

IN THE SUPREME COURT OF MISSISSIPPI, COURT OF APPEALS

JOHNNY McCULLOUGH

APPELLANTS

V

CAUSE NO.: 2009-KA-01645-COA


STATE OF MISSISSIPPI

APPELLEES

**CERTIFICATE OF INTERESTED PERSON**

That Greg E. Beard certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Supreme Court Justices may evaluate possible disqualification or recusal.

1. Johnny McCullough, Blue Springs, Mississippi, Appellant;
2. State of Mississippi, Union County, Mississippi, Appellee;
3. Honorable Robert W. Elliott, Third District Circuit Court Judge  
102 North Main Street, Suite F, Ripley, MS 38663
4. Honorable Ben Creekmore, Office of the District Attorney  
P.O. Box 1478, Oxford, MS 38655
5. Honorable Kelly Luther, Office of the District Attorney  
P.O. Box 1478, Oxford, MS 38655
6. Honorable Greg E. Beard, Attorney for Appellant  
P.O. Box 285, Booneville, MS 38829

  
\_\_\_\_\_  
GREG BEARD, ATTORNEY FOR  
APPELLANT, JOHNNY McCULLOUGH

## **TABLE OF CONTENTS**

CERTIFICATE OF INTERESTED PERSON .....	i
TABLE OF CONTENTS .....	ii
TABLE OF CASES, STATUTES AND OTHER AUTHORITIES .....	iii
I. STATEMENT OF ISSUES .....	1
II. STATEMENT OF CASE .....	1
A. Identification of Appellant .....	1
B. Summary of Case and Statement of Relevant Facts .....	1
III. SUMMARY OF THE ARGUMENT .....	4
IV. ARGUMENT .....	5
<u>Issue No. 1:</u> Whether the Jury's Verdict is against the overwhelming weight of not only the evidence but the other findings of not guilty on five counts alleging the same conduct. ....	5
<u>Issue No. 2:</u> Whether Johnny McCullough was denied effective assistance of counsel .....	8
IV. CONCLUSION .....	10
CERTIFICATE OF SERVICE .....	12

## **TABLE OF CASES, STATUTES AND OTHER AUTHORITIES**

<i>Amiker v. Drugs for Less, Inc.</i> , 97-CA-01493-SCT, 796 So.2d 942 (Miss. 2000) .....	6
<i>Bush v. State</i> , 2003 -KA-01528-SCT (Miss. 2005) .....	6
<i>Colenburg v. State</i> , 97-KA-00532-COA, (Miss. Ct. App. 1999), 735 So. 2d 1099, .....	8
<i>Henry v. State</i> 2008-KA-01648-COA (Miss. App. 2-9-2010) .....	8
<i>Herring v. State</i> , 691 So.2d 948 (Miss. 1997) .....	6
<i>Strickland v. Washington</i> , 466 U.S. 668 (1984) .....	8
United States Constitution Sixth Amendment .....	8

## **I. STATEMENT OF ISSUES**

**ISSUE NO. 1:**        **WHETHER THE JURY'S VERDICT IS AGAINST THE OVERWHELMING WEIGHT OF NOT ONLY THE EVIDENCE BUT THE OTHER FINDINGS OF NOT GUILTY ON FIVE COUNTS ALLEGING THE SAME CONDUCT.**

**ISSUE NO. 2:**        **WHETHER JOHNNY McCULLOUGH WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL**

## **II. STATEMENT OF THE CASE**

### **A.     Identification of Appellant**

Appellant, Johnny McCullough, at the time of the trial was 63 years of age, having been born on December 6, 1945. He is married to Julia McCullough for approximately 43 years at the time of the trial. Mr. McCullough is the natural father of three children, two of whom were alive at the time of the trial, namely, Billy McCullough, 42 years of age, and Jamie Dwayne McCullough, 38 years of age.

