IN THE CIRCUIT COURT FOR THE SIXTEENTH JUDICIAL CIRCUIT
DEKALB COUNTY, ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Plaintiff,	)	
	)	
v.	)	NO. 11 CF 454
	)	
JACK MCCULLOUGH,	)	
	)	
Defendant.	)	

FILED

OCT 12 2012

Maureen A. Josh
Clerk of the Circuit Court
Dekalb County, Illinois

NOTICE OF FILING

To: Clay Campbell
DeKalb County State's Attorney
200 N. Main Street
Sycamore, Illinois 60178

Please take notice that on October 12, 2012, I filed the attached Motion for Motion for Judgment Notwithstanding the Verdict or a New Trial with the Clerk of the Circuit Court of DeKalb County, Illinois.

Respectfully submitted,

Thomas O. McCulloch
Public Defender

DeKalb County Public Defender
133 W. State Street
Sycamore, Illinois 60178
(815) 899-0760

FILED

OCT 12 2012

Maureen A. Josh
Clerk of the Circuit Court
Dekalb County, Illinois

STATE OF ILLINOIS)
) SS.
COUNTY OF DEKALB)

PROOF OF SERVICE

I, the undersigned, being first duly sworn upon oath, say that I served the above Notice by delivering a copy thereof to whom it is addressed on this the 12TH Day of OCTOBER _____, 2012.

Thomas Q. McCann

Subscribed and sworn to
before me this day
of 2012.

_____
Notary Public

State of Illinois)
)
County of DeKalb)

#01826891

IN THE CIRCUIT COURT FOR THE SIXTEENTH JUDICIAL CIRCUIT
DEKALB COUNTY, ILLINOIS

People of the State of Illinois,
Plaintiff,

vs

Jack McCullough,
Defendant

General No. 11 CF 454

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Clerk of the Circuit Court
Dekalb County, Illinois

MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT OR A NEW TRIAL

NOW COMES the Defendant, Jack McCullough, through his attorneys, Thomas McCulloch and Robert Carlson and the DeKalb County Public Defender's Office, moving this Court pursuant to 725 ILCS 5/116-1 for a new trial or to vacate judgments and enter verdicts of not guilty, and, in support thereof, the Defendant states as follows:

1. On September 14, 2012, the Defendant was found guilty by this Court of the offenses of first degree murder, kidnapping and abduction of an infant. The State failed to prove the Defendant guilty of the charges beyond a reasonable doubt and failed to prove every material allegation of the indictment beyond a reasonable doubt.

2. That the Court erred in denying the Defendant's Motion in Limine relating to the admissibility of the FBI Reports, thereby directly barring the Defendant from the introduction of an alibi, and the presentation of evidence of other perpetrators, in violation of the Defendant's right to present a defense as well as his right to Due Process. As argued to this Court in the course of the pre-trial motions, in the words of Justice Learned Hand, "[t]he question here is whether there is such an exception. I have been unable to find any express authority in point and must decide the question upon principle. In the first place, I think it fair to insist that to reject such a statement is to refuse evidence about the truth of which no reasonable person should have any doubt whatever, because it fulfills both the requisites of an exception to the hearsay rule, necessity and circumstantial guaranty of trustworthiness." *Dallas County v Commercial Union*, 286 F.2d 388, 395 (5th Cir. 1961) (quoting Judge Hand, *G. & C. Merriam Co. v Syndicate Pub. Co.*, 207 F. 515, 519 (2d Cir. 1913)). Whereas Justice Learned Hand made an exception to the hearsay rule so that essential evidence could be presented, this Court should have allowed the FBI reports into evidence since they are necessary, trustworthy, relevant, and material.

3. That, in denying the Defendant's Motion in Limine relating to the admissibility of the FBI Reports, the Court further erred in denying the alternate prayer for the Dismissal of all charges against the Defendant. Clearly the passage of 55 years substantially prejudiced the Defendant in his ability to prepare and present a defense, and to effectively confront and cross-examine the witnesses called against him. While the State has referred the Court and Counsel to the statute of limitations relating to murder for guidance, it is the Defendant's position that the Defendant's Constitutional rights under the State and Federal Constitutions to Due Process, Assistance of Counsel, and Confrontation preempts the States statutory scheme permitting an unlimited time for prosecution, at least as applied to the facts in the case presented.

