IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

JOHNNY MCCULLOUGH — APPELLANT

VS. — NO. 2009-KA-1645-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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PROCEDURAL HISTORY:

On August 9-11, 2009, Johnny McCullough, "McCullough" was tried for seven counts of gratification of lust under M. C. A. Sect. 97-5-23 before a Union County circuit court jury, the Honorable Robert W. Elliott presiding. R. 7. McCullough was found guilty of two counts. C.P. 66-67. He was given concurrent fifteen year sentences in the custody of the Mississippi Department of Corrections. R. 605-606; C.P. 91.

From these conviction, McCullough filed notice of appeal to the Mississippi Supreme Court. C.P. 102.

ISSUES ON APPEAL

I.
WAS THERE CREDIBLE, SUBSTANTIAL EVIDENCE OF GUILT? GIVEN THE JURY'S ACQUITTAL ON SOME COUNTS?

II.
WAS MCCULLOUGH GIVEN EFFECTIVE ASSISTANCE OF COUNSEL?

STATEMENT OF THE FACTS

In the July, 2008 term, McCullough was indicted for twenty two counts of gratification of lust by a Union County Grand jury under M.C.A. Sect. 97-5-23. The victims were six female children who often visited in his home which was near his son's . C.P. 4-10.

On August 5, 7, 2009, Johnny Mccullough was tried for seven counts of gratification of lust before a Union County circuit court jury, the Honorable Robert W. Elliott presiding. R. 7. McCullough was represented by Mr. Chris Kitchens. R. 7.

Ms. Andrea Bond testified that she had stayed in the same house with McCullough and his wife. R. 347. She was sixteen at the time of trial. Her birthday was September 19, 1993. She had been calling McCullough's son, Jamie, "daddy" and McCullough "papaw" since she was two years old. R. 347. Her step-father's house was on the same land as McCullough's, who was married and lived there with his wife when he was not traveling as a truck driver.

Ms. Andrea Bond testified that she was touched and rubbed on her "breasts" and "vagina." R. 350. This was "under her clothes." Her "papaw," McCullough, did this to her. He did it, more than once, in a room with the door closed. This touching of her vagina occurred under the pretense of his "praying" for her. He used some kind of oil, which he called "praying oil." R. 350. This unwanted touching occurred often. She testified that it started when she was around nine and continued until she was fifteen. Andrea remembered that it happened the summer of 2007. R. 351.

Ms. Savannah Chandler's birthday was July 8, 1997. She was twelve years old at the time of trial. R. 203-204. Savannah testified that she was ten years old at the time she was touched, rubbed, licked and "kissed on her middle spot." She explained this contact with her "middle spot" happened after McCullough pulled her pants and "underclothes down to her knees." This occurred while she was on a trip in McCullough's truck. R. 233.

Savannah testified that after her step-grand father did this, she locked him out of the truck cab. She then called her mother, her step father and her friend, Ms. Emily McCullough. She testified that Emily told her that "the same thing had happened" to her. R. 235-236.

Ms. Angie Floyd was accepted as an expert witness on child sex abuse. She testified that she had a Master's degree. She was a licensed social worker with training as "a forensic interview specialists." R. 249. Ms. Floyd worked with the Child Advocacy Center in Tupelo. R. 249-250. They provided assistance to law enforcement in interviewing children. This was when there were charges of neglect, and abuse of children.

Ms. Floyd testified that she interviewed six female children, which included Ms. Andrea Bond and Ms. Savannah Chandler. R. 257. This was in connection with alleged sexual abuse by McCullough. Ms. Floyd testified that she found Andrea Bond's behavior and statements were consistent with that of other children who had been sexually abused. R. 261. She also testified that Savannah Chandler's conduct and statements of abuse were also consistent with that of other child sexual abuse victims. R. 262.

Ms. Floyd testified that one of the things which forensic interviews attempt to determine is whether there is any evidence of "couching" or the making up of false allegations. R. 277. Floyd testified that she did not find such evidence in connection with her interviews with the female children in the instant cause. R. 300.

