IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

KEVIN ELDRIDGE — APPELLANT

VS. — NO. 2010-KA-0448-SCT

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

JIM HOOD, ATTORNEY GENERAL

BY: W. GLENN WATTS
SPECIAL ASSISTANT ATTORNEY GENERAL
MISSISSIPPI BAR N[redacted]

OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MS 39205-0220
TELEPHONE: (601) 359-3680

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

KEVIN ELDRIDGE **APPELLANT**

VS. **NO. 2010-KA-0448-SCT**

STATE OF MISSISSIPPI **APPELLEE**

BRIEF FOR THE APPELLEE

PROCEDURAL HISTORY:

On March 13, 2008, Kevin Eldridge, "Eldridge,"was tried for house burglary before the Circuit Court of Rankin County, the Honorable Samac Richardson presiding. R. 1. Eldridge was found guilty. He was given a twenty five year sentence as an habitual offender under M. C. A. Sect. 99-19-82 (1972). R. 137.

While no motion for a new trial was filed, a hearing was held on various allegations by appeal counsel for Eldridge. Volume 2, R. 141-180. After hearing testimony, the trial court denied relief. R. 179; C. P. 77.

Mr. Eldridge through counsel filed notice of appeal to the Mississippi Supreme Court. C.P. 78.

ISSUES ON APPEAL

I.

SHOULD THE PROSECUTOR HAVE RECUSED HIMSELF UNDER THIS SET OF FACTS?

II.

DID ELDRIDGE RECEIVE EFFECTIVE ASSISTANCE?

III.

WAS THERE CREDIBLE, SUBSTANTIAL EVIDENCE IN SUPPORT OF ELDRIDGE'S CONVICTION FOR BURGLARY?

STATEMENT OF THE FACTS

On May 17, 2007, Mr. Eldridge was indicted for burglary of Ms. Selma Yelverton's dwelling in Florence, Mississippi by a Rankin County Grand jury. This occurred between January, 20, 2007 and February 12, 2007. C.P. 5-6.

On March 13, 2008 , Kevin Eldridge was tried for house burglary before the Circuit Court of Rankin County, the Honorable Samac Richardson presiding. R. 1. Eldridge was represented by public defender, Ms. Darla Palmer. R. 1.

Ms. Selma Yelverton testified that she owned a mobile home. The address was 102 Shannon Trey Lane. R. 73. It was on a half acre lot with a shop and a shed. R. 74-75. Although there was damage from Hurricane Katrina, it was still habitable. Yelverton testified that she discovered someone was inside her trailer. She testified that the doors of the trailer were "locked" and window units "sealed." R. 83-84. When she investigated, after noticing a possible intruder , she found "the back door unlocked." R. 84. When she confronted the intruder with a male friend, the intruder identified himself as "Kevin," "Charlotte's son." R. 79.

Ms. Yelverton testified she did not give anyone permission to enter her trailer. R. 80. After notifying law enforcement about the breaking and entering, she testified to receiving some of the items missing from her trailer. Some of these items, which included collectors' baseball cards, money, coins and charms are shown in photographic exhibit 1. R. 83.

Officer Tim Lawless testified that Mr. Ball brought some items that Eldridge, his step son, had left at his home. R. 58. The items depicted in photographic exhibit 1 were identified as being what was left of a baseball card collection, as well as a wooden box. These items were identified by Ms. Yelverton as having come from her trailer. R. 59; 83.

The record reflects that Eldridge admitted to investigator Lawless that he was in Ms.

Yelverton's trailer. However, he claimed that he had permission. Eldridge also did not have any explanation for why the collectors' items shown in exhibit 1 were identified as something he brought to his step father's house. R. 62.

The trial court denied a motion for a directed verdict. R. 102.

Ms. Charlotte Ball, Eldridge's mother testified in his behalf. R. 102-107.

Mr. Eldridge was found guilty. R. 134. He was given a twenty five year sentence as an habitual offender under M. C. A. Sect. 99-19-81 (1972). R. 137.

While no motion for a new trial was filed, a hearing was held on allegations of alleged conflict of interest by appeal counsel. R. 141-179. This was based upon the fact that Mr. Dan Duggan, who participated in Eldridge's prosecution, had allegedly previously representing him as a public defender. Volume 2, R. 141-179. After hearing testimony, the trial court denied relief. R. 176-179; C. P. 77.

The court found that the motion for a new trial was "not timely." R. 176-179. Eldridge admitted that he did not notify anyone about post conviction motions "within ten days" of his conviction. R. 153 . There was also no evidence of any notice by Eldridge to anyone about an alleged "conflict of interest." R. 152. This claim arose many months after trial, and conviction. There was also no evidence that confidential evidence was obtained and used against Eldridge during his trial. Nor was there any showing of any prejudice to Eldridge.