4. That the Court erred in granting, over the Defendant's objection, the State's Motion in Limine barring the testimony of Pat Solar as to an alternate theory of a guilty party; similar to the existence of Johnny Hillbrun, who, when questioned by the police back in 1957, admitted to driving from Rockford to Sycamore where he met and talked to two little girls on the night in question. The State alleges that Pat Solar implicates an "unknown individual" when clearly the report implicates William Henry Redmond. Additionally, while the State argued that Pat Solar had no basis for his "theory", it should be noted that he was not a stranger to the case, but acting within the scope of his employment as a Lieutenant at the Sycamore Police Department investigating an unsolved murder crime. Pat Solar's "extensive search effort and investigation", aided by the FBI, led him to Redmond, an individual that almost perfectly matched Kathy Sigman's original description. The Court allowed Illinois State Police officer Brion Hanley to testify regarding his investigation of this case, but inexplicably chose not to allow Pat Solar, another police officer than had investigated the case, to testify. Further, the Court erred in not allowing the Defendant to question David Twadell regarding his status in several FBI reports as a suspect of Maria Ridulph's murder, especially in light of the Court making a pretrial determination that the Defense was allowed to present evidence of other suspects. The exclusion from evidence of these three potentially guilty parties denied the Defendant his right to present a defense and operated to deny him Due Process under both the State and Federal Constitutions.

5. That the Court erred in denying the Defendant's Motion to Suppress Statements based on a mistaken belief as to when the Defendant invoked his Right to Counsel.

6. That the Court erred in permitting the State to proceed, and the Defense to be gagged as to the identity of "John Doe," an informant witness, where there was absolutely no showing of necessity, and where such a procedure denied the Defendant his right to a fair and public trial and his right to confront and cross-examine the witness.

7. That the Court erred in admitting, over the Defendant's objection, the statement of Eileen Tessier "as a statement against interest;" the State urged that such a statement – even if true—exposed her to some form of criminal liability, and used the argument of the limitless statute of limitations for murder as a guide, when, in fact, the separate crime of a false statement –a fact not conceded by the Defendant—carried with it a 3 year statute of limitations. Further, the Evidence Rule 804(b)(3) specifically directs attention "at the

time of the making" and, contrary to the Rule, the State offered no corroboration of the claim, even though the State claimed that there was criminal liability and the statement was offered in a criminal case. The statement, as previously objected to by the Defendant, was testimonial and carried Confrontation Clause implications and, yet, the Defendant was not accorded any such protections. Indeed, what is left is the belief that, when young, alert, sober and unmedicated and undiagnosed with mental illness, Eileen Tessier made a statement that provided support to the Defendant's alibi; the State, however, was permitted to wait for the passage of decades, and long after the demise of Eileen's husband and potential witness for the Defendant, to offer the contradictory claim of a woman who's statement was interpreted differently by two daughters and at a time when she was suffering from the ravages of time and medication and mental illness. There is no justice in finding the Defendant guilty of crime that he would not possibly have been convicted of when it occurred in 1957 or even if he had been prosecuted in any year leading up to the death of Ralph Tessier, the last of his eyewitnesses that could testify to his whereabouts on the night in question.

8. Prosecutorial misconduct occurred during the Rebuttal Closing Argument which substantially prejudiced the Defendant preventing him from receiving a fair trial when the Prosecutor intentionally misquoted the testimony of two of the State's key witnesses. The Prosecutor stated during Rebuttal that Janet looked into her mother's eyes when her mother told her "those two little girls, one went missing. He did it. He did it. You have to tell someone. You have to tell someone. And Mary Hunt corroborates that statement, "he did it. You have to tell someone." The actual testimony elicited at trial was that Janet's recollection of the statement was "the two little girls, one went missing. **John** did it" and "You have to tell someone." Mary Hunt's recollection of her mother's statement was "He did it" and when they pressed their mother for more details, she refused or was unable to talk. The Prosecutor intentionally alters that testimony in order to further the State's argument that the sister's had compatible testimony, when in fact; their testimony was worlds apart. There is no question that the Defendant's mother's statement, which the State argues implicating the Defendant, was a cornerstone to the State's case. Where prosecutorial misconduct "resulted in substantial prejudice to the defendant and constituted a material factor in his conviction", it is proper for the court to reverse the verdict and order a new trial.

