

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Lancaster County

Clifton Newman, Circuit Court Judge

RECEIVED

MAY 28 2014

S.C. Supreme Court

STEVEN MCFARLAND,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-002787

APPENDIX

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STATE OF SOUTH CAROLINA
COURT OF GENERAL SESSIONS
COUNTY OF LANCASTER
2010-GS-29-262

STATE OF SOUTH CAROLINA
VS.
STEVEN BARRY MCFARLAND

LANCASTER, SOUTH CAROLINA
JULY 28-29, 2010
BEFORE THE HONORABLE PAUL BURCH

APPEARANCES
FOR THE STATE: TREY COOK
FOR THE PETITIONER: MARK GRIER
REPORTED BY: MICHAEL C. WATKINS
OFFICIAL COURT REPORTER

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1 MR. GRIER: Your Honor, this is -- I don't know if the
2 State wants to introduce it.

3 MR. COOK: State vs. Barry McFarland, 2010-GS-29-262,
4 shoplifting 3rd, represented by Mark Grier.

5 MR. GRIER: Judge, I represent Steven McFarland. I
6 have had multiple conversations with him about this case,
7 he has been here and reported as he was told to do he has
8 been cooperative at every other occasion in terms of
9 showing up when he was supposed to. I met with him this
10 morning and we discussed the potential for another witness
11 and asked him if he was able to procure that witness that
12 he would need to, that would be helpful to his case I
13 believe and advised him that he needed to be here before
14 2:00. I spoke with him subsequent to that about shortly
15 before 2:00 and he advised that he had found the witness
16 and that he was on his way to court. I have -- he's not
17 present and I have been unable to -- my office has been
18 unable to find him, I have tried to call as well the
19 numbers that I have and simply cannot find him. I don't
20 know if he had an accident or what accounts for his failure
21 to appear for the first time ever that I am aware of and I
22 am moving for a continuance to give me an opportunity to
23 find my client. It would be extremely prejudicial for him
24 to go to trial, I believe it's likely that he would need to
25 testify at trial to maintain the defense that we discussed

IN-CHAMBERS MOTION

1 and I am asking that the Court consider granting a
2 continuance at least until in the morning to allow me to do
3 everything that I could possibly do to get him in the
4 courtroom.

5 MR. COOK: What says the State?

6 MR. GRIER: Been noticed he's on trial since Monday,
7 he's had two days to find his witnesses. He was up for
8 trial, he was here this morning, I don't see any reason we
9 can't go forward.

10 THE COURT: Mr. Grier, he was fully aware this morning
11 that his case was up next today?

12 MR. GRIER: He was advised to be here at 2:00, that it
13 was likely that we would be drawing a jury I believed it to
14 be at 2:00, I thought we were going to start at 2:00 so he
15 was certainly advised that the intention of the State was
16 to call his case today at 2:00.

17 THE COURT: It's now about 15 after 3:00. In your
18 communications in the past has he had a cellphone or how
19 would you contact with him?

20 MR. GRIER: Judge, frankly my communication with him
21 has been limited, my office has made all of the
22 arrangements. We have a cellphone which I did today, I did
23 call those numbers today and I'm not sure -- I believe one
24 of them was a cellphone of another individual, Sharon I
25 don't know her last name, and the other I didn't get an

IN-CHAMBERS MOTION

1 answer at what I believed to be another number, that is not
2 his cellphone when I tried him. I'm not sure whether he
3 has got a cellphone.

4 THE COURT: Well, I will have to deny your motion, we
5 are going forward today. It's pretty obvious from the
6 scenario that you have put before the Court that he has
7 possibly flown the coupe because there's adequate
8 communication available to him out there if he was involved
9 in an accident or something tragic has happened he would be
10 getting ahold of us and if that were to prove true later on
11 there's always a remedy for that. But right now it appears
12 that he probably realized that his time was up and he has
13 taken the easy route of flight so I'm sure he understands
14 the consequences of what is going to happen, or what would
15 happen if he tells you he's going to be back with a witness
16 and we don't hear anything back. It's obvious to the Court
17 that he has decided to flee rather than face the jury.
18 Anything else?

19 MR. GRIER: No, Your Honor.

20 MR. COOK: Nothing from the State.

21 (Back in the courtroom.)

22 MR. COOK: At this time the State would call case
23 number 2010-GS29-262, State versus Steve Barry McFarland,
24 been indicted for shoplifting.

25 THE COURT: Ladies and gentlemen of the petit jury, if

VOIR DIRE

1 I could have your attention, we're about to commence the
2 trial of the case entitled the State of South Carolina
3 versus Steve Barry McFarland charged in the bill of
4 indictment by the grand jury of Lancaster County with the
5 offense of shoplifting. The defendant is not present at
6 this time, however is represented by Mr. Grier and it is my
7 understanding he enters a plea of not guilty?

8 MR. GRIER: Yes, Your Honor. I do have some voir dire
9 questions that I presented to the prosecution.

10 THE COURT: I've got some questions for you. Any
11 members of the petit jury panel related by blood or
12 connected by marriage or have any business, social,
13 religious or fraternal relationship with the defendant,
14 Steven Barry McFarland or any of the State's potential
15 witnesses, and I will defer to the solicitor to call their
16 names at this time.

17 MR. COOK: My name is Trey Cook, I'm an assistant
18 solicitor in Lancaster County, this is Bill Nowiki who you
19 may see in and out of this case. Potential witnesses are
20 Ricky Funderburke with the Lancaster Police Department and
21 Ms. Diane Smith and Mr. Jeff Hammond.

22 THE COURT: All right. If so we need you to stand at
23 this time. Yes, sir?

24 THE JUROR: Your Honor, Diane Smith is my sister.

25 THE COURT: And your name?

1 THE JUROR: Basil Bragdon.

2 THE COURT: All right. I will step out on that one,
3 he will be excused on that case. Anybody on the panel an
4 employee or former employee or have an immediate family
5 member that's an employee or former employee, or you own
6 any business that does business with Wal-Mart, or you are a
7 stock holder in Wal-Mart corporate stock? If so we need
8 you to stand at this time.

9 THE JUROR: My wife works at Wal-Mart.

10 THE COURT: And your name?

11 THE JUROR: Michael Avant.

12 THE COURT: Michael Avant and his wife presently works
13 at Wal-Mart. Would that affect your ability to be a fair
14 and impartial juror in this case.

15 THE JUROR: No, sir.

16 THE COURT: Yes, sir, your name?

17 THE JUROR: My wife also works at Wal-Mart.

18 THE COURT: Your name?

19 THE JUROR: Lonnie Faile.

20 THE COURT: Would that affect your ability to be a
21 fair and impartial juror in this case?

22 THE JUROR: No, sir.

23 THE COURT: Thank you.

24 THE JUROR: My mother works there, her name is Ranette
25 Truesdale and my name is Tosha Marsh.

VOIR DIRE

1 THE COURT: Would that affect your ability to be a
2 fair and impartial juror in this case?

3 THE JUROR: No.

4 THE COURT: Yes?

5 THE JUROR: I work at Wal-Mart.

6 THE COURT: And your name.

7 THE JUROR: Sherry Adams.

8 THE COURT: All right, I will step in on that one,
9 too. Anyone else? I may need to expand that a little bit,
10 Sam's Club is owned by Wal-Mart. Does anybody work or have
11 an immediate family member that works or works in the past
12 with any Wal-Mart affiliated businesses? I know Sam's is
13 one of them. The indictment alleges this offense occurred
14 at Wal-Mart here in Lancaster County on November 22nd of
15 2009. Do I have anybody on the panel that has formed or
16 expressed an opinion as to the guilt or innocence of the
17 defendant, Steve Barry McFarland? If so we need you to
18 stand at this time. Any juror conscious of any interest,
19 any bias or any prejudice for or against the defendant or
20 the State of South Carolina? If so, please stand at this
21 time. Any members of the panel been a member or employed
22 by any civilian or military law enforcement? Any of you
23 have an immediate family member that are in law
24 enforcement? If you will stand and give your, name please.

25 THE JUROR: (Inaudible.) My husband works for the

1 Mecklenburg Sheriff's Department.

2 THE COURT: Which county? Mecklenburg County?

3 THE CLERK: Number 50 was her number.

4 THE COURT: Yes, ma'am?

5 THE JUROR: Brother-in-law is a correctional officer
6 in Columbia.

7 THE COURT: In Columbia? Your name?

8 THE JUROR: Laura Edwards.

9 THE JUROR: My son is a reserve police officer for
10 Lancaster County.

11 THE COURT: And your name?

12 THE JUROR: Twyla Cox.

13 THE COURT: Any member of the panel ever been the
14 victim of a serious crime or a violent crime or an
15 immediate family member? Any member of the panel ever been
16 a witness to a serious or violent crime? If I said crime
17 that means every time you rode with your neighbor and he
18 speeds we would all be standing. I know several of you
19 answered this the other day, I need for those that have
20 already served on a jury before to stand and tell us if it
21 was criminal or civil, and if it was criminal what the
22 verdict was.

23 THE JUROR: Does that count for this morning?

24 THE COURT: Yes. Does everybody know their juror
25 number? Those of you that served on the jury this morning

VOIR DIRE

1 if you will remain standing and just give your name and
2 then you may be seated and then I will take up the ones
3 that were not on the jury this morning. We'll start here.

4 THE JUROR: Terry Evans.

5 THE JUROR: Paula Lancaster.

6 THE JUROR: Keith Barton.

7 THE JUROR: Jody Manus.

8 THE JUROR: Mike Brown.

9 THE JUROR: Tosha Marsh.

10 THE JUROR: Daniel Williams.

11 THE JUROR: Kenneth Brassel, number 18.

12 THE JUROR: Hargett.

13 THE JUROR: Nisom.

14 THE JUROR: Limfado.

15 THE JUROR: Blake Mason.

16 THE JUROR: (Inaudible.) Number 100.

17 THE COURT: Y'all may be seated and then the other one
18 stand backup.

19 THE JUROR: Melinda Catoe, number 27.

20 THE COURT: Now to the other trials if you will just
21 give your name and what it was and what the verdict was.

22 THE JUROR: Cynthia Hinson, it was a civil case.

23 THE JUROR: Margaret Walters, criminal case, guilty.

24 THE JUROR: Charlie Lucas, DUI, guilty.

25 THE JUROR: Steven Rape.

VOIR DIRE

1 THE COURT: And the next question I can tell you that
2 nobody stood up the other day, nobody stood up on the third
3 to the last question, and we did have some to stand.
4 Anybody that donated or you belonged to an organization
5 such as MADD, SADD, CAVE or any other law enforcement or
6 victim rights?

7 THE JUROR: 22, Mike Brown. I donate to the Fraternal
8 Order of Police.

9 THE COURT: Mr. Brown. Was there somebody else? Have
10 you or an immediate family member ever worked in retail
11 sales?

12 THE JUROR: I work at Bi-Lo.

13 THE COURT: Your name?

14 THE JUROR: McGriff?

15 THE COURT: Yes, ma'am?

16 THE JUROR: I work at Food Lion.

17 THE COURT: And your name?

18 THE JUROR: Cynthia Hinson.

19 THE JUROR: I work at Food Lion as well, Mike Brown.

20 THE JUROR: Mitsy Lopez, I work at Belk.

21 THE JUROR: I have a son that works at Target.

22 THE COURT: Son? Okay. Mr. Mason?

23 THE JUROR: I work at Smalls Food Center.

24 THE COURT: Yes, ma'am.

25 THE JUROR: I worked at Springmaid Wamsetta for 15

VOIR DIRE

1 years.

2 THE COURT: And your name?

3 THE JUROR: Stella Witherspoon.

4 THE COURT: I asked you, can each member of the petit
5 jury panel should you be drawn on this jury give the State
6 and the defendant a fair and impartial trial? If not we
7 need you to stand at this time but don't make any comment.
8 Any further inquiry from either side?

