

IN THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED

APPEAL FROM FLORENCE COUNTY
HONORABLE WILLIAM H. SEALS, JR., CIRCUIT COURT JUDGE
C/A NO. 2012-CP-21-1789

S.C. Supreme Court

Donnell McFadden,

Appellant,

v.

State of South Carolina,

Respondent.

NOTICE OF APPEAL

Appellant Donnell McFadden ("McFadden") hereby appeals the Order of the William H. Seals, Jr., signed November 25, 2013 (filed on December 11, 2013), denying McFadden's Motion for Post-Conviction Relief. McFadden's counsel received a copy of the Order on December 16, 2013.

RESPECTFULLY SUBMITTED,

CORBIN LAW FIRM

227 West Evans Street

Post Office Box 447

Florence, South Carolina 29503-0447

(843)667-6119

BY: 

DARYL J. CORBIN

Attorney for Appellant

Florence, South Carolina
December 17, 2013

Other Counsel of Record:
Joshua L. Thomas, Esquire
Assistant Attorney General
Post Office Box 11549
Columbia, SC 29211-1549
Attorney for Respondent

IN THE STATE OF SOUTH CAROLINA
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DEC 18 2013

APPEAL FROM FLORENCE COUNTY
HONORABLE WILLIAM H. SEALS, JR., CIRCUIT COURT JUDGE
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S.C. Supreme Court

Donnell McFadden,

Appellant,

v.

State of South Carolina,

Respondent.

PROOF OF SERVICE

I, Daryl J. Corbin, counsel for Appellant Donnell McFadden, certify that I have served the Notice of Appeal via regular United States Mail, postage prepaid, on December 17, 2013, to the following:

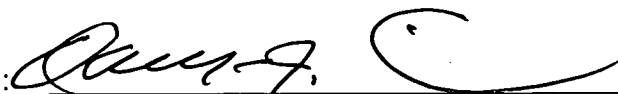
Honorable Connie Reel-Shearin
Florence County Clerk of Court
180 North Irby Street
Florence, SC 29501

Joshua L. Thomas, Esquire
Assistant Attorney General
Post Office Box 11549
Columbia, SC 29211-1549

RESPECTFULLY SUBMITTED,

CORBIN LAW FIRM
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Florence, South Carolina 29503-0447
(843)667-6119

BY:



DARYL J. CORBIN
Attorney for Appellant

FILED

STATE OF SOUTH CAROLINA
COUNTY OF FLORENCE
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2012CP2101789

Donnell Mcfadden

2013 DEC 12 AM 11:28 State

CONNIE REEL-JONES
CCCP & GS
FLORENCE COUNTY, SC

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

Attorney for: Plaintiff Defendant
 Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. See Page 2 for additional information.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit);
 Rule 43(k), SCRPC (Settled); Other: _____
- ACTION STRICKEN (CHECK REASON):** Rule 40(j) SCRPC; Bankruptcy;
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other: _____
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
 Affirmed; Reversed; Remanded; Other:

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order; (formal order to follow) Statement of Judgment by the Court:

ORDER INFORMATION

This order ends does not end the case.

Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge

Judge Code

12/12/2013

Date

For Clerk of Court Office Use Only

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P. & G.S.
FLORENCE COUNTY, SC

This judgment was entered on **December 11, 2013**, and a copy mailed first class or placed in the appropriate attorney's box on **December 12, 2013**, to attorneys of record or to parties (when appearing pro se) as follows:

Daryl James Corbin PO Box 447 Florence, SC 29503-0447

ATTORNEY(S) FOR THE PLAINTIFF(S)

Joshua Lee Thomas PO Box 11549 Columbia, SC 29211

ATTORNEY(S) FOR THE DEFENDANT(S)

Connie Reel Shearin

Court Reporter

Connie Reel-Shearin - Clerk of Court

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

STATE OF SOUTH CAROLINA)
COUNTY OF FLORENCE)

IN THE COURT OF COMMON PLEAS
FOR THE TWELFTH JUDICIAL CIRCUIT

Donnell McFadden, #229635,)

Case No. 2012-CP-21-1789

Applicant,)

v.)

ORDER OF DISMISSAL

State of South Carolina,)

Respondent.)