9. That the Court erred in permitting, over the Defendant's objection, the testimony of Pam Long about her claim of "piggyback evidence," where such, even if true, occurred several years before the time in question and was, therefore, remote and speculative. Further, the Court erred in admitting, over the Defendant's continuing and standing objection, evidence regarding the reaction of Pam Long's father. Illinois Rule of Evidence 801 defines a statement as "(1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion." Pam Long's father forcibly removing her from the Defendant's back clearly fits into the definition of an *assertion*. Pam Long's testimony regarding her father pulling her off of the Defendant's back served no purpose of furthering the State's alleged exception argument that the Defendant had a propensity to offer piggy-back rides, but only served to be prejudicial against the Defendant attempting to show that others in the community viewed the

Defendant with distrust. The State eliciting such impermissible and prejudicial hearsay and the Court admitting the statements was improper.

10. That the Court erred in permitting the State to proceed , in spite of the Defendant's Motion for a Bill of Particulars and Motion for More Particularity; the result was a trial on a void Indictment that only informed the Defendant that he was accused of "by means unknown and at unknown places and at unknown times…." As a practical effect, this sort of vague claim was what permitted the State's informant witnesses to all provide different manners of death, and which were all contradicted by a forensic anthropologist. Since a conviction cannot be based on a void Indictment, the Court should have dismissed the charges.

11. That the Court erred in denying the Defendant's Exhibit #5 being the medical records of Eileen Tessier.

12. That the Court erred in admitting, over the Defendant's objection, the testimony of Cathy Caulfield, nee Tesssier, and Jan Tesssier, relating to a conversation purportedly between their mother, Eileen Tessier and unnamed and unknown police officers supposedly on December 4, 1957, where the declarant has been deceased since 1994.

13. That the Court erred in admitting, over the Defendant's objection, testimony and exhibits relating to the photographic identification procedure, where there was no assurance of reliability in the procedure as described. Eyewitness testimony is well known in the criminal justice system for being the leading cause of wrongful convictions in the United States. *See State v. Henderson*, 208 N.J. 208 (N.J. 2011). In a massive study of eye witness reliability undertaken by the New Jersey Supreme Court, the State introduced new rules due to over 75% of overturned convictions due to DNA involving eyewitness misidentification. *Id.* In controlled studies, people asked only 2-24 hours after meeting an individual were only able to correctly identify the individual 42% of the time, and 41% of the time they chose the wrong person (17% answering that the individual was not in the lineup). *Id.* Furthermore, New Jersey had standards in place that the primary investigator was not allowed to conduct an identification procedure due to "inadvertent verbal cues or body language . . . impact[ing] . . . a witness." *Id.* at 222. Clearly, the role of Investigator Brian Hanley was, at the time of identification, that of principal investigator. The lack of DNA available to exonerate the Defendant in no way lessens the problematic identification procedure in this case. The United States Supreme Court held that two procedures should be followed when assessing the reliability of an identification. *Manson v. Brathwaite*, 432 U.S. 98 (1977). First, a test that looks to see if the identification procedure was impermissibly suggestive and whether the procedure was so suggestive as to result in a very substantial likelihood of irreparable misidentification. *Id.* at 107-08. Second, a five-factor test: the opportunity of the witness to view the suspect at the time of the crime, the witness's degree of attention, the accuracy of the witness's prior description of the suspect, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation. *Id.* at 114. The Court further stated that "reliability is the linchpin in determining the admissibility of identification." *Id.*