### **B.     Summary of Case and Statement of Relevant Facts**

The McCulloughs all lived on sixty-nine (69) acres of land located in the Blue Springs, Union County, Mississippi. Johnny's two sons have multiple marriages and several children between the marriages. At the time of trial, Jamie McCullough was actually married to his brothers ex-wife Paula. Paula and Billy are the mother and father of Haley McCullough, the alleged victim in counts Six and Seven of the Amended Indictment. Amy Emiline McCullough, the alleged victim in Counts One, Two and Three of the Amended Indictment, is the natural child of Jamie McCullough and Billie Jean (McCullough) Maxey. The child named in Counts Four and Five was Andrea Bond, the natural child of Billie Jean (McCullough) Maxey and Andrew Bond. Andrea was raised by Jamie

McCullough since the age of two and she was sixteen (16) at the time of the trial having no substantial contact with her natural father throughout her life.

Johnny McCullough for most of his adult life worked as an over the road truck driver, driving for several different trucking companies, and was also a Baptist minister, preaching from 1981 until approximately 1998. (Transcript of Hearing, pages 458-485).

The McCulloughs were a tight knit family, however the multiple marriages of the sons led to frequent discourse among the family requiring Johnny McCullough and Julia McCullough to often provide primary care for the grandchildren and step-grandchildren for extended periods of time. Jamie McCullough was originally married to Carol Hancock, which lasted approximately one year. After which, Jamie married Billie Jean, who had one child prior to their marriage, Andrea, who was approximately two years old when she began living with Jamie. Jamie and Billie Jean had three other children, namely, Jamie Wayne McCullough, Amy Emiline McCullough and Julia Faith McCullough. This marriage lasted until they were divorced in December of 2007 at which time Jamie gained custody of the minor children and Billie Jean was granted supervised visitation at the home of Johnny McCullough and Julia Faye McCullough. (Transcript of Hearing, page 423 line 11-27). Thereafter, Jamie McCullough married Cynthia "Cindy" Chandler and lived on the McCullough community property bringing her child Savannah to that home. Savannah was one of the alleged victims in the original 22 count indictment which was amended to 7 counts by the time of the trial. Sometime early in 2008 Cindy and Jamie separated and divorced.

In February of 2008, Billie Jean McCullough had retained an attorney and began an attempt to modify the custody which currently existed with Jamie. The original court date was continued and a Chancery Court date of July 2, 2008 was scheduled. (Transcript of Hearing, page 425-426). At the

same time Jamie and were in an on again and off again relationship in which Cindy was accusing Jamie of being involved with Paula McCullough, who was the ex-wife of his brother, Billy McCullough.

It is very significant that no allegations had been made prior to the July 2, 2008, Chancery Court hearing. It is also significant that Cindy Chandler occupied the minor children when they attended forensic interviews. However, shortly thereafter the allegations were made and the children were removed from the home of Jamie by the Department of Human Services and placed in the custody of Billie Jean McCullough. (Transcript of Hearing page 427, line 26- page 428, line 7).

The capias was issued and the twenty-two (22) count indictment filed on October 22, 2008. On November 10, 2008 a waiver of arraignment and entry of a not guilty plea was entered. A jury trial was conducted beginning September 9, 2009 and lasting until September 11, 2009 on a seven (7) count indictment. The first three (3) counts of that indictment were for the fondling of Amy Emiline McCullough, counts four and five were for the sexual battery and fondling of Andrea Bond, counts six and seven were for the fondling and/or sexual battery of Haley McCullough. The jury returned not guilty verdicts on Counts One, Two, Three, Six and Seven and a guilty verdict on counts Four and Five. It is of extreme importance to note that the charges were all similar in nature and all arose after the July 2, 2008 Chancery Court matter was continued.