The trial court denied a motion for a directed verdict. R. 393-395. The Court found that the prosecution had made out all the elements of gratification of lust. McCullough was over the age of eighteen, the victims were under the age of sixteen. R. 490. There was evidence that McCullough touched their bodies with his hands "to gratify his lust."

Mr. McCullough testified in his own defense. R. 454-532. Mr. McCullough testified that he

was 63 years old at the time of trial. R. 490. He admitted that the children who testified against him were under the age of 16, and he was over the age of eighteen. R. 490. McCullough thought of himself as a "called" preacher. He admitted that he prayed for the grandchildren who testified. He admitted that he did touched them during a time of "prayer." He claimed to have only touched them "on their head." R. 489. He admitted that he sometimes used "oils" when he prayed for his grandchildren. R. 491. He admitted that he did not have a church when he was allegedly "called." R. 483.

Mr. McCullough testified that the female child witnesses that allegedly loved him were all lying. R. 520.

A cautionary instruction was given. C.P. 64. This instructed the jury that testimony by Emily McCullough, Haley McCullough, Amy McCullough, and Savanna Chandler about other alleged crimes "while not in the state of Mississippi"could be considered to show the defendant's "motive, intent, pattern or may be used to show the defendant's lustful disposition," but not for proof on the charges at issue. C.P. 64. The record reflects that these acts occurred while these female children were taken on trips to other states, including Florida and confined within McCullough's truck.

Mr. McCullough was found guilty of two counts, counts 4 and 5. C.P. 76-77. He was given fifteen year concurrent sentences in the custody of the Mississippi Department of Corrections. R. 605-606.

From these convictions, McCullough filed notice of appeal to the Mississippi Supreme Court. C.P. 102.

SUMMARY OF THE ARGUMENT

1. The record reflects there was corroborated evidence in support of McCullough's guilt on counts 4 and 5. C.P. 76-77. There is corroborated record evidence in support of these convictions. **Mamon v. State**, 724 So. 2d 878, 881 (Miss. 1998).

McCullough admitted he was over eighteen years old. He also admitted that Andrea Bond, Savannah Chandler and other children were under sixteen when allegedly touched inappropriately. R. 490.

Ms. Andrea Bond identified McCullough as the person who had touched her inappropriately. This was done behind "closed doors" under the pretext of "praying for us." R. 350.

Ms. Andrea Bond was corroborated by Savannah Chandler. R. 234-235. Savannah identified McCullough as the person who had touched her breast and vagina. R. 237. She was also threatened like Andrea with harm to herself if she revealed what he had done to her. R. 234-235; 352.

Savannah was corroborated by her mother, Ms. Cindy Chandler. Savannah told her of being sexually abused by McCullough just after it occurred. R. 206.

Finally, Ms Angie Floyd, a forensic interviewer of children specialist, testified that both Andrea and Savannah's statements and conduct were consistent with that of other child sex abuse victims. R. 261-262.

There is no requirement for a "formula" or explanation for how the jury resolves conflicting factual issues in their deliberations. **Groseclose v. State**, 440 So. 2d 297, 301 (Miss. 1983). Therefore, McCullough's argument about an alleged factually inconsistent verdict is flawed, and lacking in merit.

2. The record reflects that McCullough received effective assistance of counsel. His counsel had

fifteen counts dismissed before trial. R.107-109. The record also reflects a vigorous and effective defense during the trial, with acquittal on three counts.

There was no affidavit from trial counsel, and the affidavit from his son, Jamie, included with the appellant's brief is "hearsay." It was not "certified" as part of the record of this cause. **Mason v. State**, 440 So. 2d 318, 319 (Miss. 1983); and M.R.A.P. Rule 10(e).

The appellee would submit that the record reflects a lack of evidence of either deficient performance, or of prejudice to McCullough's defense. **Johnston v . State**, 730 So. 2d 534, 538 (Miss. 1997). His defense was a general denial of having ever having touched any of his grandchildren lustfully. R. 520-521. He made his credibility the central issue in his defense. In short, he told the jury all the children, including his own grandchildren were "lying". R. 454-532.