Looking at the identification procedures undertaken with Kathy Sigman Chapman, the identification should not have been found reliable. First, analyzing whether the test was impermissibly suggestive, the evidence strongly demonstrates that it was. As noted above, the primary investigator conducted the identification process, something that other states, such as New Jersey, forbid due to the unreliability of such tests. *See Henderson* at 222. Second, not only was the primary investigator involved, but he had just interviewed Kathy Sigman Chapman eight days prior to the investigation for nearly an hour and a half. In that prior meeting, officers discussed details of the case with Kathy Sigman Chapman, including using her own prior descriptions in order to try and refresh her memory about the description of "Johnny." Third, the six pictures that were placed in front of Kathy Sigman Chapman for identification were impressively suggestive for the following reasons:

A. All five filler photos had a white background while the Defendant's photo had a black background,

B. All five filler photos had gentlemen wearing a suit and tie while the Defendant's photo had different clothing,

C. All five filler photos had the gentlemen looking off slightly to the right in a yearbook style pose while the Defendant was staring directly into the camera for his picture,

D. All five filler photos had gentlemen with neatly combed hair while the Defendant had unruly hair in his photo,

E. Defendant's photo had an amateur quality appearance which caused his ear to shine brightly in the picture,

F. All five filler photos were taken directly from a yearbook while the Defendant's was not.

As a result, she still picked the #4 photo even though the gap in his teeth – previously reported to the FBI-- is not visible in the photo. This type of bias is exactly what states like New Jersey and others have been afraid of because it adds a high degree of unreliability to the entire identification process. For all the reasons stated above, the identification should not even pass the impermissibly suggestive test imposed by the Supreme Court. *Manson v. Brathwaite*, 432 U.S. 98 (1977).

14. Even if the Court believed the process was not impermissibly suggestive on its face, the identification still should not have been admitted due to the five factor test in *Manson*. First, the opportunity of the witness to view the criminal at the time of the crime would weigh in favor of the Defendant. We know that the witness was only with "Johnny" for a few minutes, and that it was dark outside being close to 7pm in December. Second, the witness's degree of attention would weigh heavily in favor of the Defendant since Kathy Sigman Chapman testified at trial that being approached by a stranger offering a piggy-back ride was not something that she found very unusual at the time. It wasn't until the Prosecutor asked the question twice more with infliction that Kathy Sigman Chapman stated that it was perhaps a little strange. Nevertheless, her testimony also included that the police were not called for nearly an hour and a half after Maria Ridulph's disappearance. Clearly Kathy Sigman Chapman was not overly alarmed by the situation when it occurred, and so her degree of attention could be classified as low at best. Third, the accuracy of [her] prior description of the criminal weighs heavily in favor of the

Defendant. Kathy Chapman gave a multitude of different descriptions to the FBI in 1957-1958. Her identification on December 3, 1957 was different than both descriptions she gave on December 4, 1957 (which were also different from one another). On December 22, 1957, Kathy Sigman Chapman attended a line-up with police officers and identified a man as "Johnny", however that man was incarcerated at the time of Maria Ridulph's disappearance and was being used merely as a filler. Her description changes yet again in September, 2010. Additionally, Kathy Sigman Chapman presented yet another different description while testifying for this case. This further demonstrates the problem with a case that's decades old and the manner in which impeachment is impossible to perfect under the circumstances. Fourth, the level of certainty at the time of confrontation weighs heavily in the Defendant's favor. Officer Hanley noted that at the time of identification, Kathy Sigman Chapman stated "from my best recollection from that night, this is him". That is certainly not a very reliable level of certainty, especially in consideration of all the other factors. Fifth, the time between the crime and the confrontation weighs heavily in favor of the Defendant. This factor itself should likely nullify the identification. The Prosecution, even realizing how weak the identification was, presented in Closing Arguments that Kathy Sigman Chapman was only able to make the identification because it was presented as a "multiple choice test". Our justice system and the importance of reliability in identification should far surpass the standard that Kathy Sigman Chapman was only able to make the identification because she correctly made a one out of six pick (especially considering the photo lineup itself was highly suggestive). All five factors weigh in the favor of the Defendant that the identification was extraordinarily unreliable, and thus the identification should not have been admitted..