Eldridge admitted there was no objection to Mr. Dan Duggan's participation at trial, nor any request for recusal. R. 150; and R. 1-138. The record reflects that Duggan assisted Mr. Marty Miller who tried the case against Eldridge. R. 1.

Duggan testified to having no knowledge about any of the charges against Eldridge prior to his trial. Duggan testified that records indicate that he arranged Eldridge's arraignment prior to

discovery, or trial in the instant cause. This was when he was a public defender. At the time of this trial Duggan was an assistant district attorney. R. 154-163; 158. He did not remember any previous contact with Eldridge during the trial. R. 158.

Mr. Eldridge through counsel filed notice of appeal to the Mississippi Supreme Court. C.P. 78.

SUMMARY OF THE ARGUMENT

I. There was inadequate grounds for recusal. After hearing testimony, the trial court found there was insufficient evidence for any recusal on the part of assistant district attorney Mr. Duggan. R. 176-179 . The testimony at the post conviction hearing indicated no notice and no confidential information was obtained by Mr. Duggan. R. 158. Eldridge never raised "conflict of interest" until nine months after his conviction. This was at a post conviction hearing. R. 148; 150-152; 168.

At a hearing, Eldridge never stated "what" that alleged confidential information was that prejudiced his defense. **Aldridge v. State** , 583 So.2d 203, 205 (Miss. 1991), and **Vandergriff v. State** 920 So.2d 486, 493 (Miss. App. 2006).

The trial court also found the motion for a new trial was not timely. There was a lack of evidence that Eldridge requested any appeal. This would be either verbally or in writing within the ten days for doing so. R. 152-153; 176. The trial court found that Eldridge did not show his lack of a post conviction motion was "through no fault of his own." **Fair v. State**, 571 So.2d 965, 967 (Miss. 1990).

II. There is a lack of evidence of ineffective assistance of counsel. There was neither evidence of deficient performance or of prejudice to Eldridge's defense to the burglary charge. Eldridge did not meet his burden of proof. **McQuarter v. State**, 574 So. 2d 685, 687 (Miss. 1990).

As shown under proposition I, there was a lack of evidence that Mr. Duggan should have recused himself. There was a lack of evidence of either notice of a possible conflict, or that confidential information was either obtained or much less used against Eldridge during his trial for burglary. R. 176-179.

There are no "affidavits" or statements of "good cause why" they could not be obtained by Eldridge in support of his claims. M. C.A. Sect. 99-39-9 (1)(e) and **Lindsay v. State**, 720 So. 2d

182, 184 (Miss 1998).

There was also a lack of evidence that trial counsel was derelict in her duties in not filing a motion for a new trial. Eldridge admitted he did not direct anyone to do so within the time for filing such a motion. R.152- 153. This issue is also lacking in merit.

III.. There was credible, substantial corroborated evidence in support of Eldridge's conviction. Yelverton testified that her trailer's doors and windows were "locked" and "sealed." R. 83-84. When she discovered someone was apparently inside, she found the back door was "unlocked." R. 84. Eldridge identified himself as being inside her trailer. R. 79.

The owner also identified items taken from her trailer , exhibit 1. R. 83. Officer Lawless testified that exhibit 1 had been delivered by Eldridge's step father. Mr. Ball stated that they were left at his house by the appellant. R. 58. **McClain v. State**, 625 So. 2d 774, 778 (Miss. 1993) and **Doby v. State**, 532 So. 2d 584, 591 (Miss. 1988).

ARGUMENT

PROPOSITION I

THE RECORD REFLECTS NO NOTICE OF CONFLICT, OR THAT CONFIDENTIAL INFORMATION WAS EITHER OBTAINED OR SHARED AT TRIAL.

Mr. Eldridge argues that Mr. Duggan, who was one of the prosecutors involved in his case, should have recused himself from participating in his trial. He argues that Duggan should have done so because he had previously represented him. He also maintains that Duggan obtained confidential information. He then used it against him in his trial. Eldridge argues that jail record logs confirm that Duggan was previously involved in his case. He believes this lends support to his argument about how this conflict of interest harmed his defense. Appellant's brief page 4-7.

To the contrary, the record reflects no notice of any possible conflict of interest by the defense until nine months after sentencing. R. 152. Nor did testimony at a hearing on this alleged conflict of interest claim reveal that either confidential information was obtained by Duggan or used against Eldridge during his trial. R. 176-179.