9 MR. GRIER: Not from the defense, Your Honor.

10 MR. COOK: Not from the State, Your Honor.

11 THE COURT: All right. Unless y'all show me something
12 different it's five and five.

13 MR. COOK: That is correct, Your Honor.

14 THE COURT: Oh, got one standing. Your name, please?

15 THE JUROR: Charlie Joyner, number 80.

16 THE COURT: What relationship?

17 THE JUROR: Cousin was a police officer, still might
18 be, I'm not 100 percent sure.

19 THE COURT: Thank you, sir.

20 THE CLERK: Juror 140, Lafayette Thrower. What says
21 the State?

22 MR. COOK: Please excuse this juror.

23 THE CLERK: Juror 147, Daniel Williams. What says the
24 State?

25 MR. COOK: Please seat this juror.

VOIR DIRE

1 THE CLERK: Defendant?

2 MR. GRIER: Please swear the juror.

3 THE CLERK: Juror 32, Rico Lee. What says the State?

4 MR. COOK: Please seat this juror.

5 THE CLERK: Defendant?

6 MR. GRIER: Swear the juror.

7 THE CLERK: Juror 19, Eric Brevard. What says the

8 State?

9 MR. COOK: Please excuse this juror.

10 THE CLERK: Juror number 87, Sherry Lucas. What says

11 the State?

12 MR. COOK: Please seat this juror.

13 THE CLERK: Defendant?

14 MR. GRIER: Please excuse the juror.

15 THE CLERK: Juror 91, Tosha Marsh. What says the

16 State?

17 MR. COOK: Please seat this juror.

18 THE CLERK: Defendant?

19 MR. GRIER: Please seat this juror.

20 THE CLERK: Juror 21, Michael Broome. What says the

21 State?

22 MR. COOK: Please seat this juror.

23 THE CLERK: Defendant?

24 MR. COOK: Please seat this juror.

25 THE CLERK: Juror 27, Melinda Catoe. What says the

VOIR DIRE

1 State?

2 MR. COOK: Please seat this juror.

3 THE CLERK: Defendant?

4 MR. GRIER: Please seat this juror.

5 THE CLERK: Juror 96, Tonya McGriff. What says the

6 State?

7 MR. COOK: Please seat this juror.

8 THE CLERK: Defendant?

9 MR. GRIER: Please excuse the juror.

10 THE CLERK: Juror 128, Sherry Smith. What says the

11 State?

12 MR. COOK: Please excuse this juror.

13 THE CLERK: Juror 1, Diane Abel. What says the State?

14 MR. COOK: Please seat this juror.

15 THE CLERK: Defendant?

16 MR. GRIER: Please swear the juror.

17 THE CLERK: Juror 94, James Mcdermott. What says the

18 State?

19 MR. COOK: Please seat this juror.

20 THE COURT: Defendant?

21 MR. GRIER: Please swear the juror.

22 THE CLERK: Juror 92, Blake Mason. What says the

23 State?

24 MR. COOK: Please seat this juror.

25 THE CLERK: Defendant?

VOIR DIRE

1 MR. GRIER: Please excuse the juror.

2 THE CLERK: Juror 85, Mitzi Lopez. What says the
3 State?

4 MR. COOK: Please seat this juror.

5 THE CLERK: Defendant?

6 MR. GRIER: Excuse this juror.

7 THE CLERK: Juror 6, James Barnes. What says the
8 State?

9 MR. COOK: Please seat this juror.

10 THE CLERK: Defendant?

11 MR. GRIER: Please swear the juror.

12 THE CLERK: Juror 108, Benjamin Parra. What says the
13 State?

14 MR. COOK: Please seat this juror.

15 THE CLERK: Defendant?

16 MR. GRIER: Please swear the juror.

17 THE CLERK: Juror 42, Nora Edwards. What says the
18 State?

19 MR. COOK: Please seat this juror.

20 THE CLERK: Defendant?

21 MR. GRIER: Please swear the juror.

22 THE CLERK: Juror 107, Gary Neisler. What says the
23 State?

24 MR. COOK: Please seat this juror.

25 THE CLERK: Defendant?

VOIR DIRE

1 MR. GRIER: Please swear the juror.

2 THE CLERK: Juror 4, Michael Avant. What says the
3 State?

4 MR. COOK: Please seat this juror.

5 THE CLERK: Defendant?

6 MR. GRIER: Please excuse the juror.

7 THE CLERK: Juror 45, Inez Ervin. What says the
8 State?

9 MR. COOK: Please seat this juror.

10 THE CLERK: Any challenge for cause?

11 MR. GRIER: No.

12 THE CLERK: Alternates. Juror 56, Christopher Hagins.
13 What says the State?

14 MR. COOK: Please excuse this juror.

15 THE CLERK: Juror 47, Lonnie Faile. What says the
16 State? Any challenge for cause?

17 MR. COOK: None.

18 THE CLERK: Defendant?

19 MR. GRIER: Excuse the juror.

20 THE CLERK: Juror 7, Keith Barton. Any challenge for
21 cause?

22 MR. COOK: None.

23 THE CLERK: Defendant?

24 MR. GRIER: Swear the juror.

25 THE COURT: Any objection from the selection of the

1 jury?

2 MR. COOK: None from the State, Your Honor.

3 MR. GRIER: None from the defendant, Your Honor.

4 (The remaining panel was dismissed.)

5 THE COURT: Any matter before we swear the jury?

6 MR. GRIER: Judge, may we approach?

7 (A bench conference was held.)

8 THE COURT: Mr. McDermott, if you want to slide around
9 and take this front position right here I'm going to
10 appoint you foreman.

11 (The jury panel was sworn.)

12 THE COURT: Thank you, Mr. Clerk. How many of you
13 were on the first jury? Sorry about the repetition but I
14 have got to go back through this, I'll make it as brief as
15 possible. This is a criminal trial, all of you are aware
16 of that by now. The defendant who is not present in court
17 has a right not to be here and I will speak to you about
18 that further in my charge at the conclusion of the case.
19 He has entered a plea of not guilty and that puts the
20 burden on the State to prove his guilt beyond a reasonable
21 doubt. All defendants in this country come into this
22 courtroom, or into a courtroom, presumed innocent until
23 proven guilty and that presumption of innocence stays with
24 them throughout trial and would only end if you, the jury,
25 find the defendant guilty. The phases of the trial we will

VOIR DIRE

1 go through will be as follows: Brief opening statements
2 which are meant to outline the respect of State and
3 defense's position to you. Then will come the evidentiary
4 portion of the trial where you will actually receive the
5 evidence and hear the testimony to be offered. You are the
6 finders of the facts in this case, no one else will be
7 allowed to find the facts except you, the jury. I am the
8 judge of the law. The end result of any case is to reach a
9 verdict, verdict which is the Latin derivative word which
10 means a true saying so it can be said that a trial is the
11 search for the truth. How do you do that? You listen to
12 the evidence, you decide what is the truthful evidence,
13 apply the law of the case that I supply to you in my charge
14 and thus reach a final verdict. Whatever the evidence is
15 it is crucial that you listen and observe it because of
16 what I just stated because you are the finders of the
17 facts. I don't get involved in that, I have to remain
18 neutral. After the evidentiary portion of the trial will
19 come the closing arguments where both sides will be allowed
20 ample opportunity to argue their position to you to try to
21 persuade you to see the evidence as they see it. Closing
22 arguments, of course, are not evidence, they may quote the
23 evidence or repeat the evidence or refer back to some
24 evidence that's been presented to you, but the evidence
25 comes from the witness stand and from any exhibits that are

VOIR DIRE

1 introduced into evidence. After that will come the Judge's
2 charge of the law where you will receive the law of the
3 case. Only after all of those phases are completed will
4 you be asked to deliberate. In saying that I instruct you
5 at this time, do not discuss this case amongst yourselves
6 and do not allow anybody to approach you either in court or
7 out of court and discuss this matter with you. Should
8 anybody attempt such a stunt immediately notify the Court
9 of that attempt or if it's after hours notify the sheriff's
10 department. When you are asked to reach a verdict it will
11 have to be a unanimous verdict, all 12 deliberating jurors
12 will have to be in agreement on whatever the verdict is.
13 Once again the burden is on the State so therefore they get
14 to go first, they have to prove the case beyond a
15 reasonable doubt and the defendant does not have to prove
16 anything under our system. I will retire upon that
17 statement to you and turn the case over initially to the
18 solicitor for opening statement if he so desires.

19 MR. GRIER: Your Honor, may we approach one moment
20 before he starts?

21 (A bench conference was held.)

22 MR. COOK: Please the Court? Ladies and gentlemen, my
23 name is a Trey Cook, I'm an assistant solicitor here in
24 Lancaster County. As you heard earlier we are here today
25 in the State versus Barry McFarland for Shoplifting, not a

OPENING STATEMENTS

1 very difficult case, it's not going to be a very long case,
2 it's a fairly simple case. Mr. McFarland was bringing home
3 the bacon without paying for the bacon essentially. You're
4 going to hear from a couple of people here today from the
5 State to prove beyond a reasonable doubt that Mr. McFarland
6 is guilty of the offense. You will hear from Officer
7 Funderburke -- you will hear from Officer Funderburke --

8 (Break in the proceedings.)

9 MR. COOK: I think I was at Officer Funderburke. You
10 will hear from Officer Funderburke with the City of
11 Lancaster Police Department, you will also hear from Diane
12 Smith who is a customer service manager at Wal-Mart, both
13 of them had a part in this case. Officer Funderburke
14 walked in and saw Mr. McFarland with another female who
15 you're not going to hear from who we don't know who she is
16 who got away from the scene who was stuffing meat and other
17 items into his clothing right in the front, I guess you
18 would call the breezeway where the buggies are, in
19 Wal-Mart, and Officer Funderburke told him to stop, talked
20 to him, he took off. He apprehended him in the parking
21 lot, had meat -- a trail of meat from the door to him and
22 was arrested for shoplifting. My job is to prove beyond a
23 reasonable doubt that he is guilty. Your job is to take
24 all of the evidence in this case, take the law that the
25 Judge is going to instruct you on and apply it to that

OPENING STATEMENTS

1 evidence and come back with a verdict, and it has got to be
2 a unanimous verdict, either guilty or not guilty, all 12 of
3 you. And you can probably imagine what I'm going to ask
4 you to do, I'm going to ask you to come back with a verdict
5 of guilty, so I'm going to ask all 12 of you to consider
6 him guilty. The evidence in this case is going to come out
7 of this chair right here. Okay? It is what the witnesses
8 testify to in this microphone and any exhibits, photos or
9 exhibits that may be introduced by myself or Mr. Grier
10 during this trial, that's it. What I say is not evidence,
11 what Mr. Grier says is not evidence, we're here as
12 advocates. I'm here as an advocate for the State, he's
13 here as an advocate of Mr. McFarland. I'll submit to you
14 at the end of this thing it is going to prove beyond a
15 reasonable doubt through Officer Funderburke's testimony of
16 him watching him shoplift and Ms. Smith's testimony from
17 Wal-Mart that the merchandise was from Wal-Mart and he did
18 take it without paying for it which constitutes he walk
19 past all points of purchase with merchandise and left the
20 store with it. I will be back up here to talk to you at
21 the end, wrap it up, talk about what we've heard, what the
22 witnesses talk about. And like I said, I'm going to ask
23 you to come back with a verdict of guilty on shoplifting.
24 Until then I just ask that you give both of us your
25 attention, give the witnesses your attention, I know some

OPENING STATEMENTS

1 of you have been here for two days sitting here, hopefully
2 we can get you out of here either today or early in the
3 morning. Thank you.

