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**Dec 14 2022**

**S.C. SUPREME COURT**

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Sumter County

Honorable L. Casey Manning, Circuit Court Judge

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MARCUS MCFADDEN,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

APPELLATE CASE NO. 2022-000543

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JOHNSON PETITION FOR WRIT OF CERTIORARI

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### **ISSUE PRESENTED**

Was defense counsel ineffective for failing to move to suppress petitioner's statement to the police where petitioner said he was not given Miranda warnings prior to being interrogated, and where defense counsel admitted at PCR that he thought petitioner could have been impeached with his statement at trial if he testified, even though the state chose not to introduce the statement during its case-in-chief, and where defense counsel advised petitioner not to testify at trial because he thought petitioner could be impeached with his statement?

## STATEMENT

Petitioner was indicted at the September 8, 2016 term of the Sumter County grand jury for burglary in the first degree as to the residence of Tiffany Calvin. Latique Bracey and Dominique Ross were alleged in the indictment to be petitioner's co-defendants. Petitioner was also indicted for assault by mob in the third degree for committing an assault and battery upon Artemas Bryant with Bracey and Ross. Bracey was also indicted for possession of a weapon during a violent crime and for pointing and presenting a firearm at Bryant during this same incident. App. 359-360.

Petitioner's case was called to trial together with co-defendant Latique Bracey on September 20, 2016, before the Honorable William Jeffrey Young and a jury. Michael Jordan was the retained counsel for Petitioner. Jason Bridges represented co-defendant Bracey. Assistant solicitor John P. Meadors represented the state. App. 1.

After jury selection, defense counsel Jordan moved to sever petitioner's case from that of Bracey. Jordan maintained that all three co-defendants had given statements which raised potential Bruton<sup>1</sup> problems. App. 30 l. 24- 34 l. 4. Defense Counsel Bridges for co-defendant Bracey joined in that severance motion. The trial judge denied the motion for a severance. App. 35 ll. 11-12

Assistant Solicitor Meadors then told the judge that petitioner had given a statement to the police. However, Meadors said that the state would not offer petitioner's statements into evidence. Meadors seemed to raise potential Bruton problems in redacting the statement as his purported reason for not introducing any co-defendant statements into evidence . App. 36 l. 6- 37 l. 5

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<sup>1</sup> Bruton v. United States, 391 US 123 (1968).

Artemas Bryant testified he was injured while in the Marines, and he was honorably discharged in May 2013. He met Tiffany Calvin while he was working at Color-Fi. App. 72 l. 2- 73 l. 18

Bryant remembered on April 9, 2016, he came back to Sumter to visit his family. Bryant learned that Tiffany Calvin had been injured in an accident, so he went to visit her at her house in Sumter on the night of April 9, 2016. App. 74 l. 4- 76 l. 6.

Bryant took two boxes of pizza “and some wings and some movies” over to Calvin’s home where she lived with her two children. Bryant had never been to Calvin’s house before, and he was only able to locate it by using his GPS, App. 76 l. 2- 77 l. 3

After Calvin put her children to bed, she later fell asleep on the couch while watching a movie with Bryant. Bryant testified around 12:30 a.m., he heard banging at the door at the same time or man -- or men -- were yelling to open the door. Bryant woke up Calvin and told her about the pounding on her door. Bryant heard a man yell that “they were going to shoot through the door. . .” App. 78 l. 11- 79 l. 16

Strangely, Calvin told Bryant to go to the door and see who was outside. Bryant said he cracked the door to attempt to talk to whomever was outside. Bryant remembered:

I go to the door and I kind of crack it to see. Like, to talk to them. *And the second I opened it, the gun's in my face and he's, like, who the fuck are you, and I said I'm Artemis Bryant, and then, then he went over to Tiffany, like, choked her.* Then the other two came in and they were, like, who are you? Who are you and they started hitting on me, and I tripped and fell. Then I was pretty much beaten in the corner for a while, but then Bracey came back to me and put the gun to my head, and one of the other two were searching through my pockets. Like, what the fuck you got, nigga? And then they were saying, like, Red Bay and just shouting and stuff. And then after that, they, they all left, and then I went to the bathroom to call the cops, and then they all came running back in. It's, like, what the hell are you doing here? Get out. So, Bracey had the gun on me in the bathroom and the other two beat me. So, I just

grabbed what I could, my phone and I think my iPod, and they beat me outside, and then I finally get to my truck. My glasses are smashed. These are the ones from basic, and so I was holding my glasses and trying to shift. I actually ran into the tree backing up. And they were, like, come back or we'll kill you. If you, if you come back we'll kill you. And so I finally get into the truck. I run into the tree and I make my way to the, the street somehow, and then I drive. And by the time I got to the corner where Safe is at, I got a hold of the operator, called the -- after I called 911. Then I gave them my statement.