On the other hand , the record is clear that the child victims in the instant cause were subjected to cross examination. They all consistently identified McCullough as the person who abused them. R. 239-242; 310-342; 355-362; 372-385.

This issue is also lacking in merit.

ARGUMENT

PROPOSITION I

THERE WAS CREDIBLE, SUBSTANTIAL CORROBORATED EVIDENCE IN SUPPORT OF MCCULLOUGH'S CONVICTIONS.

McCullough argues that there was a lack of evidence in support of his convictions. Since he was acquitted on five of the seven charges for gratification of lust, and the female children testified to the same type of conduct , he believes there was no reason to believe he was guilty on some rather than all the counts. He also believes their was evidence that the children had been encouraged, if not coerced, into making the charges against him by Ms. Cindy Chandler. Appellant's brief page 5-8.

To the contrary, the appellee would submit that there was sufficient credible, corroborated evidence in support of the jury's verdict. R. 604-605. This was based upon the testimony of the female child victim, Ms. Andrea Bond. Andrea identified McCullough, as the person who had touched her inappropriately on her breasts and her vagina. R. 349-350. She referred to him as "papaw" and his son, Jamie as her "daddy."

The record reflects that although they were not her biological father and grandfather, she had been living with them since she was two years old. R. 347. She also testified that this touching was not an isolated incident. It was part of a pattern which repeated itself over a long period of time. It started when she was around nine and continued until she was fifteen. R. 350-351.

Ms. Andrea Bond testified that she was touched and rubbed on her breasts and "vagina." R. 350. This embarrassed and upset her. Her "papaw", McCullough, did this to her. He did it, more than once, in a room with the door closed. It would be done after he took her back to the room under the pretense of "praying" for her. R. 349-350. He would use some kind of oil, which he called

"praying oil." R. 350. It happened more than a few times. Andrea remembered that it happened the summer of 2007. R. 351.

Ms. Andrea Bond testified that her birthday was September 19, 1993 . She was sixteen in the tenth grade in Mantachie, Mississippi at the time of trial. R. 346. She had been living with McCullough's son, Jamie. He was her step-father. She spent some of her time in McCullough's home which was near his son's. R. 347. She grew up calling McCullough her "pawpaw." R. 347. Both McCullough and his son were truck drivers, who were frequently out of town on over-night trips to other states.

Ms. Andrea Bond testified that she told the truth about her "papaw" touching her improperly to Ms. Angie Floyd. R. 353. Ms. Floyd was a social worker who worked with the Child Advocacy Center in Tupelo.

This touching occurred when she was visiting in McCullough's home, which was a common occurrence. McCullough's home was on the same tract of land as his son's and easily accessible. She also testified that her "pawpaw" continued this pattern of conduct from the time she was nine years old until she was fifteen. R. 350.

Q. Did your papaw ever take you back into a room?

A. Yeah.

Q. **And when you were in that room, would he touch your breasts or your vagina?**

A. **Uh-huh.**

Q. And what was the purpose? Why would he say you were going in that room?

A. **To pray for us if like we felt like we was sick of something, you know, or something was wrong. We would go back there and he would pray for us.** R. 349.

...

Q. **And on your vagina, was it under, under your clothes?**

A. **Yes, ma'am.**

Q. **And how often would that happen would you say?**

A. I don't know. **Like every other time we would go up there or we was sick or something was wrong with us.**

...

Q. And when this started, how old would you say you were?

A. About nine.

Q. Nine?

A. Yeah.

Q. Up until about I was probably 15. R. 350.

...

Q. So the summer–there's been a lot of talk about May 2008, but I'm going to go back to the summer before that, May 2007 and that summer. Were you up there a lot that summer? You would have been, I think, 14?

A. Yeah.

Q. **Okay. When you were up there that summer,(including May 2007) were things like that happening to you?**

A. **Yes, ma'am.** R. 351. (Emphasis by appellee).

Ms. Andrea Bond testified that she initially would not reveal to adults what McCullough did to her. She did not do so because she "was scared." She also did not want to hurt her surrogate grandparents. R. 352. She felt affection for them. She felt close to her grandmother with whom she spent time. She had stayed with them when her mother was having serious marital problems with McCullough's son, Jamie.