4 MR. GRIER: May it please the Court? Solicitor? My
5 name is Mark Grier and I represent Steve McFarland.
6 Congratulations to you on being selected and those of you
7 that are serving twice how could you possibly be so lucky?
8 It's hard to imagine. In all seriousness it is a serious
9 case, it's a shoplifting case and while we see crimes of
10 violence tried in this courtroom and we tried and we see
11 very difficult cases involving things unimaginable almost,
12 this shoplifting charge is just as serious and goes through
13 the same process as any other charge does and the same
14 rules, of course, apply. And most of you having set on a
15 trial most certainly is that the burden of proof is on the
16 State to prove the defendant guilty beyond a reasonable
17 doubt and I believe the Judge at the conclusion of the case
18 will charge you on the law of reasonable doubt and there
19 are a couple of things that I would expect him to charge
20 you, number one, that a reasonable doubt is the kind of
21 doubt that would cause a reasonable person to hesitate to
22 act, and in this case to hesitate before convicting. A
23 reasonable doubt is also in our case law found to be -- to
24 exist where the real possibility of innocence exists.
25 Because defendants don't have to prove anything and they

OPENING STATEMENTS

1 most certainly are in disadvantageous position in having to
2 prove anything and having and attempting to prove their
3 innocence. When our constitution was created by our
4 founding fathers they had experience and had seen a system
5 where people had been charged with crimes and were subject
6 to what is called summary judgment, they didn't have any
7 rights, they were presumed to be guilty and they had the
8 burden of proof. And, of course, that flies against the
9 freedoms that are cherished by our country and the freedoms
10 that have been established through the American system that
11 have been duplicated in many places where freedom exists
12 throughout the world. That's not to excuse any crime, it's
13 simply to prevent innocent people from falling into the
14 trap of being found guilty of crimes that they didn't
15 commit where there's not enough evidence that is
16 convincing. In this case Mr. McFarland, I submit to you,
17 is innocent, and what you're going to find from the
18 evidence is that Mr. McFarland was at Wal-Mart on this
19 occasion, I don't think there's any about it. Another
20 individual had shoplifted items and had passed maybe you
21 will hear some testimony about the point of purchase and
22 when the law enforcement officer arrived realized that the
23 gig was up and ran up to Mr. McFarland and tried to stuff
24 stolen items on him and just ran up and approached him when
25 she realized that she was being pursued by law enforcement.

OPENING STATEMENTS

1 Mr. McFarland had no association with this woman and, of
2 course, when he was approached by law enforcement I believe
3 that the testimony will be that he did run but out of
4 consternation as to what was going down he did run, which I
5 don't think may be unreasonable when you don't understand
6 what's going on and there's chaos going on around you that
7 you may try to flee. What's important is just that if you
8 listen to the evidence in this case, in fact, I expect
9 perhaps to call witnesses on Mr. McFarland's behalf as well
10 although he's not required to present any evidence, he is
11 presumed innocent, is cloaked in innocence, and you are the
12 only people in the world that can remove that cloak of
13 innocence from him if you find that the State has met their
14 burden of proof and proved him guilty beyond a reasonable
15 doubt. Now, Mr. McFarland certainly may participate in the
16 trial and he may not and he's not required to. The State
17 has the burden of proof of presenting all of the evidence
18 and Mr. McFarland doesn't have to do anything including he
19 doesn't have to be here. Listen closely to the evidence
20 because it is critical that you balance out what you hear
21 and the way that it's presented and the way that the
22 investigation was conducted to determine whether the State
23 has met its burden of proof and prove its case beyond a
24 reasonable doubt and I submit to you that upon hearing all
25 of the evidence in this case you're going to hear some

OPENING STATEMENTS

1 issues about the way the investigation was conducted, about
2 the way the police work was done, about the evidence that
3 raised the real possibility that this was totally an
4 erroneous assumption on the part of law enforcement and a
5 conclusion that was hastily made and the incident which law
6 enforcement often has to do, but there is a real
7 possibility and, in fact, Mr. McFarland is innocent and I
8 believe that upon hearing this evidence you're going to
9 make that finding that he is not guilty. Thank you for
10 your attention.

11 THE COURT: Thank you, gentlemen. The State may call
12 the first witness.

13 MR. COOK: State calls Officer Funderburke.

14 The witness, RICKY LEN FUNDERBURKE, was first duly
15 sworn and testified as follows, on:

16 DIRECT EXAMINATION

17 BY MR. COOK:

18 Q Officer Funderburke, will you state your name for the
19 record?

20 A Ricky Len Funderburke, II.

21 Q Who are you employed by?

22 A Lancaster City Police Department.

23 Q How long have you been working for the city?

24 A Roughly almost five years.

25 Q What is your job with the city police department?

TESTIMONY OF RICKY FUNDERBURKE

1 A Patrol officer.

2 Q All right. Were you on patrol on November 22nd of
3 2009?

4 A Yes, I was.

5 Q Did you happen to be at Wal-Mart the night of
6 November 22nd of 2009?

7 A Yes, I was.

8 Q Is Wal-Mart within the city limits of Lancaster?

9 A Yes, it is.

10 Q And it's in your jurisdiction?

11 A Yes, sir.

12 Q Tell me how you got to Wal-Mart. Did you respond in
13 reference to a call or were you just on regular patrol?

14 A I was on regular patrol. I was on a 708 in Wal-Mart,
15 which means that I tend to exit my vehicle, walk around
16 the parking lot and make sure nothing is going on in the
17 parking lot and walk around in the store and make sure
18 nothing is going out of the ordinary inside the store.

19 Q So essentially foot patrol.

20 A Basically.

21 Q Talked about walking around the parking lot, did you
22 walk into the store?

23 A Yes, I did.

24 Q Did you happen to encounter someone you suspected as
25 a shoplifter?

- 1 A Yes, I did.
- 2 Q Where at?
- 3 A They were standing in the foyer facing the door, the
4 female subject facing the back.
- 5 Q Let me stop you for a second. Wal-Mart -- explain to
6 me and the jury when you're looking at Wal-Mart, how many
7 entrances are on the front of it?
- 8 A It's one entrance inside of the door, but once you
9 walk in through the double, sliding doors or whatever you
10 want to call it, you are standing in the foyer. Once you
11 walk past -- through the foyer you are inside Wal-Mart.
- 12 Q And you saw somebody there you suspected of
13 shoplifting?
- 14 A Yes.
- 15 Q Who did you see?
- 16 A Mr. McFarland and that female subject that got away.
17 MR. COOK: Approach, Your Honor?
- 18 Q Take a look at that for me. Do you recognize that
19 face?
- 20 A Yes, I do.
- 21 Q Who do you know that to be?
- 22 A Steve McFarland.
- 23 Q Is that the gentlemen you saw in the Wal-Mart foyer
24 you suspected as shoplifting?
- 25 A Yes, sir.

TESTIMONY OF RICKY FUNDERBURKE

1 MR. COOK: I would ask to have this marked as Exhibit
2 1 and introduced into evidence, Your Honor.

3 MR. GRIER: No objection.

4 THE COURT: In without objection.

5 (The photo was received as State's 1.)

6 Q So you saw Mr. McFarland and the female that you
7 don't know who she is.

8 A Yes.

9 Q What were they doing that looked suspicious to you?

10 A Mr. McFarland was holding his coat out like this, was
11 holding the front of it while the lady -- the female
12 subject standing behind him was stuffing some items at the
13 time in the back of his jacket.

14 Q Were you in uniform?

15 A Yes, I was.

16 Q Did they seem to be together? Did he seem to be
17 trying to get away from her or did they seem to be a team
18 more or less?

19 A They were together.

20 Q How do you know that, were they cordial with each
21 other?

22 A They were cordial with each other by doing the act.
23 But even after that we was questioning trying to find out
24 who the female subject was, he said, "That was my
25 girlfriend she didn't have nothing to do with it."

TESTIMONY OF RICKY FUNDERBURKE

- 1 Q How did they react -- how did Mr. McFarland
2 especially react when he saw you walk in in full uniform?
- 3 A He got nervous. His eyes got wide, it was like he
4 had just seen a ghost.
- 5 Q Do you remember what you saw her stuffing into his --
6 you said up under his jacket and his pants?
- 7 A It was a ham, a roast. Do you mind if I look -- this
8 is the report I took.
- 9 Q It was some type of meat.
- 10 A It was some type of meat, I think it was like a ham
11 or maybe even a roast but it was one of those big -- it
12 was beef rib roast.
- 13 Q Okay. All right. Pretty large?
- 14 A Yeah, large.
- 15 Q Any Wal-Mart bags that you could see? Did it look
16 like they had purchased anything?
- 17 A It was a buggy beside them that she was taking stuff
18 and pushing up inside of him.
- 19 Q Nothing in the buggy was in a bag?
- 20 A Nothing in this buggy was in a bag.
- 21 Q So at that point it raised your suspicion, right?
- 22 A Yes, it did.
- 23 Q Did you try to confront them and talk to them?
- 24 A I did. At the time I walked in it was already a rack
25 of buggies in the middle of the foyer so I was -- once

TESTIMONY OF RICKY FUNDERBURKE

1 you're walking in the entrance it separates the outgoing
2 from the ingoing traffic. As I was coming in I seen them
3 stuffing the stuff up inside of the shirt, I said, "Stop.
4 What are you doing?" And they started walking towards me
5 and I said, "Wait a minute, come here". They started
6 walking and I said, "Stop," one more time. At that time
7 when they got close enough to the door both of them bolted
8 out.

9 Q Door going to the outside?

10 A Door going on the outside.

11 Q Did you run around the buggies or did you return back
12 out to get them?

13 A I ran around the buggy after them. The female went
14 to the left, he followed but as he was running meat was
15 falling off of him. She had some items still in her hand.
16 I was told later that she got into a white vehicle but
17 with my eyes still on McFarland, he ran behind some cars,
18 maybe a truck, I think it was a SUV and we kept going
19 around in a circle --

20 Q You kept telling him to stop the whole time?

21 A Stop the whole time. It was a Cadillac in the middle
22 of the parking lot and we kept going around and around and
23 around and every time I got to the front of the vehicle he
24 was at the trunk, and I said, "Stop," and he shook his
25 head. So he started easing around so when he I tried to

TESTIMONY OF RICKY FUNDERBURKE

1 jump around again he took around the other side. So at
2 that time I pulled out my taser, I said, "Stop or I'm
3 going to tase you." And he looked at me again and shook
4 his head no. I said, "Stop or I'm going to tase you," and
5 he kept running. At that time he tried to take off and
6 when he got past to where -- the vehicle was parked by
7 where the buggy was, where the buggies rack where you put
8 your buggies up, as he ran by there I discharged my taser
9 to tase him and I tased him, only one probe hit him.

10 Q Explain to the jury, it takes --

11 A It takes two connections when the probe hits you for
12 it to immobilize you to stop you from any kind of movement
13 or whatnot. One probe hit him dead center in the back,
14 the other one hit the jacket and when I guess the movement
15 of the jacket, he's doing this, it kind of -- the second
16 connection actually hit him so it made him not drop but
17 collapse a little bit but it soon came out because he
18 wrapped around the truck and it was around the tail pipe
19 and it didn't help me. So we're back running again and
20 finally while -- I called for backup and my lieutenant
21 arrives and he just throws his hands up I guess because he
22 didn't want to get tased again and goes to the ground.

23 Q At that point he was detained.

24 A At that point he was detained.

25 Q Did you search him?

TESTIMONY OF RICKY FUNDERBURKE

1 A Yes, I did.

2 Q Did you find any goods that you thought were
3 shoplifted from Wal-Mart on him?

4 A Yes. He had some sausages, it was pack of meat.

5 Q Shirts or pants?

6 A In his shirt, and he had a roll of nickels or dimes,
7 I think it was dimes, tightly rolled up in some duct tape.

8 Q Okay.

9 A It was pennies wrapped in electrical tape.

10 Q Continue.

11 MR. GRIER: That was something that was stipulated
12 that we wouldn't be getting in to.

13 THE COURT: Okay. Go ahead.

14 Q That's fine. Did Mr. McFarland have any receipts on
15 him from Wal-Mart?

16 A No, he didn't.

17 Q Once again, he didn't have any bags on him then
18 either, did he?

19 A Didn't have no bags or nothing.

20 Q Did you ask him had he purchased it?

21 A No. We didn't ask him did he purchase the items, we
22 asked him why was he shoplifting and he said times was
23 hard.

24 Q What did you do after he was detained?

25 A I handcuffed him and placed him inside of the vehicle

TESTIMONY OF RICKY FUNDERBURKE

1 where I had Sergeant Small watch me place him in the
2 vehicle and stood by the vehicle where I went back and
3 collected some of the items and contacted the CSM to come
4 help me and give me a receipt for the items that was
5 taken.