After the July 2, 2008 Chancery Court matter was continued and the allegations were brought forward, the Department of Human Services came into the picture taking the children away from Jamie McCullough and giving custody of the children to Billie Jean (McCullough) Maxey. Jamie McCullough was given unsupervised visitation thereafter and sometime in the summer before the trial Amy Emiline McCullough told her father that Cindy Chandler, forced those girls to give

statements which led to the twenty-two (22) count indictment and subsequent trial of their grandfather, Johnny McCullough. (See affidavit of Jamie McCullough and recording attached hereto as Exhibits A and B and incorporated as if fully copied herein). The tape recording of the child making this confession was not entered into evidence as an exhibit, nor did the attorney for the Defendant, Christopher Kitchens, question Jamie, Cindy, or the minor child, Amy Emiline McCullough, regarding the statement made by the child.

### **III. SUMMARY OF ARGUMENT**

Johnny McCullough was originally indicted on a twenty-two count indictment which alleged various acts of sexual abuse to minor children. These acts were alleged only after a Chancery Court matter concerning custody of these minor children was continued from July 2, 2008.

Johnny McCullough only went to Court on seven (7) counts which involved three children, Amy Emiline McCullough, Counts 1-3, Andrea Bonds, Counts 4 and 5, and Haley McCullough, Counts 6 and 7. The seven count indictment alleged acts against these three children which were almost identical in nature. All three children testified to similar type conduct yet the jury found the Defendant not guilty on two of the children and guilty on two counts involving the same child. To say that the jury's verdict is inconsistent would be an understatement. It is in fact a conflict which is contrary to all common sense and reason.

The defense attorney, Christopher Kitchens, was in possession of a tape recording and certain knowledge and facts, if which were provided to the jury would surely have convinced the jury that not only was Johnny McCullough not guilty of five of the seven counts at trial but he would have been found not guilty of all counts. Jamie McCullough had recorded a statement given by Amy Emiline McCullough, referred to as Emily McCullough in the Transcript, in which she stated that

she and the rest of the girls were forced to allege that Johnny McCullough sexually abused them. Because that evidence was not brought before the jury, the Defendant was denied his right to an effective assistance of counsel which greatly prejudice his ability to receive a fair and impartial trial.

#### **IV. ARGUMENT**

**ISSUE NO. 1:        WHETHER THE JURY'S VERDICT IS AGAINST THE  
OVERWHELMING WEIGHT OF NOT ONLY THE  
EVIDENCE BUT THE OTHER FINDINGS OF NOT GUILTY  
ON FIVE COUNTS ALLEGING THE SAME CONDUCT.**

The State produced four minor children to testify for the jury during the trial, Savannah Chandler, a child who was the subject to some of the counts which were dismissed, Amy Emiline McCullough, Counts 1-3, Andrea Bond, Counts 4 and 5, and Haley McCullough, Counts 6 and 7. The minor children all testified that they had been touched in an unlawful manner by the Defendant, Johnny McCullough. Throughout the testimony of the minor children the State repeatedly asked the children if they were telling the truth to which the children would respond yes. In fact the jury heard during closing arguments by Assistant District Attorney Honey Ussary "you (jury) had four little girls that stood up here and told you the truth, and all seven of these counts have been proven." (Transcript of Hearing, page 578, line 28 - page 579 line 1). This is a reoccurring theme throughout the testimony and the closing argument provided by the prosecution. There was no difference in the testimony from one child to the other that can be gleaned from the transcript.

Assistant District Attorney Kelly Luther phrased the case in this fashion "[t]his case is about whose lying and whose not." (Transcript of Hearing, page 599 line 16). He continued to lump the children together characterizing their testimony as follows: "they've kept telling the same story as bad as it hurts them, as bad as it hurts their family, as bad as it hurts their grandma who they love,

they kept telling the same story because it's true." (Transcript of Hearing, page 597, line 9-13). While Mr. Luther was not meaning that they told exactly the same story neither Assistant District Attorney tried in their closing arguments to differentiate the testimony because the testimony was so similar.