2013 DEC 11 PM 4:37
COMMUNITY COURT
FLORENCE COUNTY

This matter comes before the Court by way of an Application for Post-Conviction Relief (PCR) filed July 10, 2012. Respondent made its Return on or about December 18, 2012. The Court convened an evidentiary hearing into the matter on October 10, 2013, in Marion County. Applicant was present at the hearing and represented by Daryl J. Corbin, Esquire. Joshua L. Thomas, Esquire, of the South Carolina Attorney General's Office, represented Respondent.

Applicant testified on his own behalf at the PCR hearing. Applicant also called Investigator Bazen of the Florence County Sheriff's Office to testify. Applicant's trial counsel, Scott P. Floyd, Esquire, also testified. The Court had before it a copy of the trial transcript, the records of the Florence County Clerk of Court, Applicant's records from the South Carolina Department of Corrections, the application, and the return. The Court finds as follows:

I. PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Florence County Clerk of Court. In October 2008, the Florence County Grand Jury indicted Applicant for distribution of cocaine base (2008-GS-21-1598). He was represented by Scott P. Floyd, Esquire ("trial counsel"). On April 14, 2009,

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COMMUNITY COURT
FLORENCE COUNTY

Applicant proceeded to trial before the Honorable Thomas A. Russo and a jury. The jury found Applicant guilty as indicted on April 15, 2009. Judge Russo sentenced Applicant as a third drug offender to confinement for a period of twenty-two (22) years.

Applicant filed a timely notice of appeal, and the appeal was perfected by Tricia A. Blanchette, Esquire ("appellate counsel"). On January 25, 2012, the South Carolina Court of Appeals affirmed Applicant's conviction. State v. McFadden, 2012-UP-28 (S.C. Ct. App. filed Jan. 25, 2012).

II. ALLEGATIONS

In his application, Applicant alleges he is being held in custody unlawfully for the following reasons:

1. "Ineffective Ass. of Counsel"
 - a. "Strickland vs. Washington"
2. "Chain of Custody Rule 6"
 - a. "State vs. Sweet, 374 S.C. 1, 6 (2007) State vs. Chisolm"
3. "Tampering with Evidence"
 - a. "Melendza-Diaz vs. Mass. 129 S.Ct. 2527 (2012)"

On October 3, 2013, Applicant filed an amended application alleging ineffective assistance of appellate counsel for failing to argue the trial judge erred in denying Applicant's Batson challenge. At the PCR hearing, the Applicant proceeded on only the allegations of (1) ineffective assistance of trial counsel for failure to present evidence of Applicant's work as a confidential informant, (2) ineffective assistance of trial counsel for failing to allow Applicant to plea and receive a lesser sentence, and (3) ineffective assistance of appellate counsel for failure to raise the Batson issue on appeal.

III. SUMMARY OF TESTIMONY

Applicant's first witness was Investigator Bazen of the Florence County Sheriff's Office narcotics division. Investigator Bazen testified Applicant's brother worked as an informant for the narcotics department. However, he further testified Applicant never did any work for the department. On cross-examination, he reiterated he never employed Applicant as an informant and he never promised Applicant anything in return for any cooperation.

Applicant testified he worked as an informant in March 2009 by buying drugs for Investigator Bazen. He also testified he informed trial counsel of his work, but that trial counsel failed to give this information to the State or to the trial judge. Applicant also testified he wanted trial counsel relieved because trial counsel never mentioned the informant work to the State or to the trial judge. However, on cross-examination Applicant admitted he did not tell the trial judge about any informant work when given the opportunity to speak at sentencing.

Applicant further testified he received an offer to plea to a second offense in exchange for a five (5) year sentence. He stated he wanted to take this plea offer on the Friday before trial, but trial counsel told him the offer would still be valid on Monday. Applicant testified he went to court on Monday, but his name was not called during roll call. He instead went home, and was arrested on a bench warrant the next day. He testified he wanted to accept the five (5) year offer when he appeared for trial, but the State had withdrawn the offer.

On cross examination, Applicant admitted he met with trial counsel at least three times before trial. During these meetings, they reviewed the State's evidence and discussed the case. He also admitted he did not speak to trial counsel on the Monday he was supposed to appear to

plea. Applicant further admitted he did not speak to anyone about his plea on that Monday. He testified he went home instead of making any attempt to contact trial counsel.

Trial counsel testified he met with Applicant several times after being appointed. He recalled reviewing with Applicant the State's responses to trial counsel's Rule 5/Brady motions. According to trial counsel, the State's evidence consisted of a video of the drug transaction and the testimony of a confidential informant. Trial counsel also discussed Applicant's version of the facts and any possible defenses. However, trial counsel recalled the video evidence would have been difficult to counter at trial. Trial counsel further testified he never heard of Applicant's informant work until the day of the PCR hearing. He did not know why Applicant never discussed working as an informant with him, but he did not recall being informed Applicant was a confidential informant.

