define counsel's duty to investigate, the duty at issue in this case. As the Court of Appeals concluded, strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic [466 U.S. 668, 691] choices made after *less* than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments. The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. In particular, what investigation decisions are reasonable depends critically on such information. For example, when the facts that support a certain potential line of defense are generally known to counsel because of what the defendant has said, the need for further investigation may be considerably diminished or eliminated altogether. And when a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable. In short, inquiry into counsel's conversations with the defendant may be critical to a proper assessment of counsel's investigation decisions, just as it may be critical to a proper assessment of counsel's other litigation decisions. See United States v. Decoster, supra, at 372-373, 624 F.2d, at 209-210.

B.

An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment. Cf. United States v.

Morrison, 449 U.S. 361, 364 -365 (1981). The purpose of the Sixth Amendment guarantee of counsel is to ensure [466 U.S. 668, 692] that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding. Accordingly, any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution. In certain Sixth Amendment contexts, prejudice-is presumed. Actual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice. So are various kinds of state interference with counsel's assistance. See United States v. Cronic, ante, at 659, and n. 25. Prejudice in these circumstances is so likely that case-by-case inquiry into prejudice is not worth the cost. Ante, at 658. Moreover, such circumstances involve impairments of the Sixth Amendment right that are easy to identify and, for that reason and because the prosecution is directly responsible, easy for the government to prevent. One type of actual ineffectiveness claim warrants a similar, though more limited, presumption of prejudice. In Cuyler v. Sullivan, 446 U.S., at 345 -350, the Court held that prejudice is presumed when counsel is burdened by an actual conflict of interest. In those circumstances, counsel breaches the duty of loyalty, perhaps the most basic of counsel's duties. Moreover, it is difficult to measure the precise effect on the defense of representation corrupted by conflicting interests. Given the obligation of counsel to avoid conflicts of interest and the ability of trial courts to make early inquiry in certain situations likely to give rise to conflicts, see, e. g., Fed. Rule Crim. Proc. 44(c), it is reasonable for the criminal justice system to maintain a fairly rigid rule of presumed prejudice for conflicts of interest. Even so, the rule is not quite the per se rule of prejudice that exists for the Sixth Amendment claims mentioned above. Prejudice is presumed only if the defendant demonstrates that counsel "actively represented conflicting interests" and that "an actual conflict of interest adversely affected his lawyer's performance." Cuyler v. Sullivan, supra, at 350, 348 (footnote omitted). [466 U.S. 668, 693] Conflict of interest claims aside, actual ineffectiveness claims alleging a deficiency in attorney performance are subject to a general requirement that the defendant affirmatively prove prejudice. The government is not responsible for, and hence not able to prevent, attorney errors that will result in reversal of a conviction or sentence. Attorney errors come in an infinite variety and are as likely to be utterly harmless in a particular case as they are to be prejudicial. They cannot be classified according to

likelihood of causing prejudice. Nor can they be defined with sufficient precision to inform defense attorneys correctly just what conduct to avoid. Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another. Even if a defendant shows that particular errors of counsel were unreasonable, therefore, . the defendant must show that they actually had an adverse effect on the defense. It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding. Virtually every act or omission of counsel would meet that test, cf. United States v. Valenzuela-Bernal, 458 U.S. 858, 866 -867 (1982), and not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding. Respondent suggests requiring a showing that the errors "impaired the presentation of the defense." Brief for Respondent 58. That standard, however, provides no workable principle. Since any error, if it is indeed an error, "impairs" the presentation of the defense, the proposed standard is inadequate because it provides no way of deciding what impairments are sufficiently serious to warrant setting aside the outcome of the proceeding. On the other hand, we believe that a defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case. This outcome-determinative standard has several strengths. It defines the relevant inquiry in a way familiar to courts, though the inquiry, as is inevitable, is anything but precise. The standard also reflects the profound importance of finality in criminal proceedings. [466 U.S. 668, 6941 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. Mitchell, 327 U.S. 106, 112 (1946). An ineffective assistance claim asserts the absence of one of the crucial assurances that the result of the proceeding is reliable, so finality concerns are somewhat weaker and the appropriate standard of prejudice should be somewhat lower. The result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome. Accordingly, the appropriate test for prejudice finds its roots in the test for materiality of exculpatory information not disclosed to the defense by the prosecution, United States v. Agurs, 427 U.S., at 104 , 112-113, and in the test for materiality of testimony made unavailable to the