Yet when the jury heard this same evidence coming from a different child, but of a similar nature, the jury found Johnny McCullough not guilty on counts one, two, three, six and seven and guilty on counts four and five. The Defendant, Johnny McCullough, by and through new counsel filed a motion for new trial and for judge notwithstanding the verdict which was denied.

A new trial should be granted when the jury's "verdict is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice." Herring v. State, 691 So.2d 948, 957 (Miss. 1997). The Appellate Court has been referred to as the thirteenth juror and a new trial should be granted "only in exceptional cases in which the evidence preponderates heavily against the verdict." Amiker v. Drugs for Less, Inc., 97-CA-01493-SCT, 796 So.2d 942, 947 (Miss. 2000). When the reviewing Court reviews the evidence it should be weighed in the light most favorable to sustaining the jury's verdict. Herring at 957, and if the Appellate Court disagrees with the jury's verdict then the proper remedy is to grant a new trial. Bush v. State, 2003 -KA-01528-SCT (Miss. 2005), page 844 at ¶ 18.

The consist theme throughout the trial was that there was no allegations of abuse prior to the July 2, 2008, Chancery Court hearing in which Billie Jean (McCullough ) Maxey, who was suffering from restricted supervised visitation rights, had filed a custody proceeding against Jamie McCullough.

The minor children testified uniformly throughout that Johnny McCullough had touched them in an inappropriate manner. Their testimony was bolstered by Angie Floyd, a Department of Human Resources employee, who was admitted as a expert in forensic interview techniques and Cynthia "Cindy" (Chandler)( McCullough) Talley. It should be noted that the mother of Andrea Bond, Billie Jean (McCullough) Maxey did not testify for the State or the Defense. Despite being crucially involved every aspect of the custody battle with Jamie McCullough and the allegations which were brought forth.

Jamie McCullough is and was in possession of the tape recording in which Amy Emiline McCullough states that Cindy Chandler forced her and the other girls to allege that Johnny McCullough had touched them in an inappropriate manner. The entire evidence at trial was the minor children's testimony, yet the weight was unevenly distributed when the jury returned its verdict. The minor children's testimony did not establish a long standing pattern of inappropriate behavior. They simply recalled specific, isolated events which, in the case of Amy Emiline McCullough and Haley McCullough, the jury did not believe.

The Appellant Court is compelled to consider the evidence and weigh it in a light most favorable to the verdict. But the verdict in this case is inconsistent. As stated by the Assistant District Attorney Honey Ussary each child was asked repeatedly if they were telling the truth, to which each child would respond yes. However, when the jury returned the verdict they found that two of the children were not telling the truth and that one child was. The jury come back with a unanimous not guilty verdict on Counts One, Two and Three, finding that minor child Amy Emiline McCullough was not being truthful and a unanimous not guilty verdict on Counts Six and Seven finding that the minor child Haley McCullough was not being truthful. And a unanimous guilty

verdict finding that the minor child Andrea Bond was being truthful. However, the testimony at trial was almost exactly the same. Not the content of the testimony but the allegations contained therein. It should be remembered that these children were raised together for most of their life and had been exposed to all the same environmental and human contact throughout their life. This verdict is contrary to the overwhelming weight of the evidence and this Court should remand this matter for a new trial.

**ISSUE NO. 2:      WHETHER JOHNNY McCULLOUGH WAS DENIED  
EFFECTIVE ASSISTANCE OF COUNSEL**

The Sixth Amendment to the United States Constitution states that a Defendant is entitled “to have the Assistance of Counsel for his defense.” Sixth Amendment of the United States Constitution. This assistance of counsel has been defined by the United States Supreme Court in the case of Strickland v. Washington is the right to the effective assistance of counsel in which the complaining party must show that: 1) counsel’s performance was deficient and 2) this deficiency prejudice his defense. Strickland v. Washington, 466 U.S. 668, 687 (1984). There exists a strong presumption that counsel was effective and that “to overcome this presumption, ‘[t]he defendant must show that there is a reasonable probability that, but for the counsel’s unprofessional errors, the result of the proceeding would have been different.’” Henry v. State 2008-KA-01648-COA (Miss. App. 2-9-2010) ¶ 17 quoting Strickland at 694.