Trial counsel testified he was able to negotiate an offer of five (5) years for a plea to a second drug offense. He also testified the five (5) year plea was still on the table up to the moment jury selection began. Trial counsel recalled holding the sentencing sheet reflecting the negotiated five (5) years in his hand the day of trial, and Applicant refusing to sign the sheet. He further recalled the State again offering to allow Applicant to plead guilty to the third offense as trial was ongoing. Trial counsel testified Applicant backed out of that plea because Applicant's brother talked him out of it.

Regarding the Batson challenge, trial counsel recalled discussing it as an appellate issue with the Office of Appellate Defense. However, the appeal was ultimately perfected by appellate counsel, who is not employed by the Office of Appellate Defense. Trial counsel admitted the

trial judge made findings of fact that the State's strikes were race neutral, and that the standard of review on appeal gives great deference to the trial judge.

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the record in its entirety and has heard the testimony and arguments presented at the PCR hearing. This Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their credibility. This Court has weighed the testimony accordingly. Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80 (2003).

A. Ineffective Assistance of Counsel

In a post-conviction relief action, the applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (citing Griffin v. Martin, 278 S.C. 620, 300 S.E.2d 482 (1983)). Where the application alleges ineffective assistance of counsel as a ground for relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Id. at 442, 334 S.E.2d at 814 (citing Strickland v. Washington, 466 U.S. 668 (1984)).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Id. (citing Strickland, 466 U.S. at 687; Turner v. Bass, 753 F.2d 342 (4th Cir. 1985); Marzullo v. Maryland, 561 F.2d 540 (4th Cir. 1977)). Courts presume counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Id. (citing Strickland, 466 U.S. at 690). The

applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. Id. at 117, 386 S.E.2d at 625. First, the applicant must prove that counsel's performance was deficient. Id. Under this prong, courts measure an attorney's performance by its "reasonableness under prevailing professional norms." Id. (citing Strickland, 466 U.S. at 688). Second, any deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 117-18, 386 S.E.2d at 625. With respect to appellate counsel, the applicant must prove prejudice by showing "there is a reasonable probability he would have prevailed on appeal." Anderson v. State, 354 S.C. 431, 434, 581 S.E.2d 834, 835 (2003) (citations omitted)

1. Trial Counsel

The Court finds Applicant failed to meet his burden of proving trial counsel was ineffective. Applicant's allegation trial counsel failed to present evidence of his work as a confidential informant is wholly without merit. Regarding this allegation, the Court finds the testimony of trial counsel and Investigator Bazen to be very credible. Further, the Court finds Applicant's testimony to be neither credible nor believable. The record is clear trial counsel was under no obligation to disclose Applicant's work for two reasons. First, Applicant never did any informant work for Investigator Bazen. Second, even if Applicant did any informant work, he never disclosed it to trial counsel. Trial counsel cannot have been expected to discover facts that did not exist at the time of trial. Thornes v. State, 310 S.C. 306, 310, 426 S.E.2d 764, 765-66

(1993) (citations omitted). Therefore, trial counsel was not deficient in failing to present this information to the trial court.

Likewise, trial counsel was in no way deficient for failing to secure the five (5) year plea offer. The record is clear Applicant had every opportunity to plea to a second offense. The Court finds very credible trial counsel's testimony Applicant could have received the benefit of the negotiated plea up to the moment jury selection began. The Court finds not credible Applicant's testimony he wanted to plea to five (5) years instead of go to trial. Applicant freely and intelligently declined this offer, and decided to take the case to trial. Even after trial started, Applicant again declined an opportunity to plead guilty. Therefore, trial counsel did everything possible to secure the plea offer Applicant now complains he was not afforded.

Furthermore, plea counsel provided competent representation in light of the overwhelming evidence against Applicant. The State presented the eye-witness testimony of a confidential informant who purchased drugs from Applicant. The officers running the sting testified the only way the informant had possession of the drugs was by purchasing them from Applicant. The most damaging piece of evidence was a video which the trial judge stated clearly showed Applicant selling drugs. (Trial Tr. 171:2). Because the State presented overwhelming evidence of Applicant's guilt, he cannot show he was prejudiced by any of trial counsel's alleged errors. Harris v. State, 377 S.C. 66, 79, 659 S.E.2d 140, 147 (2008). Therefore, Applicant has not proven ineffective assistance of trial counsel.