Mr. Dan Duggan testified that when he was a public defender, he handled arraignments and trial dates. He had many clients-as many as twenty to twenty five a month. R. 154. He testified that in that capacity he would not receive discovery until several months after indictment. R. 155. He testified that while he was involved in Eldridge's trial, it was only as second chair to Mr. Miller. He did not remember any contact with Eldridge during the trial. R. 158.

There was no objection to his participation and no request for recusal. During the trial Duggan did not either recognize Eldridge or recall any information obtained about Eldridge's case. He did not recall sharing anything during the trial based upon any previous contact with him.

Q. **Okay. At any time during the trail or leading up to that, did you ever recall**

that meeting, that brief meeting with Eldridge in the jail?

A. **No, I did not.**

Q. **Did you and I at any time discuss any possible information he may have given you in the jail about his case?**

A. **No.**

Q. Do you have any recollection, Mr. Duggan, of any confidential information pertaining to his defenses, his theories, anything like that with specific facts of his case that he may have discussed with you?

A. ...**But as to any specifics, I do not have any direct knowledge of anything specifically said right now. I do not.** R. 158. (Emphasis by appellee).

Mr. Duggan testified that while he may have met with Eldridge, as shown on the jail log book entries, it was to arrange for his arraignment. He would have been doing so not just for Eldridge but also for other defendants. This is confirmed by the record. C.P. 9. Duggan filed a waiver of arraignment for Eldridge as he did for other defendants awaiting trial in Madison County.

The jail logs indicate that Duggan signed in to visit with Eldridge along with nine other inmates on June 19, 2007. See Exhibit 1, "Rankin County Jail Attorney Visits," page 2 in manila envelop.

Mr. Duggan testified that after his visit with Eldridge and nine others to arrange arraignments, the jail logs show that Eldridge was visited by Ms. Lemon who was also a public defender.

Q. Okay. What about 9-28?

A. On 9-28, it looks like she (Ms. Lemon) saw Carla Calcote and Kevin Eldrige.

Q. Did you see Kevin Eldridge on those days that you recall from this log?

A. I did not. R. 165.

See state's exhibit 1 for copy of "Rankin County Jail Attorney Visits." It shows as entry for

Duggan visiting Eldridge in June 2007 but not thereafter.

Eldrige admitted that he never brought up any alleged conflict of interest until long after he had been tried, convicted and sentenced.

> Q. **Okay. Well why did you not do that at that time?** (Not tell his trial counsel, Ms. Palmer, Mr. Duggan, the Judge or anyone else about his prior contact with Duggan.)
>
> A. **Because I really didn't realize it until after-the-fact.** R. 148.
>
> ...
>
> Q. **Mr. Duggan was present in the courtroom for all of your trial?**
>
> A. **Yes, sir.**
>
> Q. **And you never once brought that to the attention of the court or your attorney, myself, or even Mr. Duggan, did you?**
>
> A. **No, sir.** R. 150.
>
> ...
>
> Q, Did you sent a letter to the DA's office?.
>
> A. No
>
> Q. Did you send a letter to Mr. Duggan?
>
> A. No, sir. R. 152. (Emphasis by appellee).

While Eldridge claimed to have sent a letter to the public defender's office about filing a post conviction motion, he admitted that this would have been some 30 days after conviction and he did not know the date of the letter and he had no copy. R. 152-153.

> Q. How long after you got to MDOC before you sent a letter to Ms. Palmer advising her for the first time that Dan Duggan, who at the time of your trial was assistant district attorney, at some point in the past as a public defender had talked to you in the jail?
>
> A. Within a month because I wanted to get a direct appeal going. R. 152- 153.

Ms. Darla Palmer, the public defender who represented Eldrige during the trial, testified that

she was contacted by someone on the telephone. They contacted her on behalf of Eldridge. Palmer was told that they were going to get counsel for him. Ms. Palmer testified that after the call, she was never contacted by Eldridge. She was not contacted by anyone on his behalf about filing either a motion for a JNOV or a direct appeal.

Ms. Palmer testified that Eldridge never mentioned at any time prior to or during the trial that he remembered contact with Mr. Duggan when he was a public defender. R. 168. She testified that had he done so, she would have requested recusal for Duggan, or any other attorney who had any previous contact with Eldridge while serving as a public defender.