6 Q Let's talk about that.

7 MR. COOK: May I approach the witness, Your Honor?

8 Q Take a look, do you recognize that?

9 A Yes, I do.

10 Q What is that?

11 A It was a receipt from Wal-Mart with the items that
12 was taken.

13 Q Is there a date on there?

14 A Yes, November 22, 2009.

15 Q What is the time on it?

16 A 11:29.

17 Q Is that the time that you detained Mr. McFarland?

18 A Yes, sir.

19 Q So you got all of the items back, gave it to the CSM,
20 got the receipt. What did you do after that? Did you
21 clear --

22 A I cleared, took him to the station, booked and
23 processed him. The next process is to take a picture of
24 him, fingerprint him and put him in the system and it
25 prints you out a booking report. So when you transport

TESTIMONY OF RICKY FUNDERBURKE

1 him to the county the county already has a list of his
2 charges and his weight and size, date of birth, social and
3 all that.

4 Q Did we ever talk -- Wal-Mart has a loss prevention
5 officer, you're aware of that?

6 A Yes.

7 Q Did you ever talk to anybody in there about a video?

8 A I talked to someone that night, it was one of the
9 managers who stated at that time that --

10 MR. GRIER: Your Honor, he is getting ready to go into
11 hearsay there by saying that he stated, that the manager
12 stated.

13 THE COURT: Corporation, agent of the corporation, I
14 believe you've got an exception but I'll leave that up to
15 you if you want to pursue it.

16 Q Were you able to get a video from loss prevention
17 that night?

18 A No, not that night.

19 Q Why not?

20 A Because loss prevention workers weren't -- don't work
21 third shift.

22 Q Okay. Is there a timeline that you know of that they
23 keep these videos that you've got to go back and get it
24 before it gets taped over?

25 A Not that I know of. When I went back to get a copy

TESTIMONY OF RICKY FUNDERBURKE

1 of the tape they said that they had already done something
2 with it?

3 Q So in other words, we don't have a video?

4 A We don't have a video.

5 Q There probably was one but it was taped over,
6 correct?

7 A Correct.

8 MR. COOK: I don't have any further questions at this
9 time, Your Honor.

10 THE COURT: Your witness.

11 CROSS EXAMINATION

12 BY MR. GRIER:

13 Q Officer Funderburke, what was Mr. Funderburke (sic)
14 wearing -- Mr. McFarland wearing on this occasion?

15 A He was wearing a big green coat and some jeans.

16 Q Can you describe it more than just a coat?

17 A It was a coat with a bunch of pockets.

18 Q Like a trench coat or a --

19 A It wasn't a trench coat, it was a big enough coat to
20 wear it at the time of the day he was wearing that, it was
21 too hot for that coat so to speak.

22 Q This is in November?

23 A Right. It wasn't that cold that night.

24 Q It was around Thanksgiving?

25 A Right.

TESTIMONY OF RICKY FUNDERBURKE

1 Q Around the 22nd of November?

2 A Right.

3 Q Generally a cold time of the year, isn't it?

4 A Generally.

5 Q Okay. Well, the location where -- who did your

6 attention first go to when -- what drew your attention to

7 the whole situation?

8 A Both of them standing there. When I walked in both

9 of them -- she's standing behind him, he's holding himself

10 and both of them are looking at me like they had just seen

11 a ghost.

12 Q Okay. Well, did you do a police report about this?

13 A Yeah.

14 Q All right. So in that you say when you walked in you

15 observed a white female placing unknown items underneath

16 the jacket of a white male subject.

17 A Correct.

18 Q Okay. Did you see any contact before you saw that?

19 Did you see any contact between this white female and this

20 white male before you saw that?

21 A No. I just scene them push stuff up under his .

22 jacket.

23 Q So nobody had been tracking that in loss prevention

24 in Wal-Mart or anything, nothing suspicious had been

25 reported to you? You weren't pursuing any kind of

TESTIMONY OF RICKY FUNDERBURKE

1 investigation at that time?

2 A At that time, no, I was just solely on foot patrol.

3 Q Did you say a buggy was involved in this?

4 A It was a buggy -- if I'm standing looking out the
5 door it was on the right side.

6 Q Okay. All right. Now, this location is past the
7 cash registers and this is actually past the point of
8 purchase?

9 A Right.

10 Q The way you're describing it it sounds like it was
11 being done kind of openly where anybody, you know, could
12 have seen it; is that right?

13 A Yes. But usually -- working third shift usually the
14 only two registers that's open is register 18 and that's
15 down at the GM side they was on the grocery side.

16 Q Were there other customers coming in, going out,
17 other folks around?

18 A The time I was going in I didn't see nobody going in
19 with me nor coming out.

20 Q All right. So how would they have -- how would the
21 buggy have gotten into that spot without passing the cash
22 register?

23 A One of them had to push it.

24 Q Well, who appeared to be the one in control of the
25 buggy?

TESTIMONY OF RICKY FUNDERBURKE

1 A The female subject pushing stuff up inside him. It
2 was a buggy next to her and him both, but at the time I
3 seen them she was stuffing meat up in him.

4 Q Okay. Well, were there other law enforcement
5 officers on the premises or in the area or any security
6 people? What kind of help did you have immediately?

7 A The immediate help I had was my lieutenant and my
8 sergeant responded to me when I called.

9 Q Were they in the parking lot or where were they at?

10 A They weren't in the parking lot at that time but my
11 lieutenant -- as we got on the foot chase my lieutenant,
12 he was pulling down in the parking lot.

13 Q Well, you say that the female who got into a white
14 car got away, you found that out later?

15 A I found that out later.

16 Q If you found out what kind of car and how she got
17 away, how did she get away without being stopped if you
18 found out?

19 A Because at the time of me running my attention was on
20 him because as he was running stuff was dropping. Okay.
21 Once he was captured asking the people who saw me running
22 around the cars after him said that the female that was
23 with him got in a white truck and took off and was at the
24 light and they didn't know which way she went, right or
25 left.

TESTIMONY OF RICKY FUNDERBURKE

1 Q Did anybody attempt to find her, or was there any
2 attempt made?

3 A There was an attempt made while the officers that
4 were responding to me, was an attempt made after we caught
5 him trying to find because it was some officers still
6 trying to get to where I was even though McFarland had
7 been captured and was looking for the vehicle that we gave
8 out.

9 Q Well, the female was taking the items out of the
10 buggy and giving them to Mr. McFarland then, right, is
11 what you saw?

12 A What I seen was both of them -- she's stuffing stuff
13 in him, in his back.

14 Q But she's taking the action, he is standing there
15 past the point of purchase and she is putting stuff on
16 him.

17 A Both are standing past the point of purchase, which
18 him holding his coat which had two roasts in front of him.

19 Q Openly doing that?

20 A Right.

21 Q And that's right in front of the video cameras and
22 that place has got video everywhere, doesn't it?

23 A Right. Both of them taking action is him holding
24 stuff while she's placing it on him.

25 Q So he was doing it openly in front of video cameras

TESTIMONY OF RICKY FUNDERBURKE

1 and really where anybody that happened to be around there
2 could have seen him doing it.

3 A Yes.

4 Q You happened to be there and you happened to see it.

5 A Right.

6 Q And it may have been on videotape but you never saw
7 it whether it was on video or not.

8 A Correct.

9 Q So you don't know whether Mr. McFarland knew whether
10 those items had been paid for or not.

11 A Say that one more time.

12 Q You don't know whether Mr. McFarland knew whether
13 these items had been paid for or not, do you?

14 A No.

15 Q Why didn't you immediately -- that was a very
16 entertaining story that you told there, in fact, I would
17 love to have seen the video. Why didn't you procure the
18 video immediately?

19 A Because when I did I spoke to one of the managers he
20 said he wouldn't be able to get the video until the next
21 day until I speak to loss prevention. At that time I was
22 off that next day, but I also told the officers that
23 responded that comes in that morning when I got off if one
24 of them would go by and pick up the video. Now, at that
25 time I don't know if -- I guess a video wasn't picked up,

TESTIMONY OF RICKY FUNDERBURKE

1 but when I came back to work I contacted the loss
2 prevention man, I contacted him and got up with him and he
3 checked and looked over the tapes and they had been
4 already recorded over.

5 Q Are you speaking of Mr. Capachee (phonetically)
6 Allen?

7 A That's him, Mr. Allen.

8 Q But that was just recently, wasn't it? That was
9 within the last month where you asked Mr. Allen about
10 whether or not the video was available.

11 A Right. Because I got a phone call from Mr. Cook that
12 told me to go back and just make sure.

13 Q Okay. You spoke with other people out in the parking
14 lot that saw the female leave you said.

15 A Yes.

16 Q Who were those people? Did you get any witnesses or
17 any other --

18 A They was coworkers. One was I think pushing buggies
19 at the time, they were just people in the parking lot. Of
20 course, when people see police running after somebody
21 everybody want to come out in the parking lot, it was just
22 different people I was just asking did they see anything.

23 MR. GRIER: Right. All right. No further questions,
24 thank you.

25 REDIRECT EXAMINATION

TESTIMONY OF RICKY FUNDERBURKE

1 BY MR. COOK:

2 Q Mr. Grier said you didn't know of anything that

3 Mr. McFarland had that had paid for, right?

4 A Right.

5 Q He didn't give you a chance to ask him, did he?

6 A No, he did not. When I tried to stop him he took off
7 running.

8 MR. COOK: All right. I don't have anything further.

9 THE COURT: Anything else?

10 MR. GRIER: Nothing, Your Honor.

11 THE COURT: You may step down. Thank you.

12 The witness, DIANE SMITH, was first duly sworn and

13 Testified as follows, on:

14 DIRECT EXAMINATION

15 BY MR. COOK:

16 Q Ms. Smith, will you state your full name for the
17 record?

18 A Diane Bragdon Smith.

19 Q Who are you employed by?

20 A Wal-Mart.

21 Q How long have you been employed at Wal-Mart?

22 A Twenty-two years.

23 Q What is your position at Wal-Mart?

24 A CSM, which is a front-end manager, and I work nights.

25 Q Okay. So you were the front-end manager on

TESTIMONY OF DIANE SMITH

1 November 22nd of 2009?

2 A Yes, sir.

3 Q Do you recall the events of November 22nd of 2009?

4 A Yes, sir.

5 Q Third shift, what time do you usually report to work?

6 A 10:00.

7 Q Tell us what happened when you got to work, what do
8 you remember about that night?

9 A I come to work and it was shortly after I got to work
10 there, probably ten or 15 after ten and the door greeter
11 starts waiving her hands and I see commotion going down at
12 the grocery store. So I walk down there to see what is
13 going on and she said there's an officer running outside,
14 so I went out to the door and I seen Officer Funderburke
15 chasing a gentleman around the vehicles.

16 Q All right. Did you watch the whole thing, you
17 watched him be detained?

18 A Yes.

19 Q And I guess you figured out what was going on?

20 A Yes.

21 Q What did you see -- did you see anything in the
22 parking lot that looked funny?

23 A Yeah. I went ahead and got a buggy and started
24 picking up the meat and cheese and sausages and stuff that
25 had left a trail.

TESTIMONY OF DIANE SMITH

1 Q Okay. Now, tell us what you do when somebody
2 shoplifts and they're apprehended, what do you do with the
3 merchandise that was stolen?

4 A Well, first thing we do is we take it to the
5 registers and we ring it up and put it on a receipt for
6 law enforcement if they're already there, and depending on
7 what it is, like for instance this right here we end up
8 having to take it and throw it away.

9 Q Let's talk about this. Take a look at that. What is
10 that?

11 A It's a receipt for where I rang up the merchandise
12 that we recovered.

13 Q What is the date and time on that?

14 A 11/22/09, and the time is 23:29.

15 Q That's not -- that is not a valid receipt, is it?

16 A No, it's not a valid receipt. What it is is I put it
17 in a mode where I can ring everything up that gives me all
18 of the details that a regular receipt would give me and
19 then it doesn't stay in our system.