Q. You told them it didn't?

A. **Because I was scared and I didn't want to hurt mammaw or papaw.**

Q. Even though papaw had been doing all these things, you still didn't want to hurt him?

A. Uh-huh. R. 352.

Ms. Andrea Bond also testified that no one had told her to make up charges against her "papaw."

Q. **Has anyone ever told you to make up these stories?**

A. **No, ma'am.**

Q. Has anybody said this will be great. Let's go to court and you can make up this story?

A. No, ma'am.

Q. You've just told the truth here today?

A. Yes, ma'am.

Q. **And how about when you talked to Angie Floyd, did you tell her the truth too?**

A. **I did.** R. 353-354. (Emphasis by appellee).

Ms. Cindy (McCullough) Talley, the mother of Savannah Chandler, testified that her daughter Savannah called her. This occurred when she went on a trip with her grandfather, McCullough. They went in his truck on a trip to Miami, Florida. Savannah told her mother that McCullough had just touched her inappropriately on her breast and vagina. McCullough told her not to tell about "this game" they were allegedly playing.

Q...What happened when Savannah went on the road?

A. **Savannah called me and said Johnny had touched her inappropriately, had held her down in the back of the truck on the bed.** She said that he had touched

her breasts: that he had tickled her stomach, kissed her stomach, **and undone her pants; and he had licked her where her pants were undone. She said he had told her not to tell me that they were playing that game.** R. 206. (Emphasis by appellee).

Mrs. Cindy M. Talley, an adult female, also testified that she personally had been subjected to McCullough's inappropriate touching. He had touched her breasts and tried to kiss her. When she resisted, he apologized and stopped his advances.

Q. Cindy, I'm going to go real quick thought this. Mr. Kitchens keeps going back to a statement you made to Anthony Anderson. Under what circumstance was the defendant doing things to you that you felt were inappropriate? What happened?

A. **Um, he was down at our white house one time and he tried to kiss me, tried to touch me, and then maybe I think one time in a vehicle**; but he apologized and said he was very sorry and he had fallen down in the Lord's eyes with me and that would never happen again. R. 226-227. (Emphasis by appellee).

Cindy Talley also explained that she did not initially report this touching of her daughter to authorities. McCullough's son, Jamie requested, that she not report it because of a child custody dispute with his ex-wife.

Q. There's one thing you said. What did you mean when you said you didn't want this to fall through the cracks? What was your concern?

A. I did not want Johnny to not have to pay for what he did to Savannah.

Q. Why were you afraid it was going to fall through the cracks?

A. **Because if Johnny had known-I felt in my heart that if Johnny had known that I knew what was going on with the kids that he might convince the kids to lie before social services could ever get to them.** Jamie, I felt if I crossed him, he would turn on me because I've heard of things he's done to others in the past and I was fearful he would turn on me and convince his kids to lie, so I tried to wait. I did what he asked and I waited because I wanted it to be prosecuted. R. 229-230. (Emphasis by appellee).

Ms. Savannah Chandler testified that she was ten years old when she went on a road trip with McCullough. During this trip, McCullough stopped his truck. She was inside the cab of the

truck with him. McCullough then took off her shirt, and then her pants and underwear. He then touched, rubbed, licked and was "kissing me down on my middle spot." R. 234-235. McCullough told her not to reveal this "game" that they were playing. R. 204.

Savannah testified that after this assault , she locked him out of the truck cab. She called her mother, her step father and her friend, Ms. Emily McCullough. She testified that Emily told her that "the same thing had happened" to her.