> Q. **At any time prior to trial or at trial, did Mr. Eldridge ever advise you that Dan Duggan had spoken to him about his case while Mr. Duggan was a public defender?**
>
> A. **No, not that I recall**. R. 168.
>
> ...
>
> Q. All right. And, of course, after a verdict comes back there's 10 days to file a JNOV trial motion?
>
> A. Exactly.
>
> Q. Would you agree with me that one of those was not filed in this case?
>
> A. No, I did not. I just–and the reason for that would just have been that I was under the impression that a new lawyer was going to be obtained at that point.
>
> Q. And likewise there was no notice of appeal filed of any kind, correct?
>
> A. Not that I filed , no, sir. R. 170
>
> Q. Could you tell us what you recollect about the substance of that conversation?
>
> A. **I believe that there were several calls, and there was a discussion about what would be the next step, something of that nature. And then in the midst of that, I want to say that the lady I spoke to said that, well, she wold hire–that they were going to try to hire an attorney.**

Q. Okay. But she did call inquiring about what the next step is?

A. Yeah, what would be the next step.

Q. ... the next step after a verdict is, after a verdict comes back is what?

A. It would be a 10 day JNOV motion. R. 170. (Emphasis by appellee).

Madison county prosecutor Mr. Marty Miller testified there was no evidence that Eldridge provided anyone with notice of a possible conflict of interest. He also never contacted anyone about any post trial motions or a direct appeal. There was also no evidence that any confidential information was ever shared with Mr. Duggan.

> Mr. Miller: So our position is, number one, it's untimely. It was not filed within 10 days. There was no confidential information that was shared between Mr. Duggan and this defendant. It was only an issue with the arraignment and bound. And number three, the defendant, by his own omission, told no one. R. 174 ...In addition, your honor because he's not filed it within 10 days, his only recourse at this time is a post conviction motion, which he has not filed. R. 175.

The trial court found based upon the testimony that the motion for a new trial was not timely. There was no testimony in support of Eldridge giving anyone notice that he wanted these motions filed. While he testified to telling Ms Palmer to do so, he admitted that it would have been after thirty days or more. A motion for new trial must be filed within ten days.

> Court: Mr. Eldridge testified that-he was asked a question about when Ms. Palmer was notified, and I remember his response was, well, it was within 30 days, which is more than 10 days the last time I checked and added it up. He has no copy of any notice sent to Ms. Palmer. R. 176.
>
> Now, it's my opinion that the deadline for filing the motion for a new trial has long since expired. The conversation with Ms. Palmer was, what was the next step? She disclosed that. And if that was–I don't know when that was, but it appears to me from the testimony I heard that it was past the 10 day period under rule 10.05. Therefore, it really doesn't matter what that conversation was. You're still past the 10 days. R. 178.

The trial court also found that there was insufficient grounds for recusal. The record reflected

no objection at trial to Mr. Duggan's participation. There was never any notice of a possible conflict of interest until nine months after trial and sentencing. Mr. Duggan testified to merely arranging arraignment for Eldridge along with many others, and never receiving any discovery much less any confidential information from Eldridge.

As stated by the trial court:

> **Mr. Eldridge has not come forward and said that's what they did. All he's come forward and said is that based on this Gray case that Mr. Duggan should have been disqualified and the case should be reversed for that reason. Mr. Duggan has testified that all he did was administratively handle any arraignment and have a trial setting.** R. 178-179. (Emphasis by appellee).

In **Aldridge v. State**, 583 So.2d 203, 205 (Miss. 1991), the Court announced "a case by case analysis" for dealing with alleged conflict of interest cases. These cases arise where public defenders join the prosecutor's office.

In that case, unlike the case sub judice, there was evidence of disclosure of confidential information, as well as notice by the accused to his attorney of record. The notice was about the potential disclosure of confidential information to someone now involved with the prosecution's case against the defendant. Under these facts, the Court found the trial court erred in allowing another district attorney from the same office to continue with the trial.

> We do not believe a per se disqualification rule is the answer. In **Gray**, we declined to adopt a per se disqualification rule when considering whether an assistant district attorney who previously represented an accused was disqualified from prosecuting the case. **Gray**, 469 So.2d at 1255. **We found the better approach to be a case-by-case analysis to determine whether the lawyer gained any confidential information during his representation of the client.** Id. Gray, however, is distinguishable because we did not consider whether imputed disqualification is required when, as in the instant case, there has been a disclosure of confidential information by an accused to his attorney, who later joins the district attorney's office and is clearly disqualified from participating in the case. (Emphasis by appellee).

In **Vandergriff v. State** 920 So.2d 486, 493 (¶18-¶19) (Miss. App. 2006), the Court

affirmed the trial court's denial of relief. While Vandergriff claimed the prosecutor gained confidential information when he was a public defender, the prosecutor's affidavit indicating otherwise. In addition, Vandergriff never stated "what" that confidential information was or how it prejudiced his defense.

And Vandergriff, like Eldridge, did not raise any issue about an alleged conflict of interest until after his conviction in a motion for a JNOV. Eldridge did not do so until some nine months after his trial and conviction.