2. Appellate Counsel

The Court finds Applicant has not met his burden of proving appellate counsel was ineffective for failing to argue the trial judge erred in denying Applicant's Batson¹ challenge. Specifically, the Court finds Applicant has not proven he would have been successful on appeal had this issue been briefed. A trial court's ruling on a Batson motion rests largely on credibility and is given great deference on appeal. State v. Ford, 334 S.C. 59, 65, 512 S.E.2d 500, 503 (1999). Here, the trial judge found the State offered race-neutral explanation² for striking each juror. (Trial Tr. 27:24-28:12). The State struck the first juror because she was reluctant to serve on a jury; the second juror because he possibly had a prior record; the third juror because she was from the same area as Applicant; and the fourth juror because she had pending criminal charges being handled by the same Solicitor's Office. Each of these reasons has been previously found to be racially neutral. See State v. Wright, 304 S.C. 529, 533, 405 S.E.2d 825, 827 (1991) (apparent disinterest in serving); State v. Martinez, 294 S.C. 72, 73, 362 S.E.2d 641, 642 (1987) (possible criminal record); Arthur v. Sexton Dental Clinic, 368 S.C. 326, 336, 628 S.E.2d 894, 900 (Ct. App. 2006) (area where juror lived); Sumpter v. State, 312 S.C. 221, 223, 439 S.E.2d 842, 844 (1994) (prior involvement with same Solicitor's Office). Therefore, the trial court did not err in finding each strike was racially neutral.

Thus, Applicant must show the trial court erred in finding there was no pretext to the strikes. Ford, 334 S.C. at 64, 512 S.E.2d at 503. Trial counsel essentially consented to the explanations given for the first, second, and fourth jurors. (Trial Tr. 23:4; 24:5; 27:15).

¹ Batson v. Kentucky, 476 U.S. 79 (1986).

² Ford, 334 S.C. at 64, 512 S.E.2d at 503 ("After a party objects to a jury strike, the proponent of the strike must offer a facially race-neutral explanation.").

Therefore, only the third challenged juror could have been reviewed on appeal. To show the strike was pretextual, trial counsel demonstrated the State later sat another juror who was also from the same area as Applicant. However, the State explained it was reserving its two remaining strikes for two potential jurors who indicated they had a prior relationship with trial counsel. This Court can find no error with the trial court's acceptance of that rationale as a racially neutral reason for striking the third juror.³ Furthermore, the Court notes the State sat a black juror before exercising any of the challenged strikes. See State v. Johnson, 302 S.C. 243, 246, 395 S.E.2d 167, 169 (1990) (citing U.S. v. Lane, 866 F.2d 103 (4th Cir.1989)); Ford, 334 S.C. at 66, 512 S.E.2d at 504 ("Although appellant exercised most of his strikes against white jurors, he did not strike every white juror."). Because the State's "explanations [were] not so fundamentally implausible as to constitute mere pretext[.]" the Court finds Applicant cannot show he would have been successful if appellate counsel had raised the Batson issue on appeal. Ford, 334 S.C. at 65, 512 S.E.2d at 504. Therefore, appellate counsel was not ineffective.

B. All Other Allegations

As to any and all allegations that were raised in the application or at the hearing in this matter and not specifically addressed in this Order, the Court finds Applicant failed to present sufficient evidence regarding such allegations. Accordingly, the Court finds Applicant has abandoned any such allegations.

³ This case is distinguishable from State v. Hicks, 330 S.C. 207, 499 S.E.2d 209 (1998), and State v. Grandy, 306 S.C. 224, 411 S.E.2d 207 (1991), because the State's claim it was reserving strikes for later jurors was supported by a clear and reasonably specific explanation of which jurors it wished to avoid seating.

V. CONCLUSION

Based on the foregoing, the Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.


The Court notes that Applicant must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), an applicant has a right to appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides that if the applicant wishes to seek appellate review, post-conviction relief counsel must serve and file a notice of appeal on the applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED THAT:

1. The Application for Post-Conviction Relief is denied and dismissed with prejudice; and
2. The Applicant be remanded to the custody of the Respondent.

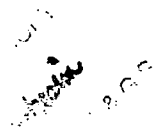
AND IT IS SO ORDERED this 25 day of Nov., 2013.