> Q. And you said a little while ago that he did some bad things. What did you mean by that?
>
> A. Well, I was back there where the very back of the truck was, the sleeper, and he had came back there and started tickling me. **Then he pulls up my shirt and my bra and started kissing me and touching me, and then he was pulling my pants and my underwear down to my knees and started kissing me down on my middle spot and licking me and stuff.**
>
> ...
>
> Q. **What happened after that? Did he say anything?**
>
> A. **He had said, You better not tell your mama that I was playing around with you.**
>
> Q. What happened after that?
>
> A. **He had got out of the truck and I had locked the doors and called my mom and told her everything.** R. 234-235.
>
> ...
>
> Q. Did you talk to anybody else?
>
> A. Emily McCullough.
>
> Q. What did you and Emily talk about?
>
> A. **We just started talking regular, and then I told her what had happened to me. Then she had told me that the same thing had happened to her. I told her that she would need to let my mom know.** After I got off the phone with Emily, I called my mom back and told her that Emily needed to talk to her. R. 236. (Emphasis by appellee).

Ms. Angie Floyd, was accepted as an expert witness on child sex abuse. R. 252. Ms. Floyd was educated, trained and licensed as a social worker. She was also a trained "forensic interviewer of children" who allegedly were victims of such some type of abuse. R. 249-304. She testified that she interviewed "six" female children in this cause. They were the children allegedly touched inappropriately by McCullough.

This included Ms. Andrea Bond and Ms. Savannah Chandler. R. 257. Ms. Floyd testified that she found Andrea Bond's behavior and statement consistent that of other children who had been sexually abused. R. 256-257. This was also true for Savannah Chandler.

> Q. Do you know what children you performed those interviews of anyway?
>
> A. Yes, sir. I had Emily McCullough, Savannah Chandler, Haley McCullough, Andrea Bond, Faith McCullough, and then Amy McCullough.
>
> Q. **But in this case, you marked that there was a disclosure, and after conducting this interview, that this was consistent with child sexual abuse?**
>
> A. **Yes, sir.** R. 256-257.
>
> ...
>
> Q. **After conducting the interview of Andrea, did you make a finding of whether or not there had been a disclosure and whether or not her statement was consistent with child sexual abuse?**
>
> A. **Yes, sir. I do have that she disclosed, and she did appear to be consistent with a child that had been sexually abused.** R. 261. (Emphasis by appellee).

Ms. Floyd testified that she looked for evidence of "coaching" from others when she interviewed Andrea Bond, Savannah Chandler and the other children. She testified that she found no evidence of coaching. R. 300.

> Q. Did you attempt to determine whether or not this was a case of coaching or not?
>
> A. Yes, sir.

Q. **Did you see any evidence of coaching in any of these cases?**

A. **No, sir.** R. 300. (Emphasis by appellee).

Ms. Floyd testified that she also found Savannah Chandler's behavior, and statements to her about abuse by McCullough to be consistent with the behavior exhibited by other alleged victims of child sexual abuse.

> Q. As to Savannah Chandler, did you make a determination whether she disclosed child sexual abuse and whether she appeared, based on your observations, to be a child that was consistent with a child victim of child sexual abuse?
>
> A. **Yes, sir, she did disclose, and she did appear to be consistent.** R. 262. (Emphasis by appellee).

In **Groseclose v. State**, 440 So. 2d 297, 301 (Miss. 1983), the Court stated that any conflicts "in the finding of facts" created by testimony from defense witnesses was to be resolved by the jury. Who and what the jury believes from all the evidence presented is solely for their determination. As stated:

> Jurors are permitted, indeed have the duty, to resolve the conflicts in the testimony they hear. They may believe or disbelieve, accept or reject the utterances of any witness. No formula dictates the manner in which jurors resolve conflicting testimony into finding of fact sufficient to support the verdict. That resolution results from the jurors hearing and observing the witnesses as they testify, augmented by the composite reasoning of twelve individuals sworn to return a true verdict. A reviewing court cannot and need not determine with exactitude which witness or what testimony the jury believed or disbelieved in arriving at its verdict. It is enough that the conflicting evidence presented a factual dispute for jury resolution. **Shannon v. State**, 321 So. 2d 1 (Miss. 1975) 373 So. 2d at 1045.