15. That the Court erred in admitting, over the Defendant's objection, Exhibits 13, 14, 15, and 16 purporting to relate to Jo Davies County.

16. That the Court erred in permitting, over the Defendant's objection, the State's three informant witnesses to testify without first according the Defendant full disclosure of their backgrounds and history as well as conducting a reliability hearing as to each of them. For example, and without limitation, the State provided a "Discovery Disclosure," as well as closing argument, that the witness "John Doe" had received no promises in exchange for his testimony. This is false on its face. In an affidavit signed by Illinois State Police Officer Brian Hanley, Hanley states that Doe is "unwilling to go 'on the record' and testify as to what defendant has stated regarding the murder of Maria Ridulph unless his identity is protected from the public and specifically the Media". The prosecution knew that John Doe would not testify unless they offered him a deal, his testimony in exchange for anonymity. The Prosecution thereby provided a misleading Discovery Disclosure, further elicited the knowingly false statement when John Doe was on the stand, and never corrected the falsity as required by law. *See People v. Bolton*, 295 N.E.2d 11 (Ill. App. Ct. 3d Dist. 1973) ("Fundamental fairness demands that state officials not only refrain from producing testimony known to be false but that they correct statements known to be false even if unsolicited".) As a result, this Court's finding the jailhouse informant testimony "reliable" is also against established case law holding that jailhouse informants are "inherently unreliable". *People v. Mertz*, 357 N.E.2d 525 (Ill. 2005).

17. That the Court erred in permitting the State witness, Stephen Cook to testify, over the Defendant's objection, to the acts of third persons in the course of a search of the Defendant's home, and, further the introduction of testimony about weapons and ammunition, which is inflammatory and unrelated to the case at bar. Indeed, the Defendant was licensed and permitted to possess and own such materials in his home in the State of Washington.

18. The Court erred in denying the Defendant's Motion for a Directed Finding as to all counts.

19. The Court erred in finding that the Statute of Limitations on the charges of Kidnapping and Abduction of an Infant had been proved beyond a reasonable doubt to toll from 1957 to 2011. As stated in *People v. Hawkins*, 340 N.E.2d 223 (Ill. App. Ct. 1st Dist. 1975), "The occurrence of certain events which would operate to toll the Statute of Limitations would be material allegations to any criminal charge which must not only be proved but must be pleaded as well." The State has failed to prove that the Defendant has not been "usually and publicly resident within this State" as required 720 ILCS 5/3-7. In fact, the State provided virtually no evidence of the Defendant's whereabouts between when the crime occurred in 1957 and his arrest in 2011. Since the State failed to prove this *material* element to the tolling statute, the Court erred in not dismissing the charges due to the Statute of Limitations.

20. The State incorrectly stated the law for tolling the statute of limitations regarding the charges of Kidnapping and Abduction of an Infant. The State cited Illinois Revised Statutes, chapter 38, section 682 (1957) as the statute by which the statute of limitations regarding the charges of Kidnapping and Abduction of an Infant should be tolled. Illinois Revised Statutes, Ch. 38, sec. 682 (1957) reads: "If it appears that an offense has been committed, and that there is probable cause to believe the prisoner guilty, and if the offense is bailable by the judge or justice of the peace, and the prisoner offers sufficient bail, it shall be taken and the prisoner discharged; but if no sufficient bail is offered, or the offense is not bailable by the judge or justice, the prisoner shall be committed to jail for trial." This statute clearly has no relevance to the present case, and since the State failed to provide sufficient reason for why the statute of limitations does not apply to the defendant, the charges of Kidnapping and Abduction of an Infant should be dismissed.

WHEREFORE, the Defendant requests this Honorable Court vacate the findings of guilty in this cause, hold that the evidence was insufficient, and enter verdicts of not guilty or, alternatively, grant the Defendant a New Trial for the above and forgoing reasons, and for such other and further reasons as may be just and appropriate.

Respectfully submitted,

Thomas O. McCulloch