2013 DEC 11 PM 4:37
DO NOT REMOVE
FIDELITY & SECURITY



THE HONORABLE WILLIAM H. SEALS, JR.
Presiding Judge

Maurice, South Carolina





403-0001

CONNIE REEL-SHEARIN
Clerk of Court
City-County Complex
180 N. Iby St. MSC E
Florence, S.C. 29501

Daryl James Corbin
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Corbin Law Firm

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DARYL J. CORBIN
ATTORNEY AT LAW

TELEPHONE: (843)667-6119
FACSIMILE: (843)664-9180

December 17, 2013

Honorable Connie Reel-Shearin
Florence County Clerk of Court
180 North Irby Street
Florence, SC 29501

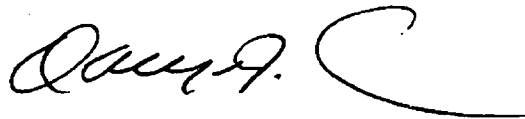
Re: Donnell McFadden v. State of South Carolina
(Case No. 2012-CP-21-1789)

Dear Ms. Reel-Shearin:

Please find enclosed and file a copy of Appellant Donnell McFadden's Notice of Appeal and Proof of Service in the above-captioned matter. If you have any questions, please do not hesitate to contact me.

Thank you; and, with warm regards, I am

Sincerely yours,



Daryl J. Corbin

DJC/cbs/6321
Enclosures

cc: ~~Honorable Daniel E. Shearouse~~
~~SC Supreme Court Clerk of Court~~
Joshua L. Thomas, Esquire
Assistant Attorney General
SC Commission on Indigent Defense
Division of Appellate Defense

Corbin Law Firm

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December 17, 2013

Joshua L. Thomas, Esquire
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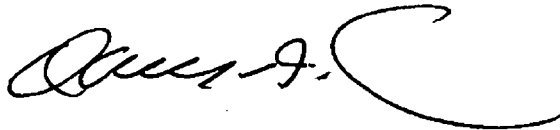
Re: Donnell McFadden v. State of South Carolina
(Case No. 2012-CP-21-1789)

Dear Mr. Thomas:

Please find enclosed and accept a copy of Appellant Donnell McFadden's Notice of Appeal and Proof of Service in the above-captioned matter.

Thank you; and, with warm regards, I am

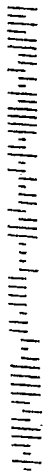
Sincerely yours,



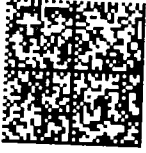
Daryl J. Corbin

DJC/cbs/6353
Enclosures

cc: ~~Honorable Daniel E. Shearouse~~
~~SC Supreme Court Clerk of Court~~
~~Honorable Connie Reel-Shearin~~
~~Florence County Clerk of Court~~
~~SC Commission on Indigent Defense~~
~~Division of Appellate Defense~~



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December 17, 2013

Honorable Daniel E. Shearouse
SC Supreme Court Clerk of Court
Post Office Box 11330
Columbia, SC 29211

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DEC 18 2013

S.C. Supreme Court

Re: Donnell McFadden v. State of South Carolina
(Case No. 2012-CP-21-1789)

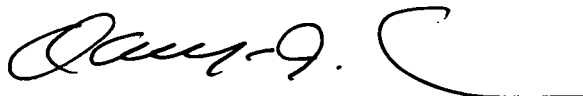
Dear Mr. Shearouse:

Please find enclosed for filing the original and one (1) copy of Appellant Donnell McFadden's Notice of Appeal and Proof of Service in the above-captioned matter which I have served upon opposing counsel and the Florence County Clerk of Court involving the Order dismissing Mr. McFadden's Motion for Post-Conviction Relief signed by Judge William H. Seals, Jr. ("Judge Seals"), on November 25, 2013, and filed on December 11, 2013. I received a copy of Judge Seals' Order on December 16, 2013. I am enclosing a copy of Judge Seals' Order for your file.

I understand there is no requisite filing fee. Would you please return to me a certified copy of the Notice of Appeal and Proof of Service in the enclosed self-addressed, stamped envelope? If you have any questions, please do not hesitate to contact me.

Thank you; and, with warm regards, I am

Sincerely yours,



Daryl J. Corbin

Enclosures

cc: Honorable Connie Reel-Shearin
Florence County Clerk of Court
Joshua L. Thomas, Esquire
Assistant Attorney General
SC Commission on Indigent Defense
Division of Appellate Defense