

**COPY**

**IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI**

**TIMOTHY DUPUIS**

**APPELLANT**

**VS.**

**NO. 2006-CA-1635-COA**

**STATE OF MISSISSIPPI**

**APPELLEE**

**FILED**

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**BRIEF FOR THE APPELLEE**

**APPELLEE DOES NOT REQUEST ORAL ARGUMENT**

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**IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI**

**TIMOTHY DUPUIS**

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**NO. 2006-CA-1635-COA**

**STATE OF MISSISSIPPI**

**APPELLEE**

**BRIEF FOR THE APPELLEE**

**STATEMENT OF THE CASE**

This is an appeal from the denial of Post - Conviction Collateral Relief Act of the Circuit Court of Lincoln County, Mississippi, in which the Appellant, Timothy Dupuis, was found guilty and was sentenced for the felony crime of **MOLESTATION**, Mississippi Code Annotate § 97-5-23 (1972).

**STATEMENT OF FACTS**

On Easter Sunday, April 15, 2001, Bob and Susan Smith's two daughters spent the night with his sister, Nancy Dupuis, and her husband, Timothy Dupuis. The Dupuises had two children living with them, a teenage son and a young boy. Nancy and Timothy Dupuis slept in their bedroom and the Smith girls along with the Dupuises's youngest son slept in the living room. At some point in the evening, the Dupuises's oldest son came home and he slept in his room.

The next morning around 5:30 a.m., Bob Smith received a telephone call. It was his oldest daughter, who was under the age of fourteen. She asked to speak to her mother. When Susan took the phone, her daughter was crying and told her that, "Uncle Tim messed with me." Susan

immediately went to the Dupuises's home and found her daughter wrapped in a blanket crying. Susan woke the other children and Nancy Dupuis, and she explained what had happened. Susan called the police and her husband and told them to meet her at the hospital.

When they arrived at the hospital, the victim was interviewed and examined by a nurse and then a doctor. She told the nurse that “her uncle messed with her this morning.” The victim told the nurse that she woke up on the couch and her uncle was rubbing her back and legs telling her she was beautiful. She said that she pretended to be asleep and he told her to spread her legs so he could feel her. The victim told the nurse, “he started rubbing my thing and put his fingers up in me and moved them around.” The doctor examined the victim, and she told him what happened. He performed a pelvic examination and a urinalysis. Neither of these tests revealed any abnormalities or trauma.

Based on the victim's testimony, Timothy Dupuis was indicted for the crime of sexual battery, pursuant to Mississippi Code Annotated Section 97-3-95. At trial, the jury heard testimony from several witnesses for the State including the medical staff who examined the victim, her counselor, her mother and the victim herself. The victim testified that Dupuis, “stuck his fingers inside my panties, inside of my private, with his finger.

### **SUMMARY OF THE ARGUMENT**

#### **I. and II.**

#### **THE APPELLANT HAD EFFECTIVE ASSISTANCE OF CONFLICT FREE COUNSEL.**

Garibaldi v. State, 840 So.2d 793, 796 (Miss. App. 2003) held that each case involving claim of ineffective assistance of counsel should be decided based on the totality of the circumstances, that is, by looking to the evidence in the entire record. The standard of performance used is whether

counsel provided reasonably effective assistance and that for purposes of claim of ineffective assistance of counsel, there is a strong presumption that counsel's conduct is within the wide range of reasonable professional conduct.

## **THE ARGUMENT**

### **PROPOSITIONS I. and II.**

#### **THE APPELLANT HAD EFFECTIVE ASSISTANCE OF CONFLICT FREE COUNSEL.**

Garibaldi v. State, 840 So.2d 793, 796 (Miss. App. 2003) held that each case involving claim of ineffective assistance of counsel should be decided based on the totality of the circumstances, that is, by looking to the evidence in the entire record. The standard of performance used is whether counsel provided reasonably effective assistance. For purposes of claim of ineffective assistance of counsel, there is a strong presumption that counsel's conduct is within the wide range of reasonable professional conduct.

The Appellant alleges that an actual conflict of interest existed when Attorney Fernald, while employed by the City of Brookhaven as City Attorney, simultaneously represented Dupuis as a criminal defendant in the criminal trial. (Appellant Brief 3).

Judge Taylor heard this allegation and ruled, "I do not find that Mr. Dupuis met his burden of proving prejudice. And I find that he in fact did waive his conflict of interest, based on the testimony of Ms. Jones, Judge Smith, and Mr. Fernald." (R. E. 133). Judgements of the trial courts come to the [appellate] court clothed with a presumption of correctness, and it is the burden of the appellant to overcome that presumption. King v. State, 857 So.2d 702, 739 (Miss. 2003).

Furthermore, this Court is charged with a review of the totality of counsel's performance and the demonstration of resulting prejudice. Stringer v. State, 627 So.2d 326, 329 (Miss. 1993). Mere

allegations are insufficient.

In Stevenson v. State, 798 So.2d 599, 602 (Miss. App. 2001), the Court's standard for the determination of ineffective assistance of counsel is as follows:

The standard for determining whether or not a defendant was afforded effective assistance of counsel was set out in the United States Supreme Court in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674( 1984). Before counsel can be determined to have been ineffective, it must be shown (1) that counsel's performance was deficient, and (2) that the defendant was prejudiced by his counsel's mistakes... Under Strickland, there is a strong presumption that counsel's performance falls within the range of reasonable professional assistance. To overcome this presumption, "the defendant must show that there is a reasonable probability that, but for the counsel's unprofessional errors, the result would have been different. A reasonable probability is sufficient to undermine confidence in the outcome. Strickland. 446 U.S. at 684, 104 S. Ct. at 2068.

There is no indication in the record other than the allegations of the Appellant that performance of the counsel fell below the standards as defined by Schmitt. In fact the record supports the exact opposite.

On appeal this Court must confine itself to what actually appears in the record, and unless provided otherwise by the record, the trial court will be presumed correct. Shelton v. Kindred, 279 So.2d 642, 643 (Miss. 1973).

Clearly, judging on the totality of the performance of counsel there was no merit to the Appellant's claim that he was denied effective assistance of counsel. Counsel is required to be competent and not flawless.

The substantive principles of law relative to this issue are found in the familiar case of Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In order to prevail on a claim of ineffective assistance of counsel, a defendant must show that his counsel's performance was not only deficient, but that said deficient performance prejudiced the defense. The State submits that it simply cannot be maintained from the record in this case that counsel's

assistance was ineffective, and that ineffective assistance should have been apparent to the trial court, which would then have had the duty to declare a mistrial or to order a new trial *sua sponte*.

Dupuis contends that he was denied effective assistance of counsel; however, nothing in the record evinces this allegation.

This issue brought by the Appellant is therefore lacking in merit. Dupuis has failed to show deficiency in his attorney or as a result prejudice.

This issue brought by the Appellant is therefore lacking in merit.


### **CONCLUSION**

Based upon the arguments presented herein as supported by the record on appeal the State would ask this reviewing court to affirm the jury verdict and sentence of the trial court.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL

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## CERTIFICATE OF SERVICE

I, Deshun T. Martin, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

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This the 12th day of March, 2007.

  
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