> ¶ 18. Although Vandergriff makes the aforementioned allegations in his appellate brief, he did not submit an affidavit to that effect in the trial court. Vandergriff submitted a Statement of Facts that are Within the Personal Knowledge of the Petitioner, as required by section 99-39-9(1)(d) (Rev.2000), but nowhere in this statement of facts did Vandergriff claim to have communicated confidential information to Daniels. Nor did Vandergriff state specifically what confidential information was communicated, or how this confidential information was used against him. Vandergriff submitted absolutely no evidence to support his allegation; the only evidence before the trial court was the affidavit of Daniels, which denied that any confidential information was communicated.
>
> ¶ 19. Furthermore, Vandergriff entered an open and voluntary plea of guilty, without recommendation by the State. At no point during the entry of his plea or during his sentencing hearing did Vandergriff request that the prosecutor recuse himself because of a conflict of interest; the issue was not raised until Vandergriff filed his motion for post-conviction relief. These circumstances indicate that both Vandergriff and Daniels, at the time of the hearings in question, were not even aware of their previous relationship, if any. We conclude that the trial court judge was not clearly erroneous in her finding that no confidential information was communicated from Vandergriff to Daniels. Confidential information was not used in the prosecution of this case, and Daniels' relationship with Vandergriff had no effect on the disposition of this case. Accordingly, we affirm.

In **Fair v. State**, 571 So.2d 965, 967 (Miss. 1990), the Supreme court that defendants who want an out of time appeal must show that failure to perfect an appeal "was through no fault of their own."

> On the other hand, it is settled that a defendant desiring an out-of-time appeal must, at the very least, show that the failure timely to perfect an appeal was through no fault

of his own. See, e.g., **Moawad v. State**, 531 So.2d 632, 633 (Miss.1988); **Barnett v. State, supra**.

In **Gray v. State**, 469 So. 2d 1252, 1254 (Miss. 1985), relied upon by Eldridge, there was evidence that Robert Taylor, the prosecutor, had met with Gray for 45 minutes while in jail. While Taylor testified that he did not remember any confidential information from that meeting, Gray claimed that he did.

In the instant cause, while jail visit records indicate Duggan met with Eldridge and nine other defendants in June 2007, he testified this was for merely for setting up arraignments and trial dates for his various clients. C.P. 5-6; 9.

The record subsequent jail logs indicate that Duggan did not register as having met with Eldridge. He testified that he may have been in the jail briefly when Ms. Lemon was discussing a plea agreement with Eldridge. However, he did not receive any facts about the case at that time. And Eldridge did not mention any specific confidential information that he allegedly shared with Duggan. R. 144-153. Also in the Gray case , his motion for a JNOV was timely, which was not the case in the instant cause.

In **Wagner v. State**, 624 So. 2d 60, 65 (Miss. 1993), also relied upon by Eldridge, there was timely notice provided in a pre-trial motion of a possible conflict of interest. Upon receiving timely notice, the prosecutor with the alleged conflict was promptly removed from Wagner's case.

As shown with cites to the record, Mr. Duggan, and Eldridge's trial counsel, Ms. Palmer, testified there was no notice of a conflict, either before, or during the trial. R. 158. Ms. Palmer testified that Eldridge never mentioned any confidential information to her. R. 168. Had he done so she would have requested recusal to avoid any appearance of impropriety.

And finally, at the hearing, on the motion there was no testimony from Eldridge either about

what the confidential information was, or how it prejudiced his defense. R. 144-154. The record reflects that Eldridge did not testify at his trial. His mother testified that he had permission to enter the owner's trailer. R. 104.

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

PROPOSITION II

THE RECORD REFLECTS THAT ELDRIDGE RECEIVED EFFECTIVE REPRESENTATION WITHOUT ANY CONFLICT OF INTEREST BY THE PROSECUTION.

Mr. Eldridge argues that he did not receive effective assistance of counsel. Based upon his previous argument in proposition I, Eldridge believes that the prosecutor's conflict of interest prevented him from receiving a fair trial. Since Mr. Duggan had represented him while a public defender and then participated in his prosecution, he allegedly gained an unfair advantage over him during the trial. He also argues that Mr. Palmer did not follow through on his alleged request to file a motion for a JNOV, which prejudiced his defense on appeal.

Appellant's brief page 7-12.

To the contrary, as shown under proposition I, the record from the hearing on the alleged conflict of interest did not indicate either that Duggan received confidential information, or that Ms. Palmer was requested to file a motion for a JNOV. R. 176-179.