App. 81 l. 6- 82 l. 9. (emphasis added).

In essence, Bryant said that Bracey held a gun on him and he claimed petitioner and co-defendant Ross “were just wailing on me.” App. 88 ll. 9-13. Bryant had never seen Petitioner, Bracey, or Ross prior to this incident. App. 96 ll. 6-12.

Tiffany Calvin testified she met co-defendant Bracey in 2011. They began dating, but she offered that Bracey broke up with her in February 2016 after she was involved in a car accident. She speculated Bracey broke up with her because “[t]hey wanted to amputate my leg for the things that I was going through maybe was just too much for him to bear.” App. 118 l. 7- 119 l. 12.

Calvin testified she met Artemas Bryant while he was working at the Color-Fi, that they were friends, but she was never involved in a romantic relationship with him. App. 121 l. 21- 122 l. 9. Calvin remembered on April 9, 2016, she was living with her two children when Bryant came over that night with boxes of pizza, chicken wings, and some movies. App. 122 l. 4- 123 l. 20.

Calvin testified that Bryant, as opposed to Bracey, was very sympathetic with her about her injuries suffered in the car accident. She watched the movie Star Wars with Bryant after putting her children to bed. She fell asleep on the couch shortly after midnight. App. 124 l. 22- 126 l. 21.

Calvin remembered that Bryant woke her up, and he told her about the noises from outside her door. He said someone was beating on her door and yelling that they would shoot into her house. Calvin told Bryant to open the door. When Bryant opened the door “the next thing there was a bum rush. They bum rushed in the door without him even, you know, getting to open the door good to see who, who was who. Latique [Bracey] came in with a gun. Black Marc [Petitioner] Marcus came in and Ross, he came in but he [stood] at the door, and they beat him from the door, from the chair, to the side of the chair. And when they beat him, Latique came to me, put a gun to my head, telling me to shut up, bitch. I’ll kill you, you slut. This, that, all kind of stuff.”

Calvin said she was scared because she had never seen Bracey act in this manner before, and it was the first time she had ever had a gun pointed at her face, actually touching her skin. Calvin testified that Bracey had “no sympathy for me,” even though she was in pain because of her car accident . App. 124 l. 22- 126 l. 21.

Calvin explained she was able to crawl out of the house onto her neighbor’s porch. However, Bracey continued to look for her, and he yelled: “Bitch, where you at?” App. 127 ll. 7-25. Calvin said neither petitioner nor co-defendant Dominique Ross had ever been to her house before that night. App. 136 l. 6-13

On cross-examination by defense counsel Jordan, Calvin admitted she had been in a long-term relationship with co-defendant Bracey, that Bracey had stayed at her house, Bracey knew her children, and Bracey had his clothes at her house. App. 139 l. 12- 141 l.12; App. 143 ll. 13-18. Calvin denied that she told Bryant that she knew the man at the door and that she could talk to them. App. 145 ll. 11-17. Calvin claimed she did not know who was at her door when

she told Bryant to open the door. She said that Bracey choked her, slapped her, and told her to “shut the fuck up.” Calvin admitted that petitioner did not hit her, but she claimed petitioner did hit Artemas Bryant “but he never said anything to me.” App. 146 l. 3- 147 l. 2.

The jury found petitioner guilty of burglary in the first degree and assault and battery by a mob in the third degree. App 272 ll. 11-20 . The jury found Bracey guilty of burglary in the first degree, assault and battery by a mob in the third degree, pointing and presenting a firearm, and possession of a firearm during the commission of a violent crime. App. 272 l. 24- 273 l. 15.

Judge Young said he believed petitioner was the least culpable in this incident, and he sentenced petitioner to 20 years’ imprisonment for burglary in the first degree, and he imposed a one-year concurrent term for assault and battery by a mob in the third degree. The judge imposed a twenty-two-year prison term on Bracey for burglary in the first degree together with a consecutive five-year prison term for possession of a weapon during a violent crime. App. 286 l. 7- 287 l. 6.