In Henry the Court also points out that ineffective assistance of counsel claim on direct appeal is only when “(1) the record affirmatively show[s] ineffectiveness of constitutional dimensions, or (2) the parties stipulate that the record is adequate to allow the appellate court to make the finding without consideration of the findings of fact of the trial judge.” Colenburg v. State,

97-KA-00532-COA, (Miss. Ct. App. 1999), 735 So. 2d 1099, 1101(¶5), Henry at ¶18. This does not preclude the Defendant raising ineffectiveness assistance of counsel in a post conviction proceedings. Id at 1102 (¶6).

The Defendant in his motion for JNOV or new trial attempted to introduce into the record the recorded statement of the minor child Amy Emiline McCullough in which she stated that Cindy Chandler had made all the girls allege that Johnny McCullough had committed acts which resulted in the twenty-two (22) count indictment and ultimately in the conviction on two counts involving the minor child Andrea Bond. The trial court denied defense counsel's request to include that into the record.

The defense counsel, Christopher Kitchens, had disclosed the existence of the recorded conversation to Assistant District Attorneys Honey Ussary and Kelly Luther. That recording is included as an exhibit herein as well as the affidavit of Jamie McCullough.

Trial counsel for the Defendant also did not offer the testimony of Billie Jean (McCullough) Maxey who is the natural mother of two of the minor children involved in this case, Andrea Bond and Amy Emiline McCullough and was in an hotly contested custody battle in a Chancery Court proceeding which was scheduled for July 2, 2008 and continued. Thereafter, the allegations were made and the Department of Human Services took action removing the minor children from the custody of Jamie McCullough and placing them into the hands of Billie Jean (McCullough) Maxey.

The case law requires that only the matters contained within the transcript are considered. However, it should be just as obvious that the matters which were not contained within the transcript be appropriate on appeal for the Defendant to sustain a claim of ineffective assistance of counsel. Surely the recorded statement of the minor child stating that the minor children were forced to make

these statements by their step-mother, Cindy Chandler, should have been brought to the attention of the jury. Had that matter been brought to the attention of the jury it would have surely had a great impact upon the jury's verdict. Therefore, the two elements of ineffective assistance of counsel have been met. Those being that evidence was not produced and that the lack of said evidence had a prejudicial effect on the outcome of the proceedings adversely impacting the Defendant, leading to a guilty verdict on two counts of the seven count indictment. This Court should find that the Defendant did not receive effective assistance of counsel and that because of that deficient performance this matter should be remanded for new trial.

## **VI. CONCLUSION**

The State of Mississippi indicted Johnny McCullough on twenty-two (22) counts alleging unlawful touching of a minor female children. Those counts were reduced to seven (7) and at trial the jury returned a verdict of not guilty on counts One, Two and Three involving the minor child Amy Emiline McCullough; not guilty on counts Six and Seven involving the minor child Haley McCullough; and guilty on counts Four and Five involving the minor child Andrea Bond. The evidence produce by the State which was in the form of the testimony of the minor children, and two other witnesses used to bolster the testimony of the minor children, were substantially the same testimony. However, the jury unanimously found that two of the children were not telling the truth but found that one child did tell the truth. As the thirteenth juror the jury's verdict is contrary to the overwhelming weight of the evidence and therefore this Court should remand this matter fora new trial.