Eldridge admitted that he did not contact anyone about any conflict or about any desire for post convictions appeals until long after the expiration of time for doing so. R. 148; 150; 152. While he claimed he requested a post conviction motion, he admitted that he did not do so in a timely manner. R. 152-153.. His trial counsel denied any such request for either a new trial or an appeal. R. 170.

For Eldridge 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). Eldridge must prove: (1) that counsel's performance was "deficient," and (2) that the deficient performance "prejudiced" the defense. The burden of proving both prongs rests

with Eldridge. **McQuarter v. State**, 574 So. 2d 685, 687 (Miss. 1990).

Finally, Eldridge must shown that there is "a reasonable probability" that but for the errors of his counsel, the result of his 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).

The second prong of the **Strickland v. Washington**, 466 U.S. 668, 685, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) is to determine whether there is a reasonable probability that but for the alleged errors of the prosecution, the result of Eldridge's trial would have been different. This is to be determined from "the totality of the circumstances" involved in his case.

Appellee would submit that based upon the record we have cited, there is a lack of evidence for holding that there is a reasonable probability that Mr. Duggan, or Ms. Palmer erred in representing Eldridge. As shown, under proposition I, there was a lack of evidence that any notice of a conflict of interest was provided anyone in the instant cause. R.148; 150-152; 168.

There was no evidence that Mr. Duggan obtained any confidential information regarding the charges against Mr. Ethridge. R.158. He merely arranged for his arraignment. This was when he was a public offender rather than an assistant district attorney. See R. 140-176 for hearing on Eldridge claims for relief.

Likewise, there was a lack of evidence that Mr. Eldridge ever requested that Ms. Palmer or anyone else in the public defender office file a motion for a JNOV. The trial court found after a hearing, a lack of support for any such claim. R. 176-179.

As stated in **Strickland**:

> 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. Id. 698.

In **Lindsay v. State**, 720 So. 2d 182, 184 (Miss 1998), the Supreme Court found that a petitioner could not meet "his burden of proof" under the Post Conviction Relief act with only his own affidavit in support of his claim for relief.

> The only affidavits in the record that suggest appellant's counsel was deficient are those filed by Lindsay. This is not enough to prove ineffective assistance. In a case involving Post Conviction Relief, this court has held "that where a party offers only his affidavit, then his ineffective assistance of counsel claim is without merit. **Vielee v. State**, 653 So. 2d 920. 922 (Miss 1995). Se also **Brooks v. State,** 573 So. 2d 1350 (Miss 1990)...

In the instant cause, there are no supporting affidavits from Mr. Eldridge, much less his trial counsel, who is being accused of providing insufficient, if not unprofessional services, under the facts of this case.

The appellee would submit that Eldridge has not met the basic pleading requirements much less provided any affidavits or proposed testimony in support of his claims in his appeal brief.

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

PROPOSITION III

THERE WAS CREDIBLE SUBSTANTIAL EVIDENCE IN SUPPORT OF ELDRIDGE'S CONVICTION.

Mr. Eldridge argues that there was insufficient evidence in support of his conviction. He argues that Ms. Yelverton's testimony provided inadequate evidence that any breaking and entering occurred at her trailer. In addition, she did not initially report any breaking and entering, and there was no evidence of any examination of the scene of the crime by law enforcement. Appellant's brief page 12-13.

To the contrary, the record reflects that there was sufficient credible, partially corroborated evidence in support of Eldridge's conviction for burglary of a dwelling. Officer Tim Lawless testified that Eldridge admitted that he was inside the owner's trailer. R. 62. The owner also testified that she gave no one permission to enter her trailer. R. 80. She also testified that the doors and windows were "locked" prior to her discovering Eldridge was inside, surreptitiously living there. R. 83-84.

The record reflects that the trial court denied a motion for a directed verdict. R. 101-102. This was on grounds of a lack of evidence of any breaking and entering, and no evidence of intent to commit a crime upon entry.

The prosecution pointed out Ms. Yelverton testified the doors were "locked" and the windows "sealed." R. 83-84. However, after she discovered someone was apparently inside, she found the back door was "unlocked, and a section of the storm door "was broken off." R. 83-84.

She also identified items taken from her trailer which had come from Eldridge's step father. R. 83; 101. Mr. Ball, in turn, testified that these items came from his home. Eldridge had concealed them on the premises. R. 58

Officer Tim Lawless testified that Mr. Ball brought some items that Eldridge had left at his home. R. 58. Mr. Ball was Eldridge's step father. These items were identified by Ms. Yelverton as having come from her trailer. R. 59; 83. In addition, the record reflects that Eldridge told investigator Lawless that he was in Ms. Yelverton's trailer. R. 62.