The record reflects that McCullough testified in his own behalf. R. 454-532. Mr. McCullough testified that he was 63 years old at the time of trial. R. 490. He admitted that the children who testified against him were under the age of 16, and he was over the age of eighteen. R. 490. McCullough thought of himself as a "called" preacher. He admitted that he prayed with and for the

grandchildren who testified. He admitted that he touched them during this time of "prayer." He claimed to have only touched them on their head. He admitted that he sometimes used oil when he prayed for his grandchildren. R. 491. He admitted that he did not have a church when he was "called." R. 483.

McCullough made his credibility central to his defense. He testified that either all the children were lying or he was; and he allegedly was not lying. R. 520-521.

In **Mamon v. State**, 724 So. 2d 878, 881 (Miss. 1998), this Court stated that the jury is responsible for resolving "the credibility" of witnesses. The court must also disregard evidence favorable to the defendant. This is on matters regarding weight of the evidence and the credibility of the witnesses. Credible evidence with reasonable inferences consistent with guilt must be accepted as true on a motion challenging the weight of the evidence.

> Reasonably, matters regarding the weight and credibility to be accorded the evidence are to be resolved by the jury. **Wetz v. State**, 503 So. 2d 803, 808 (Miss. 1987). Once a jury has found a defendant guilty, however, this Court's authority on appeal is by law considerably constricted, **Davis v. State**, 586 So. 2d 817, 819 (Miss. 1991). When viewing the sufficiency of the evidence, this Court looks at the trial court's ruling on the most recent occasion when such sufficiency was challenged. **Green v. State** , 631 So. 2d 167, 174 (Miss. 1994). We must, as to each element of the offense, consider all of the evidence-not just the evidence which supports the case for the prosecution-in the light most favorable to the verdict. **Cooper v. State** , 639 So. 2d 1320,1324 (Miss. 1994). Credible evidence which is consistent with the guilt must be accepted as true. ***Wetz***, 503 So. 2d at 808. The recipient of the verdict, here the state, must be given the benefit of all reasonable inferences that may be drawn from that evidence. **Smith v. State** , 646 So. 2d 538, 542 (Miss. 1994).

In **Ivy v State**, 949 So. 2d 748 , 754 (¶22) (Miss 2007), the Supreme Court affirmed Ivy's conviction for touching a child for lustful purposes. This was under M. C. A. 97-5-23(1). This was based upon A.B.'s testimony of being licked and touched on her vagina against her will by Ivy. Ivy , like McCullough, testified that "he did nothing wrong." Ivy testified that the victim"just wanted him out of the house."

The appellee would submit that there was sufficient credible partially corroborated evidence in support of the guilty verdicts. Ms. Andrea Bond identified the appellant as the person who had touched her vagina more than once in the summer of 2007. This was when she was 14 years old. R. 349-350; 351. McCullough admitted that he was more than eighteen years old and that Andrea Bond, his surrogate grand-daughter was under sixteen. R. 490.

There was testimony from Ms. Savannah Chandler that corroborated Ms. Andrea Bond. R. 234-235. It provided evidence of McCullough's pattern of conduct toward vulnerable female children. These were children who were alone with him and under his control.

Ms. Savannah Chandler was corroborated, in turn, by her mother, Ms. Cindy Talley, who was briefly married for three months, to Jamie, McCullough's son. R. 206.

In **Doby v. State**, 532 So. 2d 584, 591 (Miss. 1988) , the Court stated that the uncorroborated testimony of a single witness was sufficient for supporting a conviction.

> With this reasoning in mind, the Court holds that the testimony of Conner was legally sufficient to support Doby's conviction for the sale of cocaine. This Court recognizes the rule that persons may be found guilty on the uncorroborated testimony of a single witness. See **Ragland v. State**, 403 So. 2d 146 (Miss. 1981);..

We have cited sufficient, credible partially corroborated evidence for establishing all the elements for gratification of lust. The appellee would submit that this issue is lacking in merit.

PROPOSITION II

THE RECORD REFLECTS MCCULLOUGH RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL.

McCullough argues that he did not have effective assistance of counsel. He faults trial counsel for not introducing into evidence an alleged statement of encouragement or coercion to lie against the appellant by the female child, Amy Emiline McCullough. This was allegedly through the efforts of Ms. Cindy Chandler Talley. Appellant's brief page 9.