20 Q So everything that we allege Mr. McFarland stole is
21 on that receipt, correct?

22 A Yes, sir.

23 Q I want you to read that receipt and read all of the
24 items that are on there.

25 A Okay. Beef rib roast -- do you want the price?

TESTIMONY OF DIANE SMITH

1 Q No, you don't have to do the price.

2 A Two beef rib roasts, two packs of pecans, mild
3 cheddar cheese, bone-in strips which is a steak, three
4 pounds of bacon, two of those, and two one pound rolled
5 sausage.

6 Q And all of that was between that foyer where the
7 buggies are and where he was apprehended in the parking
8 lot and on him, correct?

9 A Yes, sir.

10 Q All right. And after you get those receipts -- after
11 you scan it what do you do with it?

12 A We have to throw it away because it's --

13 Q That's why we've got a copy?

14 A Yeah. That's why y'all got a copy of it because we
15 can't sell it, we can't hold it for evidence.

16 Q All right.

17 MR. COOK: Your Honor, at this time I would like to
18 move this be State's Exhibit 2.

19 MR. GRIER: I have got no objection.

20 THE COURT: In without objection.

21 (The receipt was received as State's 2.)

22 Q What was the total amount?

23 A \$220.71, that's without tax.

24 Q How many items in total was it?

25 A Eleven.

TESTIMONY OF DIANE SMITH

1 MR. COOK: I don't have anymore questions.

2 CROSS EXAMINATION

3 BY MR. GRIER:

4 Q Beg your pardon, what was your name again?

5 A Diane.

6 Q Did you review any videotape of this?

7 A No, sir.

8 Q Do you have any responsibilities for that or in your
9 job?

10 A I don't have the --

11 Q What is your job?

12 A My job is I run the front-end.

13 Q What does that mean?

14 A I take care of customers on the front-end, take care
15 of cashiers, any customer service problems. If there's
16 any shoplifters I notify management or law enforcement,
17 whoever is involved in it and -- but I don't have access
18 to go look at videotapes.

19 Q Okay. Well, is there -- are there any places in
20 Wal-Mart that are not surveilled in the retail area?

21 A No.

22 Q There is nothing that is not under surveillance or
23 potentially under surveillance.

24 A No, sir.

25 Q Is there literally an eyeball on the people in the

1 store at all times? Is there somebody watching on the
2 surveillance at all times? Is there a person designated
3 with that job to observe what's going on?

4 A To observe what's going on in realtime?

5 Q Yeah, uh-huh.

6 A Not that I know of.

7 Q But certainly as part of your job it sounds like you
8 report suspicious activity?

9 A Yes, sir.

10 Q And you run the front-end did you say?

11 A Yes, sir.

12 Q I assume you were in the courtroom during the
13 officer's testimony there?

14 A Yes, sir.

15 Q So this occurred in the front-end area?

16 A Uh-huh.

17 Q That is a relatively open area where it would be
18 visible to virtually anybody looking in that direction
19 could have seen that activity; is that correct?

20 A Yeah.

21 Q So it would be very brazen to do that?

22 A You would be surprised how often it happens.

23 Q It would be very, very brazen to do that, right?

24 A Yes, sir.

25 Q And, of course, would you believe it to be common

TESTIMONY OF DIANE SMITH

1 knowledge that Wal-Mart is under surveillance, if you're
2 in Wal-Mart you are under surveillance, that's pretty much
3 common knowledge, right?

4 A Yes, sir.

5 Q You didn't see what happened with your own eyeballs.

6 A No, sir.

7 Q You picked up the items and everything?

8 A Yes, sir.

9 Q Was that area in the parking lot, is that under
10 surveillance as well, cameras?

11 A Yes, sir.

12 Q Okay. You really didn't see anything, you found out
13 about it after the fact. Well, you saw them run around
14 the car in the parking lot, that's kind of the extent
15 of --

16 A I came in on the end of it.

17 Q Did you see a woman that was unidentified at any
18 point or anything?

19 A No, sir.

20 MR. GRIER: Thank you.

21 MR. COOK: I don't have any further questions.

22 THE COURT: You may step down.

23 MR. COOK: State rests, Your Honor.

24 THE COURT: Defense?

25 MR. GRIER: Judge, I do intend -- I've got Mr. Allen

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1 under subpoena and told him I would give him notice and I
2 would like to have the opportunity to call him in the
3 morning. It's 5:00 and I think the witnesses that were
4 needed to get called today for personal reasons have been
5 called, I would like to have the opportunity to call him in
6 the morning.

7 THE COURT: Mr. Allen is with Wal-Mart?

8 MR. GRIER: Mr. Allen is the gentleman that is over
9 the surveillance.

10 THE COURT: All right. We'll be in recess until
11 10:00. Remember now, don't discuss this case with anyone.
12 Should they try to approach you and discuss it with you
13 don't discuss it, notify law enforcement and we will see
14 you at 10:00 in the morning.

15 (The jury left the courtroom and court recessed for
16 The day and resumed at 10:00, on July 29, 2010.)

17 THE COURT: Mr. McFarland?

18 THE DEFENDANT: Yes, sir.

19 THE COURT: Welcome to the Lancaster County Judicial
20 Center, we missed you yesterday.

21 THE DEFENDANT: Yes, sir.

22 THE COURT: I'll give you a chance in a minute.

23 THE DEFENDANT: Sorry.

24 THE COURT: You have a right not to attend your
25 hearing. Now, as far as failure to appear I don't get into

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1 that, that's up to the solicitor to take care of that
2 charge. You have a right not to testify under our
3 constitution and you have a right not to attend your
4 hearing. Now, most of the time when that comes into play
5 and somebody comes in and says, "Well, I just don't want to
6 be in there and they sit out in the lobby," but you do not
7 snatch the Court around by calling your counsel and telling
8 them that you're going to be here and we have to delay
9 court for two different periods of time yesterday. There's
10 no excuse for that and I can't imagine any explanation that
11 you can give me that will justify that with the
12 availability of telephones and cell phones that we have
13 today. Now, I'm finding you in contempt, but before I
14 sentence you I'm going to give you a chance to explain
15 yourself.

16 THE DEFENDANT: Yes, sir. When I come in yesterday I
17 come in, they had a trial, I couldn't go back out. It was
18 12:00 before I got to talk to Mr. Grier and find out that I
19 was being tried. All right. The whole time I have been
20 asking for the video, the video, the video. Mr. Grier
21 tried to get the video that would show me but I never did
22 see that. I had one witness, the one that actually did the
23 crime and they -- Lancaster County never tried to prosecute
24 them. I brought them to court myself today and that's what
25 took -- sir, that was the only thing that I had, I have no

TESTIMONY OF DIANE SMITH

1 driver's license.

2 THE COURT: Sir, you called in and said you were on
3 the way from Great Falls.

4 THE DEFENDANT: I was on the way. I was waiting on my
5 witness, Your Honor, I was waiting on the witness to get
6 here and my witness was going to bring me in.

7 THE COURT: You could have called.

8 THE DEFENDANT: I did call, Your Honor.

9 THE COURT: You inconvenienced the Court and all of
10 this court staff. 90 days. All right, are y'all ready to
11 go forward?

12 MR. COOK: The State is ready, Your Honor.

13 MR. GRIER: Your Honor, I need to make a motion for a
14 directed verdict and put a couple of things on the record
15 if we could before they come in, I think it would be a
16 matter of convenience. Judge, I understand the State has
17 rested and I would have made the motion yesterday but the
18 jury never went out and I didn't -- it made more sense just
19 to wait until this point to make a motion. Judge, I would
20 submit to the Court that the State has not presented enough
21 evidence sufficient to establish a prima facia case and
22 that the Court should direct a verdict in favor of the
23 defense. For the record, I'm just making my motion for a
24 directed verdict at this point.

25 THE COURT: Anything from the State?

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1 MR. COOK: Your Honor, I think the facts deemed in the
2 most favorable light to us I think we have put up enough
3 evidence to go to the jury.

4 THE COURT: Well, from what I heard I agree and I
5 would have to deny that motion.

6 MR. GRIER: Judge, I think we also wanted to put a
7 stipulation that would have been discussed in chambers and
8 just had not formerly been put on the record about this
9 being a third or subsequent offense to avoid the necessity
10 of the State having to call the clerk and establish the
11 defendant's record. The defense would stipulate that this
12 does constitute a third or subsequent offense.

13 MR. COOK: The State would agree with that, Your
14 Honor.

15 THE COURT: Okay, so be it.

16 MR. GRIER: Judge, one other matter, the defense is
17 going to present evidence, however we are -- I believe that
18 it would be an opportune time for the Court perhaps to -- I
19 think the practice would be to have a conversation with the
20 defendant about his right to testify or not testify. Would
21 that be appropriate at this time?

22 THE COURT: I will be glad to. Mr. McFarland, under
23 the 5th Amendment of the United States Constitution in a
24 similar counterpart provision of the state constitution,
25 you have a right to remain silent. In other words, no

TESTIMONY OF DIANE SMITH

1 defendant can be compelled to be a witness against himself
2 and therefore you can elect not to testify, it can't be
3 used against you in anyway. I will tell the jury that it
4 cannot be mitigated against you, cannot be held against
5 you, can't even be discussed in the jury room. Now, you
6 can testify, that is your right, or you can invoke your 5th
7 Amendment right and not testify. It is solely your
8 decision and it has to be decided by you, it's a personal
9 decision under our constitutional provisions. If you take
10 the stand and testify you subject yourself to cross
11 examination and impeachment. And I understand from
12 counsels stipulation there, obviously you have a prior
13 record and counsel can discuss the impeachment situation
14 about that in case you do decide to take the stand.
15 Whatever you do it's got to be freely, voluntarily and
16 intelligently decided on your part. As I say, if you take
17 the stand you will subject yourself to cross examination,
18 possible impeachment all of which, though, however is
19 subject to rules and procedure and evidence. Have you had
20 an occasion to discuss this issue with counsel?

21 THE DEFENDANT: Briefly.

22 THE COURT: Do you understand what I just went over?

23 THE DEFENDANT: Not really.

24 THE COURT: I'm going to give you the opportunity to
25 talk with counsel to respond to your questions over what I

TESTIMONY OF DIANE SMITH

1 just went over and anything he tells you and then we'll
2 discuss this after you get through.

3 (Break in proceedings.)

4 MR. GRIER: Judge, for the record, prior to -- well,
5 this morning before we got started I did have a
6 conversation with my client, I explained to him that if he
7 were to testify his record, the specifics of it as I
8 understood from your in-chambers ruling yesterday, the
9 specific convictions would not be inadmissible as to
10 shoplifting and the property offenses. However impeaching
11 him about the prior convictions as to whether they were
12 misdemeanors or felonies, that would be what he would be
13 subjecting himself to in the terms of his prior record. I
14 just want to put it on the record to say that it would be
15 preserved.

16 THE COURT: I would leave it open that you understand
17 everything that he has gone over. Well, you don't have to,
18 it has to be solely your decision, nobody can make you
19 testify. All right.

20 MR. GRIER: Thank you, Judge.

21 (The jury returned to the courtroom.)

22 THE COURT: Good morning.

23 MR. GRIER: Your Honor, defense is ready. I will call
24 Cynthia Gaston.

25 The witness, CYNTHIA GASTON, was first duly sworn and

TESTIMONY OF CYNTHIA GASTON

1 testified as follows, on:

2 DIRECT EXAMINATION

3 BY MR. GRIER:

4 Q Ms. Gaston, I'm Mark Grier, I'm Steve McFarland's
5 attorney. Can you tell me anything about a trip to
6 Wal-Mart on November 22nd of 2009?

7 A Yes, I can.

8 Q Tell me about prior to that trip to Wal-Mart, how did
9 that trip to Wal-Mart come about?

10 A I was kind of a little bit short on my bills and I
11 needed to come up with the money for my power bill and I
12 had gotten in touch with my brother who lives in Florida
13 and he was supposed to be Western Unioning me some money.
14 I was unaware -- because I haven't had this happen too
15 many times before, I never have had to go to Western Union
16 so I didn't know what time it closed and all, and we went
17 up there to get the money from Western Union, it was
18 already closed.