However, he claimed that she allegedly gave him permission to stay. Eldridge also did not have any explanation for why the collectors items shown in exhibit 1 were identified as something he brought to his step-father's house. R. 62.

Q . And how was it that you came in contact with Mr. Ball?

A. **Well, after I developed Mr. Eldridge as a suspect, I–Mr. Ball had called me and told me that he had some items that he located in his house and that he wanted to bring to me. He felt that his stepson, Mr. Eldridge, had left them there or brought there and hid them under a bed.**

Q. Okay. Did Vernon actually bring you those items?

A. He brought them to the sheriff's office and he turned them over to another investigator, a Joe Quin.

Q. Okay. Did you have an opportunity to actually look at these items?

A. Yes, sir, I did.

Q. Well, if anything, what did you do with respect to these items that Mr. Vernon had brought to you?

A. Well, I took the items that Mr. Vernon had dropped off at the sheriff's office. **I took–I photographed them and then I took the items myself and drove them down to Selma Yelverton at her house on Hickory Hill Place and said do these look familiar. And she looked at them and identified them as the items from her house on Shannon Trey Drive.** R. 58-59. (Emphasis by appellee).

Q. Okay. And would you please tell the members of the jury what discussions you had with the defendant and what he said in relation to this crime that you were investigating?

A. Sure. I basically asked Mr. Eldridge, told him what he was being charged with, the accusations against him and basically what did he have to say about that. And Mr.

Yelverton–**Mr. Eldridge had told me that, yes, indeed, he had been staying in the trailer, but he had permission to be in the trailer, once he was caught; the victim Ms. Yelverton gave him permission to stay in the trailer. I then asked him about the items that–the complainant had made against him about missing or stolen from the trailer and he said, no, he did not take anything from the trailer. He didn't know anything about that.** R. 62. (Emphasis by appellee).

See state's exhibit 1 in manila envelop marked Exhibits. This is a photograph of items, such as book of collectors' item baseball cards, and a wooden storage box identified by Yelverton, the home owner, as having been left at her house where the defendant was seen.

Ms. Selma Yelverton testified that she owned a mobile home. The address was "102 Shannon Trey Lane." R. 73. It was on a half acre lot with a shop and a shed. R. 74-75. Yelverton testified that she discovered someone was apparently inside her trailer. She testified that the doors were "locked" and window units "sealed" when she was last on the premises R. 83-84.

Her investigation revealed that "the back door (was) unlocked." R. 84. When she confronted the intruder with her male friend, the intruder identified himself as "Kevin," "Charlotte's son." R. 79.

Q. Okay. **Do you recall the condition of the doors and windows at your trailer before this incident happened?**

A. **I do. They were all locked and each bedroom and the living room each had window units in there that were sealed.**

Q. And after you discovered that an individual had been living in your trailer and that items had been taken, what were your observations as they pertained to the doors and windows of the trailer at that time, if any ?

A. **The back door was unlocked. It had a glass storm door. A piece of the plastic inside the door that you push that goes in and out that was broken off.** Mobile home doors can be gotten into with a credit card or a driver's license so– R. 83-84.

...

Q. Okay. But the individual that night identified himself as?

A. **He said–I don't remember if he said his full name or if he just said, "I'm**

Kevin." He said, "I'm Charlotte's son."

Q. What , if anything, did you do next?

A. **I'm sure at some point I asked him if you were living here. He said I've been here for a couple of days.** He said he had to turn himself in the next day for- R. 79-80. (Emphasis by appellee).

Ms. Yelverton testified she did not give anyone permission to live in her trailer. This included Eldridge. R. 80. After notifying law enforcement about the breaking and entering, she testified to receiving some of the items missing from her home. See exhibit 1. R. 83.

Q. **Had you given anyone any permission to live in your trailer?**

A. **No.** R. 80.

...

Q. Were there any items that you determined were missing but were not recovered or not returned to you, if so, what were those items?

A. Are you asking me what did I get back?

Q. Yes.

A. **I got back one book of baseball cards that my sons had started collecting since they were about seven or eight. All the good ones were gone. The old ones, the ones that weren't worth any money were left in there. I got backs some costume jewelry that was very old. In fact, I think what that was, that was something I got as a teenager, may a couple of old coins and one silver certificate**. R. 83. (Emphasis by appellee).

In **McClain v. State**, 625 So. 2d 774, 778 (Miss. 1993), the Court stated that when the sufficiency of the evidence is challenged, the prosecution was entitled to have the evidence in support of its case taken as true together with all reasonable inferences. Any issue related to credibility or the weight of the evidence was for the jury to decide, not an appeals court.