The record reflects that a motion for a J. N. O. V. or a New Trial was filed. C.P. 96-97. There was no mention of any statement by Ms. Amy Emiline McCullough included in that motion. That motion was filed on September 24, 2009. C.P. 96-98.

The affidavit of Mr. Jaime McCullough, the appellant's son, referred to in the appellant's brief was filed with that brief on March 9, 2010 some six months later. See appellant's brief page12-14, exhibit A. It was not "certified by the clerk of the trial court" as part of the record of this cause. See M. R. A.P. Rule 10(e). It was also "hearsay."

For McCullough to be successful in his ineffective assistance claim, he must satisfy the two-pronged test set forth in **Strickland v. Washington**, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064-65, 80 L. Ed. 2d 674, 693-95 (1984) and adopted by this Court in **Stringer v. State**, 454 So. 2d 468, 476-477 (Miss. 1984). McCullough must prove: (1) that his counsel's performance was deficient, and (2) that this supposed deficient performance prejudiced his defense. The burden of proving both prongs rests with McCullough. **McQuarter v. State**, 574 So. 2d 685, 687 (Miss. 1990).

Finally, McCullough must show that there is "a reasonable probability" that but for the alleged errors of his counsel, Mr. Chris Kitchens, the result of the trial would have been different. **Nicolau v. State**, 612 So. 2d 1080, 1086 (Miss. 1992), **Ahmad v. State**, 603 So. 2d 843, 848 (Miss.

1992).

Appellee would submit that based upon the record we have cited, there is a lack of evidence for holding that trial counsel erred in his representation and defense of McCullough. This was in actively defending him against the twenty two counts of gratification of lust which he faced. C.P. 4-9.

The record reflects that McCullough's trial counsel had fifteen counts dismissed before trial. R. 107-109. The record also reflects that McCullough was convicted of only two of the seven for which he was tried. R. 604-605.

As stated in **Strickland**: and quoted in **Mohr v. State** , 584 So. 2d 426, 430 (Miss. 1991):

> Under the first prong, the movant 'must show that the counsel's performance was deficient and that the deficient performance prejudiced the defense. Here there is a strong presumption of competence. Under the second prong, the movant 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.' The defendant must prove both prongs of the test. Id. 698.

McCullough bears the burden of proving that both parts of the tests have been met. **Leatherwood v State**, 473 So. 2d 964, 968 (Miss. 1985).

> The burden of proving ineffective assistance of counsel is on the defendant to show that the counsel's performance was deficient and that the deficient performance prejudiced the defense.

When an appeal involves post conviction relief, the Mississippi Supreme Court has held, "that where a party offers only his affidavit, then his ineffective assistance of counsel claim is without merit." **Lindsay v. State**, 720 So. 2d 182, 184 (¶ 6) (Miss. 1998); **Smith v State**, 490 So. 2d 860 (Miss. 1986).

In the instant cause, there was an affidavit from McCullough's son, Jaime McCullough.

Exhibit A. It was never "certified by the clerk of the trial court." It is therefore hearsay and not a part of the record of this cause. M. R. A.P. 10(e).

In **Mason v. State**, 440 So. 2d 318, 319 (Miss. 1983) the court stated that it did not accept assertions about facts not proven in the certified record of the cause on appeal.

> We have on many occasions held that we must decide each case by the facts shown in the record, not assertions in the brief, however sincere counsel may be in those assertions. Facts asserted to exist must and ought to be definitely proved and placed before us by a record, certified by law; otherwise we cannot know them. **Phillips v. State**, 421 So. 2d 476 (Miss. 1982); **Branch v. State**, 347 So. 2d 957 (Miss. 1977);...

The record reflects no affidavit from trial counsel about a matter about which he would of necessity had been knowledgeable. In addition, the alleged source of false testimony, Ms. Amy Emiline, mentioned in appellant's speculative brief, testified at trial and was cross examined. R. 306-345. She testified more than once that her mother, Cindy, had not encouraged or coerced into telling a lie about her grandfather's inappropriate touching. R. 328; 344.