Petitioner’s convictions were affirmed on direct appeal in State v. McFadden, 2020-UP-188 (Ct. App. filed June 17, 2020). App. 306. Petitioner thereafter filed an application for post-conviction relief on May 27, 2021. App. 298-304. Petitioner alleged, inter alia, that he was ineffectively represented. App. 300. Following this application, the state filed a return and motion for a more definite statement. App. 305-311.

PCR counsel Timothy L. Griffith filed an amended application for post-conviction relief dated November 9, 2021. The amended application stated counsel was ineffective for not informing petitioner he had a right to remain silent when he was questioned by law enforcement and where petitioner was not given Miranda<sup>2</sup> warnings prior to being interrogated. App. 312

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<sup>2</sup> Miranda v. Arizona, 384 U.S. 436 (1966).

An evidentiary hearing was convened on February 14, 2022, before the Honorable L. Casey Manning. Timothy L. Griffith represented petitioner. Michael J. Neubauer was the assistant attorney general. App. 314.

Petitioner testified at PCR that he had wanted to testify during his trial, but that his attorney told him that he would hurt his case if he testified. Thus, petitioner did not “take the stand” at trial. App. 331 ll. 15-21.

Defense counsel Jordan later explained that he told petitioner if he did testify, the state could use his statement against him as a prior inconsistent statement, even though it was not introduced at trial. App. 338 l. 20- 340 l. 10. Counsel Jordan also said petitioner’s statement contained admissions of other wrongful conduct, but he did not mention or seem to consider a motion to exclude or redact those prior bad acts from petitioner’s statement.

Defense counsel also seemed to reason that because both Bryant and Calvin had testified petitioner came into the house on the night of the burglary “that would have been a trial problem” if petitioner was seemingly impeached with his statement. However, in that statement, petitioner denied ever entering Calvin’s house. App. 339 l. 6- 340 l. 10

Trial counsel did acknowledge that petitioner had always blamed Bracey and Ross for the burglary and in his statement “he [petitioner] becomes [their] accuser.” App. 337 l. 11- 338 l. 10.

An order of dismissal was filed on April 21, 2022. App. 350-358. This order stated that petitioner “[t]estified he told counsel he was not read his rights, and counsel informed applicant that he should not take the stand and testify because it would hurt him. Applicant testified he was questioned [by the police] following his arrest, and ultimately gave a statement to police during this questioning. Applicant again testified that his statement was not introduced during

his trial.” App. 355. The order also stated that petitioner could not establish any prejudice since his statement was not introduced at trial.

From this order, petitioner is seeking a writ of certiorari pursuant to Rule 227, SCACR.

## ARGUMENT

Defense counsel was ineffective for failing to move to suppress petitioner's statement to the police where petitioner said he was not given Miranda warnings prior to being interrogated. Defense counsel admitted at PCR that he thought petitioner could have been impeached with his statement at trial if he testified, even though the state chose not to introduce it during their case-in-chief, and where defense counsel advised petitioner not to testify at trial because he thought petitioner could be impeached with his statement.

The PCR court erred in ruling petitioner could not establish any prejudice from defense counsel advising him not to testify where counsel did not move to suppress petitioner's inculpatory statement to the police during interrogation where he was never given his Miranda warnings. If defense counsel had requested a Jackson v. Denno, 378 US 368 (1964), hearing on the admissibility of petitioner's statement, it is likely petitioner's statement would have been suppressed since petitioner testified he was not given Miranda warnings prior to being interrogated by the police while he was in custody.

A defendant is entitled to a Jackson v. Denno hearing on the admissibility of his statement, and he is entitled to specific findings of fact on the part of the trial judge regarding that motion to suppress his statement. See State v. Creech, 314 SC 76, 441 S.E.2d 635 (Ct. App. 1993). Significantly, no one challenged petitioner's assertion that he was interrogated while in custody without Miranda warnings being given to him.

The PCR court erred by not taking into consideration the fact that trial counsel acknowledged he told petitioner he could be impeached with his statement to the police if he chose to testify, even though petitioner said he had not been given Miranda warnings before he gave his statement. While generally a statement obtained in violation of the requirements of

Miranda may be used for impeachment purposes, the statement cannot be used against a defendant even for impeachment purposes if it was involuntarily tendered to the police. See State v. Hook, 348 S.C. 401, 414, 559 S.E.2d. 856, 862-63 (Ct. App. 2001 *citing Oregon v. Hass*, 420 U.S. 714, 721-22 (1975) (statement taken in violation of the defendant's right to counsel was admissible for impeachment purposes where the defendant testified contrary to the contents of that inculpatory statement at trial); Harris v. New York, 401 U.S. 222, 224-26 (1971) (statement taken without proper Miranda warnings was admissible for impeachment purposes). Again, however, an involuntarily incriminating statement is inadmissible for any purpose, and its use in any manner would violate due process of law. See State v. Victor, 300 S.C. 220, 223, 387 S.E.2d. 248, 249 (1989).