> The three challenges by McClain (motion for directed verdict, request for peremptory instruction, and motion for JNOV) challenge the legal sufficiency of the evidence. Since each requires consideration of the evidence before the court when made, this Court properly reviews the ruling on the last occasion the challenge was made in the

> trial court. This occurred when the Circuit Court overruled McClain's motion for JNOV. **Wetz v. State**, 503 So. 2d 803, 807-08 (Miss. 1987). In appeals from an overruled motion for JNOV, the sufficiency of the evidence as a matter of law is viewed and tested in a light most favorable to the State. **Esparaza v. State**, 595 So. 2d 418, 426 (Miss. 1992); ***Wetz*** at 808; **Harveston v. State**, 493 So. 2d 365, 370 (Miss. 1986);...The credible evidence consistent with McClain's guilt must be accepted as true. **Spikes v. State**, 302 So. 2d 250, 251 (Miss. 1974). The prosecution must be given the benefit of all favorable inferences that may be reasonably drawn from the evidence. ***Wetz***, at 808 , **Hammond v. State**, 465 So. 2d 1031, 1035 (Miss. 1985); ***May*** at 781. Matters regarding the weight and credibility of the evidence are to be resolved by the jury. **Neal v. State**, 451 So. 2d 743, 758 (Miss. 1984);..We are authorized to reverse only where, with respect to one or more of the elements of the offense charged, the evidence so considered is such that reasonable and fair-minded jurors could only find the accused not guilty. ***Wetz*** at 808; ***Harveston*** at 370; **Fisher v. State**, 481 So. 2d 203, 212 (Miss. 1985).

When the credible evidence presented from the testimony above was taken as true together with reasonable inferences there was more than sufficient evidence in support of the guilty verdict and the trial court's denial of all peremptory motions.

Mr. Eldridge admitted that he was inside the trailer, and his claim of having been granted permission was contradicted by the testimony of the owner. R. 62. She testified clearly and unequivocally that he did not have permission. R. 80.

There was also evidence of breaking and entering. The owner testified that the premises were secured with locked doors and sealed windows. R. 83-84. After investigating suspicious circumstances, a door was discovered "unlocked" and apart of the storm door "was broken off." R. 84.

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

> 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);..

Mr. Eldridge's argument about there being insufficient evidence to establish forced entry are an attempt to give himself the benefit of favorable inferences. This is based upon what he has discovered missing in the evidence after the fact.

Since there were no tool marks, or testimony about exactly when or how the back door to the trailer was forced open, Eldridge thinks there was insufficient evidence that he forced his way onto the premises.

However, as shown above there was evidence that Eldridge admitted that he was inside the trailer. R. 62. He identified himself to the owner while on the premises. R. 79. If the door had been previously "locked," then it is reasonable to infer that Eldridge forced his way through the back door to gain entrance. The owner testified that it would not take much force to open the door when it was locked. R. 84.

In **Noe v. State**, 616 So. 2d 298, 302 (Miss. 1993), this Court stated that when the sufficiency of the evidence is challenged that the evidence favorable to the State must be accepted as true with all reasonable inferences. Evidence favorable to a defendant is "disregarded." See also **Clemons v. State**, 460 So. 2d 835 (Miss. 1984).

Likewise, the record reflects that Eldridge had contents in his possession that had been removed from the interior of the trailer he admitted he entered. R. 62; 83.

Ms. Yelverton, the owner, identified exhibit 1 as being photographs of items which had been in her home for a long time. R. 81;83. Officer Lawless testified that the contents shown in exhibit 1 had been delivered by Eldridge's step father. Mr. Ball stated that Eldridge had brought them into his home where he concealed them under his bed. R. 58.

The appellee would submit that this provided sufficient, credible partially corroborated evidence for denying all peremptory instructions. This issue is also lacking in merit.

CONCLUSION

Eldridge's conviction should be affirmed for the reasons cited in this brief.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL

BY: W. Glenn Watts

W. GLENN WATTS
SPECIAL ASSISTANT ATTORNEY GENERAL
MISSISSIPPI BAR N[redacted]

OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MS 39205-0220
TELEPHONE: (601) 359-3680

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:

Honorable Samac S. Richardson
Circuit Court Judge
Post Office Box 1885
Brandon, MS 39043

Honorable Michael Guest
District Attorney
Post Office Box 68
Brandon, MS 39043

Chris N. K. Ganner, Esquire
Attorney at Law
405 Tombigbee Street
Jackson, MS 39201

This the 23rd day of July, 2010.

W. Glenn Watts

W. GLENN WATTS
SPECIAL ASSISTANT ATTORNEY GENERAL

OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MISSISSIPPI 39205-0220
TELEPHONE: (601) 359-3680