19 Q Who is we?

20 A Me and Mr. McFarland.

21 Q Where was Western Union at?

22 A Wal-Mart.

23 Q What time was this?

24 A I'm not even sure.

25 Q Would it have been dark?

- 1 A Yes.
- 2 Q What is the weather like?
- 3 A It was raining outside, it was cold.
- 4 Q Okay. When you got to Wal-Mart, who went into
- 5 Wal-Mart?
- 6 A I went in by myself.
- 7 Q And what was the purpose in going there?
- 8 A To get the Western Union.
- 9 Q All right. So what happened when you went into
- 10 Wal-Mart?
- 11 A Well, I went in there, I went to the customer
- 12 service, they said the Western Union was closed, it closes
- 13 at 9:00, and I knew the next day my power was going to be
- 14 turned off and I had to have to come up with the money for
- 15 it so I attempted to shoplift.
- 16 Q What did you attempt to shoplift?
- 17 A Meat, steaks, just whatever I could to come up with
- 18 the money for my power.
- 19 Q How did you go about that?
- 20 A Stuffed it in my pocketbook and my jacket and my
- 21 shirt.
- 22 Q What kind of pocketbook did you have?
- 23 A A good sized one.
- 24 Q Excuse me? Please speak loudly.
- 25 A It was a pretty good sized one.

TESTIMONY OF CYNTHIA GASTON

1 Q Well, while you were doing that, where was Mr.

2 McFarland at?

3 A He was in the car but it was taking so long so I

4 guess he come in to check on me and see why it was taking

5 so long. He walked up to the front to the customer

6 service and he didn't see me up there so he went into the

7 bathroom, I saw him coming out of the bathroom as I was

8 coming up the aisle to exit the building I got in behind

9 him and there was an officer standing out there

10 un-uniformed, had just a plain jacket on and a pair of

11 pants with a stripe down the side. As I was trying -- as

12 I come up from behind Steve some of the things started

13 coming out of my shirt and I tried to put it in his

14 jacket. The officer started hollering to stop but Steve

15 knew that I was trying to -- he felt me putting something

16 up underneath his jacket from behind him, he didn't know

17 what it was, he was trying to get away from me.

18 Q Well, were you successful in putting stuff on him?

19 A No.

20 Q Did --

21 A He ran away from me too fast.

22 Q Well --

23 A That's when I took off running too.

24 Q At the time you started trying to put stuff on him,

25 was the police officer approaching?

TESTIMONY OF CYNTHIA GASTON

1 A Actually he wasn't approaching, he was still standing
2 there.

3 Q So why did you try to put the meat on Steve?

4 A Because it was falling out of me, it was falling out
5 and the officer had already -- he hollered but he wasn't
6 coming after us.

7 Q Okay. Did Steve know that this was going to happen?

8 A No.

9 Q There was no plan for that to happen?

10 A No. I didn't even plan on it happening.

11 Q Pardon me?

12 A I didn't even plan on it happening.

13 Q Well, once the officer started coming towards you why
14 didn't y'all stop?

15 A I didn't stop because I had all of that on me and I
16 was trying to get rid of it before the officer got to me.

17 Q Did Steve -- did you ever put anything on Steve?

18 A No.

19 Q How did he react when you're trying to put stuff on
20 him?

21 A He ran away from me.

22 Q And so when he ran, was he running from the police?

23 A No, he was running from me.

24 Q Initially?

25 A Yes.

TESTIMONY OF CYNTHIA GASTON

1 Q Where were you at when you first saw the police
2 officer?

3 A When I first saw him I was past the first door going
4 out and he was kind of like in between.

5 Q Past the first door. Were you inside?

6 A I was still inside of the building, yes.

7 Q So --

8 A It was the first door coming out and then there was
9 the little -- I don't know, the little place where you get
10 the buggies and --

11 Q All right. So how much time lapsed between the time
12 when you tried to put the meat on Steve and the time you
13 saw the officer?

14 A About right instantly, right then.

15 Q Okay. Well, you ran, and who did the officer pursue?

16 A Steve.

17 Q What happened to the stuff that you were carrying?

18 A I threw it all in the parking lot.

19 Q You were throwing stuff down when you are running?

20 A Yes, sir.

21 Q Did anybody come after you?

22 A No, sir.

23 Q Did you see any other police officers anywhere?

24 A There was another police officer, yeah. As I was
25 leaving the parking lot the one officer that hollered for

TESTIMONY OF CYNTHIA GASTON

1 us to stop, he had Steve, Steve was on his hands and knees
2 and had his arms up. As you're coming out of Wal-Mart you
3 can't going through the top entrance, you have to come
4 down and come around and go out so that gave me plenty of
5 time to see what was going on and there was no -- Steve
6 was already down on his hands on his knees and had his
7 hands up and the one officer was behind him and another
8 officer came up behind him and kicked him in the back.

9 Q As a result of the contact with the police officers
10 was anybody injured?

11 A Yeah, Steve's hand was broke.

12 Q How much physical contact was there between the
13 police officers and Steve?

14 A The first officer hit him with a taser, there was
15 really none there and Steve didn't resist anything. He
16 went down on his knees and he threw his hands up and the
17 second officer come up from behind and kicked the fire out
18 of him, kicked him hard right in the lower part of his
19 back and he hit the ground so hard that it crushed his
20 bones in his hand. Steve is a pretty good man, too,
21 that's big hands.

22 Q Why didn't you turn yourself in right then?

23 A Because I knew I didn't put anything on him, I knew
24 he didn't have anything on him, what were they going to
25 charge him with? He wasn't the one that done it.

TESTIMONY OF CYNTHIA GASTON

1 Q Okay. Well, where was Steve at yesterday, do you
2 know?

3 A He was looking for me, he was trying to find me.

4 Q Do you understand there could be consequences for
5 your testimony today to you, have we had that
6 conversation?

7 A Yes, sir.

8 Q Why are you doing it knowing that?

9 A Excuse me?

10 Q Why are you testifying knowing there could be
11 consequences?

12 A Because I did it, I was wrong for doing it. I never
13 did anything like that before, I have kids and grandkids
14 at home, I couldn't let my power get cutoff but it still
15 wasn't right. I was the one that did it, I'm the one that
16 should be charged with shoplifting.

17 Q All right.

18 MR. GRIER: Answer any questions that the solicitor
19 might have.

20 CROSS EXAMINATION

21 BY MR. COOK:

22 Q All right, Ms. Gaston. First things first, you're up
23 here today admitting you're a criminal, right?

24 A I'm admitting I did something wrong.

25 Q A crime.

TESTIMONY OF CYNTHIA GASTON

- 1 A Yes.
- 2 Q Which makes you a criminal, correct?
- 3 A Yes.
- 4 Q All right. Let's talk about -- and I'm sorry you
- 5 didn't have the money for your power bill, doesn't give
- 6 you a right to shoplift though, does it?
- 7 A No.
- 8 Q All right. Who all went to Wal-Mart with you that
- 9 day?
- 10 A Just me and Steve.
- 11 Q You and Steve. You get out, you go to Western Union,
- 12 figure out you're not going to be able to get any money,
- 13 right?
- 14 A (Nods head yes.)
- 15 Q Then where did you go? Did you walk back out the
- 16 front door, you went around the store?
- 17 A Yes.
- 18 Q What all did you shoplift?
- 19 A Steaks.
- 20 Q Steaks. That's it?
- 21 A Pecans, I think I had some pecans.
- 22 Q Steak and pecans. That's it?
- 23 A Uh-huh.
- 24 Q All right.
- 25 A I could be mistaken, it's been some months back.

TESTIMONY OF CYNTHIA GASTON

1 Q That's fine. Think hard about it, what did you take?

2 A I took things that would come up to the amount of
3 money that I needed.

4 Q Who do you sell steaks to?

5 A Anybody who will buy them.

6 Q All right. So you took steaks and pecans. How many
7 steaks do you think you took?

8 A Several.

9 Q Several.

10 A Yes. I had a large bag, I had my shirt on, my shirt
11 was tucked in, I had a jacket on.

12 Q Two or three or six or seven?

13 A Oh no, ten or 12.

14 Q Okay. All steaks. Do you remember what kind of
15 steaks they were?

16 A Ribeyes, T-bones. Like I said, I was trying to come
17 up with the money for my power bill.

18 Q All right. So after you steal all of this stuff you
19 walked past all of the cash registers, right, with all of
20 this stuff in your shirt, jacket and pocketbook?

21 A Uh-huh.

22 Q You walked back towards customer service?

23 A No, sir, I walked straight out.

24 Q All right. Well, you said that Mr. McFarland came in
25 and walked to customer service, then walked to the

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1 bathroom and then you followed him out. Now, how in the
2 world did you see him go to customer service and go to the
3 bathroom if you walked around --

4 A I didn't see him go to customer service and to the
5 bathroom, but I did see him out of the bathroom in which
6 that's where he knew I was going to be was at customer
7 service, so common sense will tell you that he went to
8 check on me.

9 Q Okay.

10 A He went to customer service to see if I was there and
11 when I wasn't there I'm assuming he went to the restroom
12 because that's where he came out of.

13 Q Did you have a buggy?

14 A No, sir.

15 Q And you said you saw --

16 A I did as I was going through the store but I didn't
17 on my way out.

18 Q What did you do with it?

19 A I dropped it.

20 Q Where at?

21 A In one of the aisles.

22 Q Did you go anywhere but the meat section in Wal-Mart?

23 A No.

24 Q Is the meat section close to that door?

25 A Kind of somewhat. Well, you come in and then you've

TESTIMONY OF CYNTHIA GASTON

1 got the deli part and then you've got the aisles coming
2 down it and the meat section is on the back side.

3 Q Did you just go mingle around the deli and come out?
4 Did you leave the meat section and come around the deli
5 and drop the cart there and walk out?

6 A No, sir, you have it backwards. I went through the
7 deli, went to the meat department, come up through the
8 aisle and then came out the main aisle that's right in
9 front of the entrance door where you come in at, that's
10 where I went out.

11 Q Where did Steve get in front of you at?

12 A Steve didn't get in front of me, I got behind Steve.
13 Steve was coming out of the bathroom and I saw him coming
14 out, he was coming out this way and cut this way and I
15 came up behind him that way.

16 Q So he was just walking out and you said, "There's
17 Steve," and you just fell in behind him.

18 A He never even saw me.

19 Q He never knew you were there.

20 A Never even saw me.

21 Q You said you saw an officer not in uniform?

22 A Yes, sir.

23 Q How did you know he was an officer?

24 A I didn't know he was an officer, later we knew he was
25 an officer. We had no idea, there was no way of knowing

TESTIMONY OF CYNTHIA GASTON

1 he was an officer.

2 Q Black guy or white guy?

3 A He had no badges, no emblems or nothing. It was a
4 black guy.

5 Q Black pants, stripe down his legs?

6 A Dark color with a stripe down his leg.

7 Q Typical for law enforcement?

8 A Not really, I didn't think so. Because law
9 enforcement would be a little bit more well maintained and
10 this looked like it was -- like a uniform, not like a
11 officer's uniform.

12 Q That's fine. Was there anything between you and
13 Mr. McFarland and the officer, do you remember that? Was
14 there any buggies in between you?

15 A No.

16 Q No buggies?

17 A No.

18 Q Now, what did he say to you? Why did he even say
19 anything to you?

20 A The officer?

21 Q The officer.

22 A He hollered, "Stop."

23 Q Why would he do that?

24 A Because he saw me putting something into Mr.
25 McFarland's jacket, up under his jacket.

TESTIMONY OF CYNTHIA GASTON

- 1 Q Against his will? All right. I know it's kind of a
2 sensitive topic for a woman, but how tall are you?
- 3 A About five-three.
- 4 Q How much do you weigh?
- 5 A About 130 pounds.
- 6 Q How big is Mr. McFarland do you think, what would you
7 guess him at?
- 8 A I have no idea.
- 9 Q Bigger than you?
- 10 A Yeah.
- 11 Q Big enough that if somebody comes up behind him and
12 is putting something up his back and he has no idea who it
13 is that he can get away from you, right?
- 14 A Honestly what I was putting up his back was so big
15 that the officer could see it so Steve was in front of me
16 between the officer -- it was the officer, Steve and me
17 and the officer really couldn't see what I had and all
18 he --
- 19 Q That's why he told you to stop.
- 20 A He saw me reaching up Steve's jacket and that's all
21 he saw.
- 22 Q Right. Was Steve stopped or was he walking?
- 23 A And he was walking.
- 24 Q And you were walking just like this, just putting
25 stuff up his shirt?