defense by Government deportation of a witness, United States v. Valenzuela-Bernal, supra, at 872-874. The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. In making the determination whether the specified errors resulted in the required prejudice, a court should presume, absent challenge to the judgment on grounds of evidentiary insufficiency, that the judge or jury acted according to law. [466 U.S. 668, 695] An assessment of the likelihood of a result more favorable to the defendant must exclude the possibility of arbitrariness, whimsy, caprice, "nullification," and the like. A defendant has no entitlement to the luck of a lawless 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 defendant 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 defendant challenges a death sentence such as the one at issue in this case, the question is whether there is a reasonable probability that, absent the errors, the sentencer - including an appellate court, to the extent it independently reweighs the evidence - would have concluded that the balance of aggravating and mitigating circumstances did not warrant death. In making this determination, a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury. Some of the factual findings will have been unaffected by the errors, and factual findings that were affected will have been affected in different ways. Some errors will have had a pervasive effect on the inferences to [466 U.S. 668, 696] be drawn from the evidence, altering the entire evidentiary picture, and some will have had an isolated, trivial effect. Moreover, a verdict or conclusion only weakly supported by the record is more

likely to have been affected by errors than one with overwhelming record support. Taking the unaffected findings as a given, and taking due account of the effect of the errors on the remaining findings, a court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors.

IV.

A number of practical considerations are important for the application of the standards we have outlined. Most important, in adjudicating a claim of actual ineffectiveness of counsel, a court should keep in mind that the principles we have stated do not establish mechanical rules. Although those principles should guide the process of decision, the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. In every case the court should be concerned with whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results. To the extent that this has already been the guiding inquiry in the lower courts, the standards articulated today do not require reconsideration of ineffectiveness claims rejected under different standards. Cf. Trapnell v. United States, 725 F.2d, at 153 (in several years of applying "farce and mockery" standard along with "reasonable competence" standard, court "never found that the result of a case hinged on the choice of a particular standard"). In particular, the minor differences in the lower courts' precise formulations of the performance standard are insignificant: the different [466 U.S. 668, 697] formulations are mere variations of the overarching reasonableness standard. With regard to the prejudice inquiry, only the strict outcome-determinative test, among the standards articulated in the lower courts, imposes a heavier burden on defendants than the tests laid down today. The difference, however, should alter the merit of an ineffectiveness claim only in the rarest case. Although we have discussed the performance component of an ineffectiveness claim prior to the prejudice component, there is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one. In particular, a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed. Courts should strive to ensure that ineffectiveness claims not become so burdensome to defense counsel that the entire criminal justice system suffers as a result.

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

Under the standards set forth above in Strickland, and by a demonstration of the record and the facts set forth in support of the claims in this case, it is clear that Mitchell 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 grant post conviction relief and order the habitual portion of the sentence imposed by this Court be vacated.

CONCLUSION

Wherefore these premises considered, Appellant prays that this Court will vacate the trial court's Order and reverse and remand this case to the trial court with instructions that the sentence be corrected and that the habitual portion of the sentence be set aside as being imporper where the trial court failed to require the state to allege proper information regarding the date of sentencing and date of judgment. The state should not now be allowed to correct the motion because of the double jeopardy clause and the requirement that the state, as well as the defendant, is allowed only one bite of the apple in habitual proceedings. Petitioner would also pray for any other relief

which this Court deems to be constitutionally allowed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that I, Derrick Mitchell, have this date served a true and correct copy of the above and foregoing Motion for Post Conviction Relief and attachments, by United States Postal Service, first class postage, prepaid, to:

Honorable Ben Creekmore
District Attorney
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Honorable Andrew K Howorth
Circuit Court Judge
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Honorable Jim Hood
Attorney General
P. O. Box 220
Jackson, MS 39205

This, the 29th day of June, 2010

Respectfully submitted,

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