In this case, petitioner was not given Miranda warnings before he was interrogated by the police. It is unclear from this record whether other factors existed which would have caused the trial court to rule that petitioner's statement was not only inadmissible but involuntarily given making it unavailable even for impeachment purposes. These factors could have included petitioner's statement being given as a result of being threatened or petitioner being promised leniency in exchange for his statement. Petitioner's statement, given under either of these conditions, would have rendered it inadmissible for any purpose, as having been involuntarily tendered. See State v. Rochester, 301 S.C. 196, 200, 391 S.E.2d. 241, 246, 47 (1990) (*citing Hutto v. Ross*, 429 U.S. 28, 30 (1976), State v. Moultrie, 373 S.C. 60, 62, 254 S.E.2d. 294, 295 (1979)).

Trial counsel admitted he advised petitioner not to take the stand because he could have been impeached with his prior statement to the police. This was highly questionable, if not

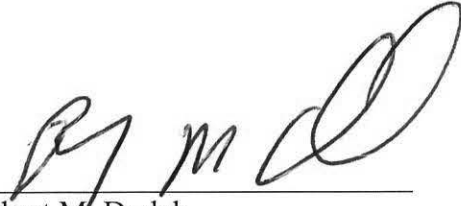
erroneous, legal advice given the record in this case. Petitioner testified he wanted to testify and did not do so based upon counsel's advise that he would hurt his defense if he testified.

This was a strange case where the homeowner or tenant's long-time boyfriend, Bracey, testified that Bracey put a gun to her head, screamed insults into her face, and beat her. Defense counsel said at PCR the defense suspected this incident was about Bracey's relationship with the female victim and that petitioner was duped into coming to her house. Petitioner never admitted that he entered the house, and this record fails to disclose any reason petitioner's statement would have hurt him, even if allowed for impeachment purposes, if petitioner had chosen to testify in his defense.

Since the PCR court failed to consider the critical issue of defense counsel erroneously advising petitioner that he could be impeached with his prior statement, which was not introduced against him, and that this erroneous legal advice led to petitioner not testifying during his trial, this case should be remanded to the PCR court for further findings of fact and conclusions of law on that legal issue. See Fishburne v. State, 427 S.C. 505, 832 S.E.2d 584 (2019).

**CONCLUSION**

By reason of the foregoing argument, petitioner's case should be remanded to the PCR court for further findings of fact and conclusions of law.

A handwritten signature in black ink, appearing to read 'R M D', written over a horizontal line.

Robert M. Dudek  
Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 14th day of December, 2022.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

—————  
Certiorari to Sumter County

Honorable L. Casey Manning, Circuit Court Judge

—————  
MARCUS MCFADDEN,

PETITIONER,

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STATE OF SOUTH CAROLINA,

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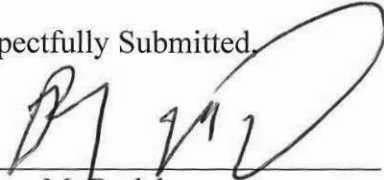
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PETITION TO BE RELIEVED AS COUNSEL  
—————

Counsel for Marcus Codell McFadden states:

1. He is Chief Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent petitioner.
2. He has reviewed the record of petitioner's post-conviction relief hearing before Judge L. Casey Manning, which was held on February 14, 2022, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. He has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed an arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve him as counsel for Marcus Codell McFadden.

Respectfully Submitted,

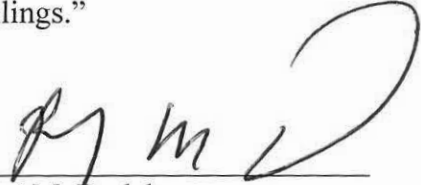
  
—————  
Robert M. Dudek  
Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 14th day of December, 2022.

**CERTIFICATE OF COUNSEL**

The undersigned certifies that to the best of his ability this Johnson Petition for Writ of Certiorari complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."



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ATTORNEY FOR PETITIONER

This 14th day of December, 2022.