> Q. **What about has anyone, your mama, Cindy, anybody else, has anybody ever told you to tell anything other than the truth?**
>
> A. **No, ma'am.**
>
> Q. **Nobody told you to lie?**
>
> A. **They just told me to tell the truth the whole time.** R. 344. (Emphasis by appellee).

In **Johnston v . State**, 730 So. 2d 534, 538 (Miss. 1997), the Court stated that the burden of showing prejudice could not be met by merely alleging it.

> Additionally, there is a further requirement which Johnston must hurdle, prejudice. Claims alleging a deficiency in the attorney performance are subject to a general requirement that the defendant affirmatively prove prejudice. **Strickland**, 466 U. S. at 693., 104 S. Ct. at 2067. However, Johnston fails to make any allegations of

> prejudice. As in **Earley**, Johnson must affirmatively prove, not merely allege that prejudice resulted from counsel's deficient performance. *Earley*, 595 So. 2d at 433. Johnston has failed on the second prong of **Strickland**. Having failed to meet either prong of the **Strickland** test, we find that there is no merit to the ineffective assistance of counsel claim raised by Johnston.

The record reflects that the appellant's son Jamie McCullough denied that any child who testified told him they were going to lie. R. 451. This would be to make up allegations about the alleged inappropriate touching of their grandfather. He also admitted that he had no evidence of anyone encouraging the female children to lie about being touched inappropriately.

Q. **Have your children told you they have lied about your father?**

A. **No, sir.** (Emphasis by appellee)

In addition, the appellant testified in his own behalf. R. 453-481. McCullough admitted he was over eighteen years old, being in his sixties, and that the female children testifying against him with under sixteen. R. 490. He admitted to having access to the female child victims, admitted to laying his hands on them, but denied doing so in a manner to gratify his lust. He therefore chose to make his own "credibility" an issue, including his alleged religiosity. His trial counsel can not be faulted for the appellant's own lack of credibility before the jury.

He testified that the children had a motive to lie so they could change custody and live with their mothers rather than with the appellant and his extended family. R. 511-519.

Q. **Can we agree on one thing? Either they're lying or you're lying, one of the two. There's no in between, is there?**

A. **I'm not lying.** R. 520-521. (Emphasis by appellee).

The record also includes testimony during sentencing from social workers and others about the hostile and belligerent actions of McCullough. This was inappropriate and hostile actions toward them at the time of their investigations. They were investigating the conditions under which

these children were living at the time. They testified that this was at a time when their were no attempt at altering custody for the children. R. 636.

> Q. So it's your testimony then that Jamie McCullough actually had custody of these children throughout the investigation, the allegations against Johnny McCullough; is that correct?
>
> A. **That's correct. I never made any recommendation for those children to leave his home**. R. 636. (Emphasis by appellee).

They also testified to McCullough's rude and aggressive actions toward his wife in their presence. R. 639. Mr. Anthony Anderson, an investigator with the Union County Sheriff's Department, testified that McCullough "put each child through hell" during their investigation. R. 652.

> Q. Mr. Anderson, did Johnny McCullough take a plea bargain in this case or did he put each kid through hell basically going through trial?
>
> A. **He put each child through hell.** R. 652. (Emphasis by appellee).

The appellee would submit that the record reflects no evidence of either inadequate representation or of prejudice to the appellant's defense to the charges. There is nothing in the certified record of this cause indicating any dereliction of duty on the part of trial counsel. To the contrary, trial counsel was effective in his having most of the many counts against McCullough dismissed based upon evidentiary matters he brought to the trial court's attention.

The record contains no evidence of any child witness in this cause having recanted her testimony. There is no evidence of any coercion or encouragement of the children to falsely accuse McCullough of abusing them.

The appellee would submit that this issue is also lacking in merit.

CONCLUSION

Mr. McCullough's convictions should be affirmed for the reasons cited in this brief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, W. Glenn Watts, 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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Circuit Court Judge
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This the 5th day of May, 2010.

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