TESTIMONY OF CYNTHIA GASTON

1 A As far as he knew it was my hand up his back.

2 Q Rubbing his back?

3 A Touching him, yeah, letting him know that I was
4 behind him.

5 Q He couldn't tell the difference between a T-bone and
6 your hand?

7 A Well, I don't believe it was a T-bone, okay. Because
8 T-bones are about this big in a pack, they're pretty
9 large.

10 Q Did you put anything on Steve? Did you successfully
11 put any food in his clothes?

12 A No, I didn't.

13 Q Do you remember taking two rib roasts, pecans,
14 cheese, bacon --

15 A Rib roasts are pretty big, yes.

16 Q You didn't put any roast on Steve?

17 A No, I didn't.

18 Q All right. What did he do when he got in the parking
19 lot? If you were putting something up him and he didn't
20 know anything about it, why did he run?

21 A Because he felt me from behind, okay, and he --
22 apparently he saw me as he was coming out and -- he was
23 coming from the bathroom and I was coming this way and he
24 saw that I was bulgy.

25 Q He knew you were shoplifting?

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1 A No, he didn't, not to begin with. But when he saw me
2 and I was all bulged out --

3 Q He knew.

4 A -- he knew something was up, yeah.

5 Q But he didn't know what you were going to do, but he
6 knew at that minute once he saw you what you were doing,
7 correct?

8 A Yeah.

9 Q Did they chase him around the parking lot?

10 A Yeah.

11 Q And you saw him get tased.

12 A Uh-huh.

13 Q And you ran to your vehicle, got in your car and
14 left.

15 A Uh-huh.

16 Q Why didn't you come back and say, "Wait a minute" --
17 you're standing here under oath to say, "Yeah, I
18 shoplifted."

19 A Because I had kids and grandkids at home.

20 Q Okay. That's fine.

21 A That's the reason I was trying to get my power bill
22 paid.

23 MR. COOK: I don't have any further questions.

24 MR. GRIER: Briefly, Your Honor.

25 REDIRECT EXAMINATION

TESTIMONY OF CYNTHIA GASTON

1 BY MR. GRIER:

2 Q You said that at some point Mr. McFarland would have
3 recognized that you had stuff on you.

4 A Uh-huh.

5 Q When would that have been?

6 A On the way out.

7 Q Okay. How much time between the time that --

8 A I didn't recognize -- I didn't see him look dead at
9 me. I thought I was sneaking up behind him but apparently
10 he did see me.

11 Q Well, what is he doing when you're trying to -- what
12 is he doing when you --

13 A He was walking out the building, he didn't know I was
14 coming up behind him.

15 Q I'm sorry, say that again.

16 A Steve didn't even know I was coming up from behind
17 him, he saw me but he didn't know if I was going to cut
18 back through the deli or what I was doing and he was just
19 trying to get out of the building. He was trying to go
20 back to the car.

21 Q Did he assist you in any way?

22 A No.

23 Q Did he know anything about what your intentions were?

24 A No.

25 Q Did he act in any way to take any items and move them

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1 around the store or take them out of the building?

2 A Definitely not, Steve would have rung my neck. No.

3 Q Okay. Thank you.

4 A Matter of fact me and Steve quit talking after that.

5 Q Okay.

6 MR. GRIER: I don't have anything further.

7 MR. COOK: I don't have anything further.

8 THE COURT: Ma'am, do you have any children in your
9 home right now?

10 THE WITNESS: Yes, sir.

11 THE COURT: Sheriff, come around, please. Sheriff,
12 you will take this witness into custody, a Lancaster
13 detective is on the way, she will be delivered to the
14 magistrate's office for the process of any necessary
15 warrants. You will need to brief the police department
16 about her testimony. Also, I want her record run so that
17 the magistrate will have that available also from her
18 statement from the stand. You need to contact DSS about
19 the welfare of the children. You may remove her from the
20 courtroom.

21 THE WITNESS: Your Honor, may I speak?

22 THE COURT: Yes, ma'am.

23 THE WITNESS: I'm currently living with my mom and dad
24 and my kids are with my mom and dad.

25 THE COURT: All right. Have the DSS people talk with

CLOSING ARGUMENTS

1 her before they go down there.

2 THE COURT: Next, Mr. Grier?

3 MR. GRIER: Judge, defense rests.

4 MR. COOK: Nothing further from the State.

5 THE COURT: All right. Are y'all ready to argue or do
6 you need a minute or two?

7 MR. COOK: I'm ready.

8 MR. GRIER: Judge, I would like about five minutes, I
9 think it will be sufficient just to wrap up.

10 THE COURT: If y'all will step back into the jury
11 room, give us about five minutes, we'll come back and get
12 on with it.

13 (A recess was taken.)

14 (The jury returned to the courtroom.)

15 THE COURT: We're ready to move to closing arguments.

16 MR. COOK: State is ready, Your Honor.

17 MR. GRIER: Defense is ready, Your Honor. May it
18 please the Court? Mr. Cook? Ladies and gentlemen of the
19 jury, you've heard all of the evidence and I know the
20 solicitor started his opening argument with this case is
21 about bringing home the bacon, but this case is where is
22 the beef? Because what you know is that the State had
23 everything on videotape and yet they don't want you to see
24 it and you're not going to get to see it. When I first met
25 with my client the first thing we went over the police

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1 report -- we looked at was the police report and let's get
2 the video and prove that it's wrong. I requested the
3 video, the State didn't produce a video. What are they
4 trying to hide? Well, what they're trying to hide is what
5 really went down which is what you just heard from the
6 witness stand and what you just saw happen is that the
7 person that was shoplifting and trying to recruit
8 Mr. McFarland and admitted it on the stand and just got
9 locked up is the person that should have been prosecuted in
10 the first place. They had a videotape of it, they could
11 have identified her, they could have asked Mr. McFarland to
12 identify her or produce some evidence or something, but no,
13 it was fixated on we got our man. And as you know, they
14 didn't want you to see what happened because it got kind of
15 rough to the point where -- there was no evidence -- the
16 officer testifying yesterday didn't tell you anything about
17 how rough it got and what they did to Mr. McFarland,
18 because as you just heard basically he ran initially and
19 then he stopped, got on his knees, got kicked down and got
20 his arm broken. So, you know, it's not bringing home the
21 bacon, it's where is the beef because if we would have been
22 able to see that video we wouldn't be in this courtroom
23 today. Either this case would have been dismissed or if it
24 demonstrated what Officer Funderburke said there wouldn't
25 have been any trial today. My client wanted that video.

1 I've never had a client that demanded and wanted the video
2 and asked me to get the video in a shoplifting case, but
3 we're not going to get to see it. The solicitor said
4 yesterday that evidence is going to come from right here,
5 okay, from the testimony that you hear from this courtroom
6 and it's going to come from what people say and it's going
7 to come from documents and you've got a couple of documents
8 here to consider. They certainly don't implicate
9 Mr. McFarland as being guilty of shoplifting but you've got
10 some documents to look at and you've heard some testimony,
11 but you can also in that -- you have to consider the
12 absence of evidence. We've got surveillance cameras all
13 over Wal-Mart, Wal-Mart knows they've got this thing, all
14 of it on video, you heard that from the Wal-Mart employee.
15 You heard from the police officer, he knows they have got
16 video and they just don't get it. So consider the absence
17 of evidence, what don't they want you to see? They don't
18 have a case against him if you get to see the video is what
19 they don't want you to see. Okay. Well, both -- I think
20 Officer Funderburke and the Wal-Mart employee, Diane, and I
21 don't think when I asked her I got her last name and I know
22 y'all probably heard it, but she -- they both said that
23 this was past the point of purchase. And so if
24 Mr. McFarland -- and, in fact, Officer Funderburke said
25 that there was the possibility that Mr. McFarland did not

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1 know that these items were not paid for in the first place.
2 If they would have just kept going and if there was some
3 confederacy and some conspiracy to shoplift here that
4 Mr. McFarland was involved in, why wouldn't they have just
5 kept going instead of trying to make some exchange? What
6 happened, which is obvious from even the testimony of
7 Mr. Funderburke, is that poor Ms. Gaston saw the cop and is
8 trying to dump stuff on Mr. McFarland and he is, of course,
9 nervous, trying to get away from her, you heard it from the
10 shoplifter herself, and that she just had to come clean.
11 She knew she was going to get locked up probably, she knew
12 that when she testified but she had to tell the story and
13 had to tell the truth because you're not getting it from
14 the State, you're not going to get to see it. You're not
15 going to get to see the video because they didn't want you
16 to see the video. Officer Funderburke even tried to
17 suggest that it was suspicious that Mr. McFarland was
18 wearing a coat at Thanksgiving in the rain on a cold day,
19 he tries to suggest that the fact that Mr. McFarland is
20 wearing a coat is suspicious and suggests that he was
21 involved in some conspiracy to shoplift. I think that
22 tells you that Officer Funderburke is capable of bending
23 the facts around to suit the case to make it appear to be
24 what he wants you to believe, not what it was. Because all
25 you have got to hear about the way this went down from the

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1 State was Officer Funderburke because he nor Wal-Mart
2 wanted you to see the video. Now, Mr. McFarland -- and you
3 know that even as of yesterday Mr. McFarland was trying to
4 get the witness in this courtroom and he was able to get
5 her to come to court and testify and she testified knowing
6 what the consequences were going to be. I submit to you
7 she wouldn't have done that, it would have been useless and
8 wasteful for her to sacrifice herself had she not known
9 that she had to testify or needed to testify to vindicate
10 Mr. McFarland. Mr. McFarland is presumed innocent, he is
11 clothed in innocence and, of course, you are the folks that
12 have to decide whether the State has met its burden of
13 proof, and the State has to prove beyond a reasonable doubt
14 that Mr. McFarland is guilty, prove he's guilty beyond a
15 reasonable doubt. It isn't whether Mr. McFarland might be
16 guilty, it isn't whether Mr. McFarland is probably guilty,
17 they have to prove beyond a reasonable doubt and if you
18 find that there is a real possibility that he might be
19 innocent, well, then you must return a verdict of not
20 guilty. And I submit to you there are many reasons to
21 believe that there's the real possibility that
22 Mr. McFarland is not guilty and you heard them all, you
23 know, I'm not going to repeat them, I've already said some
24 of them. Where is the beef? Why didn't we get to see the
25 video? Why? Because I think there's the real possibility

1 that video would have vindicated Mr. McFarland. They
2 already had their skin nailed up and who they were going
3 after, let the real shoplifter get away, plus the police
4 effort, the police overreacted, he probably panicked,
5 anybody would that had the police chasing them, but
6 nonetheless Mr. McFarland stopped and submitted to the
7 police according to his testimony. Of course, the real
8 possibility, you heard Ms. Gaston, she said she never
9 successfully got any -- she never was able to successfully
10 put anything on him and he was running trying to get away
11 from her, certainly that creates the real possibility --
12 and she got locked up for her testimony -- the real
13 possibility that Mr. McFarland may be innocent. You heard
14 testimony from Officer Funderburke trying to cast suspicion
15 on Mr. McFarland suggesting that he's wearing a coat is
16 some how evidence that he was involved in some conspiracy
17 to shoplift. I think that casts some doubt about
18 Mr. Funderburke's credibility in terms of is he trying to
19 stretch things and bending the story around to suit him
20 because he knew all that this jury was going to get to hear
21 from the State was his story because you weren't going to
22 get to see the video. Again, the State has the burden of
23 proof beyond a reasonable doubt. Reasonable doubt is the
24 kind of doubt that would cause a reasonable person to
25 hesitate to act. Most certainly there is a lot of evidence

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1 in this case that would cause a reasonable person to
2 hesitate to act. The culprit has been arrested and put in
3 jail, Mr. McFarland is innocent. I believe that after
4 you -- and, of course you haven't deliberated yet, when you
5 get into the courtroom you're all going to have the
6 opportunity to discuss all of this. Certainly what you
7 didn't get to hear and didn't get to see with your own
8 eyeballs certainly creates a huge reasonable doubt and I
9 believe that after you have considered all of the evidence
10 that you will return a verdict of not guilty. Thank you
11 for your participation today, we tried not to stretch this
12 out any longer that needed to be with the facts,
13 particularly you folks that have served on two juries,
14 thank you for your service. If you listen to the Judge's
15 instructions and if you give both sides a fair chance and
16 follow the law and if you do that then you can put your
17 head on your pillow tonight you will sleep well because you
18 will have fulfilled one of the highest callings of
19 citizenship which is serving on the jury and I thank you
20 for your service.