The defense counsel was in possession and had disclosed a tape recording of one of the minor children stating that Cindy Chandler had forced the other children to make statements which were

the basis of the twenty-two (22) count indictment against Johnny McCullough. Furthermore, the defense did not call the mother of the minor children Billie Jean (McCullough) Maxey who was critically involved in a custody battle with Jamie McCullough, Johnny McCullough's son. Lack of such a crucial piece of evidence and testimony rendered the assistance of counsel ineffective and greatly effected the outcome of the trial which would have surely impacted the jury's verdict had they been exposed to that minor child's statement. Therefore, this Court should remand this matter for a new trial.

Respectfully submitted,

GREG E. BEARD, P.A.

A handwritten signature in cursive script that reads "Greg Beard". The signature is written in black ink and is positioned above a horizontal line.

Greg E. Beard, MS Bar [REDACTED]  
Attorney for Appellant

GREG E. BEARD, P.A.  
ATTORNEY AT LAW  
POST OFFICE BOX 285  
BOONEVILLE, MS 38829  
TELEPHONE: 662/720-8340  
FACSIMILE: 662/720-8342  
EMAIL: greg109@bellsouth.net

CERTIFICATE OF SERVICE

I, Greg E. Beard, attorney for Appellant, do hereby certify that I have on this date \_\_\_\_\_ hand-delivered, \_\_\_\_\_ faxed, and/or X placed in the United States Mail, postage prepaid, a true and correct copy of the above and foregoing to the following:

Ben Creekmore, Esquire  
Kelly Luther, Esquire  
Office of the District Attorney  
P.O. Box 1478  
Oxford, MS 38655

This the 9<sup>th</sup> day of March, 2010.

  
\_\_\_\_\_  
GREG E. BEARD

IN THE SUPREME COURT OF MISSISSIPPI, COURT OF APPEALS

JOHNNY McCULLOUGH

APPELLANTS

V

CAUSE NO.: 2009-KA-01645-COA

STATE OF MISSISSIPPI

APPELLEES

---

AFFIDAVIT

---

STATE OF MISSISSIPPI                    )  
COUNTY OF PRENTISS                    )

PERSONALLY APPEARED BEFORE ME the undersigned authority in and for said State and County, the within named, JAMIE McCULLOUGH, and by me being duly sworn states on oath as follows, to-wit:

1. I am JAMIE McCULLOUGH, an adult resident citizen of Union County, Mississippi and am above the age of twenty-one (21) years.
2. My current address is 1161 County Road 252, Blue Springs, Mississippi. I am the natural father of Jamie Dwayne McCullough, Amy Emiline McCullough and Julia Faith McCullough.
3. I make this statement in connection with the above styled case. In July, 2008 I was married to Cynthia Chandler and was going through a custody dispute with Billie Jean (McCullough) Maxey who is the mother of my natural children. At the time I was residing on property owned by family in Blue Springs, Mississippi. Shortly, after the continuance of the July, 2008 hearing was continued Cindy and I separated. Allegations of sexual abuse were then made against my father, Johnny McCullough and the Department of Human Services required that I and my children move from the family property. We moved to 106 Mile Branch, Booneville, Mississippi.
4. Sometime during the middle of August, 2008 while I still had custody, my daughter, Amy Emiline McCullough, she told me that Cindy Chandler forced her and the other girls to tell Melissa that her papaw, Johnny McCullough, touched them inappropriately. Shortly after this conversation the Department of Human Services removed my children from my custody.

EXHIBIT     A

5. I taped the conversation with Amy Emiline McCullough and gave the tape to my father, Johnny McCullough. It is my understanding that my father gave this tape to his defense attorney, Christopher Kitchens, who disclosed the same to the State.. I testified at the trial which was conducted in September, 2009 and was never asked by Christopher Kitchens about the tape.

WITNESS MY SIGNATURE this the 9<sup>th</sup> day of March, 2010.

Jamie D McCullough  
JAMIE McCULLOUGH

SWORN TO AND SUBSCRIBED before me on this the 9<sup>th</sup> day of March, 2010.

Lisa K Slack  
Notary Public

My Commission Expires:

July 14 2010 }