21 MR. COOK: Please the Court, Mr. Grier?

22 THE COURT: Solicitor.

23 MR. COOK: Ladies and gentlemen, I tell you where the
24 beef was, the beef was inside Mr. McFarland's jacket, he
25 still had the meat on him when Officer Funderburke arrested

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1 him. Now, if you will remember Ms. Gaston who is what in
2 my line of work we call a codefendant, she's going to be a
3 codefendant to Mr. McFarland because she stole from
4 Wal-Mart with Mr. McFarland. Mr. Grier made a lot to do
5 about the video, and I will tell you about the video.
6 Wal-Mart does have surveillance cameras everywhere, all
7 over the place, you go in there and look around you will
8 see them. Some of this incident was probably recorded.
9 You heard Officer Funderburke say I asked them is there a
10 video, I went in and asked, the loss prevention was not
11 there, you heard Diane Smith say I'm the customer service
12 manager, I don't have access to those videos so Officer
13 Funderburke couldn't get them that day. Three days before
14 Thanksgiving he was off, he didn't go back and get it. I
15 called him beyond 30 days from the actual date, this
16 happened on November 22, 2009, and told him Mr. Grier wants
17 the video. He went back to Wal-Mart, after 30 days it's
18 taped over so they didn't have it, we don't have the video.
19 What we do have is a Lancaster Police Officer that saw him
20 which very rarely happens, it doesn't happen often where
21 you get law enforcement that catches somebody in the act
22 with their own eyes. And today he brought Ms. Gaston up
23 here that told this story about, you know, "My power bill,
24 I didn't have any money to pay it and I was just going to
25 Western Union and they were closed and I was going to try

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1 to get some money to pay for my power bill." She stole
2 steaks, and she said steaks and I think pecans. You will
3 see the receipt of rib roast and pecans and cheese and
4 sausage and bacon, she didn't mention any of that, that's
5 because she didn't steal any of that, Mr. McFarland stole
6 it, she didn't say anything about bacon or sausage.
7 Mr. McFarland didn't go in the bathroom, he may have went
8 to the bathroom but he didn't just meet her back at the
9 door or somebody is lying. She said she never successfully
10 got anything on Mr. McFarland. She said, "He had no idea
11 what I was doing and he was walking out and he walks up --
12 I walk up behind him and stick something up his shirt and
13 it may have been my hand." Come on. She was sticking
14 T-bones up his shirt or sausage or bacon or something but
15 she got something on him or she's lying. He had meat on
16 him. Mr. McFarland knew what was going on. Matter of fact
17 she said, "When I walked out he saw me bulging, he knew
18 something was up." She weighs 130 pounds, under five-six,
19 don't you think if she was trying to stuff something up his
20 shirt he didn't know what it was and he was trying to get
21 away he would have said, "Hey Officer, I don't know what's
22 going on." But no, he ran when the officer told him to
23 stop, and why did he run? Because he had the meat down his
24 pants, up his shirt, down his jacket, everywhere he could
25 get it he had it. It was like the yellow brick following

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1 him out in the parking lot with this meat and cheese and
2 pecans. And she testified, "Well, I ran the other way."
3 Well, there's only one officer, he's chasing the man who he
4 saw her putting the meat on because he had the merchandise.
5 He chased him out in the parking lot and I'll tell you, I
6 have said it 100 times, if you do what the police tell you
7 to do you don't get tased, they never tase you the minute
8 they see you. But did he do what he told him to do? Did
9 he say, "Officer, I was walking out and this lady put stuff
10 up my shirt, I have no idea what it is, I had nothing to do
11 with this?" No, he ran. Why would you run? So Officer
12 Funderburke chases him, chases him around Cadillacs and
13 SUV's, he finally does tase him when he gets close enough
14 and like most of them he complied. She says, "I saw him
15 and I saw the officer come kick him in the back, broke his
16 hand." Do y'all really think that she went and got in her
17 car and pulled up and said, "Let me see what's going to
18 happen here, let's see, are they going to arrest him?" No.
19 She was at that stop light gone by the time they chased him
20 around all of those Cadillacs and SUV's because she didn't
21 want to go to jail. I asked Officer Funderburke, "What did
22 he say to you when he got him? Well, I asked him why he
23 shoplifted. What did he say?" He said, "Times were hard."
24 Times are hard but you can't shoplift and steal. "Who is
25 the female? That's my girlfriend, she didn't have anything

1 to do with this," but she does today because we're in court
2 in front of the 12 of you. Didn't happen, ladies and
3 gentlemen. Mr. McFarland went into Wal-Mart, stole a bunch
4 of -- put a bunch of meat up his shirt or put something up
5 his shirt and she may have been putting some more in there
6 because had he more room and Officer Funderburke just
7 happened to be at the right place at the right time and saw
8 it and did the right thing and caught one of them. He
9 walked past all points of purchase. You heard Diane Smith
10 say, "Yes, this is Wal-Mart merchandise, it's 11 items."
11 Now, do you really think Ms. Gaston would have forgot about
12 11 items? Maybe if she put a Slim Jim up his shirt she
13 might not have known it was successful, but 11 items? She
14 didn't stand there at the door and put 11 items up his
15 shirt, he did it, and either way he's guilty because he
16 knows she didn't pay for it. He saw her walk out straight
17 down the entrance without going through the cash register.
18 I've got to prove to you beyond a reasonable doubt. Think
19 about the only thing that could cause you doubt is Ms.
20 Gaston, she has lied to you, or maybe she didn't put
21 anything up his shirt but he had stuff up his shirt when
22 Officer Funderburke caught him. So maybe she didn't do it,
23 he did it but either way he's guilty. Between Officer
24 Funderburke's statement and Diane Smith saying yes, it's
25 from Wal-Mart, here is what it's worth, and Ms. Gaston

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1 getting up here and lying to you, ladies and gentlemen, the
2 only verdict this evidence supports is a verdict of guilty.
3 It couldn't be anymore clear cut. You go in Wal-Mart, you
4 don't go through the cash register and pay for what you
5 get, you walk out and run from Wal-Mart from a police
6 officer and they find stolen meat on you. Ladies and
7 gentlemen, that's shoplifting, and I submit to you that's
8 what Mr. McFarland did. I told you yesterday I was going
9 to ask you at the end of this thing, you've got to go in
10 that room and you've got to make a decision, what we call a
11 verdict, a unanimous verdict and I'm going to ask every
12 single one of you to come back with a guilty verdict for
13 shoplifting against Steven Barry McFarland because he is
14 guilty. Thank you, ladies and gentlemen.

15 THE COURT: Thank you, gentlemen. Ladies and
16 gentlemen, if I could have your attention. It now becomes
17 my duty to charge and instruct you the law applicable to
18 the case. The State of South Carolina by the indictment
19 charges the defendant with the offense of shoplifting. To
20 the charge and to the indictment the defendant has entered
21 a plea of not guilty, and a plea of not guilty by a
22 defendant places the burden of proof on the State to prove
23 the guilt of the defendant beyond a reasonable doubt before
24 you, the jury, can convict the defendant and find him
25 guilty. The defendant is presumed in law innocent of the

1 charges contained in the indictment. This presumption of
2 innocence accompanies this defendant from the time of his
3 appearance in court and throughout every stage of the trial
4 until you, the jury, have reached a verdict of guilty based
5 upon the evidence that satisfies you of the guilt of this
6 defendant beyond a reasonable doubt. The presumption of
7 innocence is a substantial right which every defendant,
8 including this defendant, is entitled. Let me speak with
9 you about the words reasonable doubt. The State is not
10 required to prove the guilt of a defendant beyond all doubt
11 or beyond every doubt but beyond a reasonable doubt. Proof
12 beyond a reasonable doubt is proof that leaves you firmly
13 convinced of the defendant's guilt. There are very few
14 things in this world that we know with absolute certainty
15 and in criminal cases the law does not require proof that
16 overcomes every possible doubt. If based on your
17 consideration of the evidence you are firmly convinced that
18 the defendant is guilty of the crime charged you must find
19 him guilty. If, on the other hand, you think there is a
20 possibility that he is not guilty you must give him the
21 benefit of the doubt and find him not guilty. Now, let me
22 also tell you about reasonable doubt. A reasonable doubt
23 as sometimes said is the doubt that would cause a
24 reasonable person to hesitate to act. Proof beyond a
25 reasonable doubt is proof that leaves you firmly convinced

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1 of the defendant's guilt. If based upon the consideration
2 of the evidence you are firmly convinced that the defendant
3 is guilty of the crime charged then, as I said, you must
4 find him guilty. If on the other hand you think there's a
5 real possibility that he's not guilty then you must give
6 him the benefit of that doubt and find him not guilty. A
7 defendant is entitled to every reasonable doubt arising in
8 the whole case or in any defenses asserted. If there is an
9 issue essential to the conviction or verdict of guilty and
10 you have a reasonable doubt as to how that issue should be
11 resolved it would be your duty to resolve that issue of
12 reasonable doubt in favor of the defendant. Once again, a
13 defendant is not required to prove his innocence. The
14 State is required to prove every essential element of the
15 offense charged against the defendant by evidence which
16 satisfies you, the jury, beyond a reasonable doubt. If the
17 State has succeeded in doing that then it would be your
18 duty to find the defendant guilty. Now, during the trial
19 you and I have certain duties to perform, these duties are
20 fixed by the law of the State. You, the jury, are the sole
21 judge of the facts in the case and I'm the judge of the
22 law. Your decisions on the facts must be based upon the
23 competent evidence before you, that is the sworn testimony
24 from the witness stand, the exhibits in the record and the
25 stipulation, if any, made by the solicitor and counsel for

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1 the defendant. You must accept the law as I state it to
2 you. In every case tried in this court before a jury the
3 jury, as I've stated, is the sole and exclusive judge of
4 the facts. The constitution in our state has declared that
5 a trial judge shall not intimate, comment upon or make any
6 statement to a jury about the facts in a case. It is your
7 exclusive duty as jurors to determine the affect, the
8 value, the weight and the truth of the evidence in this
9 case, then to those true facts as determined by the jury
10 you then taken and apply the law which I state to you and
11 thus arrive at a verdict which does speak the truth of the
12 case. Necessarily then you must evaluate the credibility
13 of the witnesses who have testified. Credibility is simply
14 a legalistic word which simply means believability. I
15 instruct you that in determining the believability of
16 witnesses you may believe several witnesses as against one
17 witness or one witness as against several witnesses. You
18 may believe the testimony of a witness in its entirety or
19 reject the testimony of a witness in its entirety. You may
20 believe a part of a witness' testimony and reject the other
21 part of a witness' testimony. You may consider whether a
22 witness has exhibited any interest, any bias or any
23 prejudice. You may consider the demeanor of a witness and
24 the appearance of a witness upon the witness stand, and you
25 may consider the opportunity for knowledge concerning those

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1 things about which a witness testified. I instruct you now
2 and emphasize to you that the election of a defendant in
3 the trial of a criminal case not to testify in his own
4 behalf is not a factor to be considered by you in any way
5 in your deliberations and in your consideration on the
6 question of the guilt or innocence of the accused. It must
7 not be considered by you in any manner whatsoever against
8 the defendant or mitigate against him in any respect
9 whatsoever. A defendant has a constitutional right to
10 remain silent and the assertion of such constitutional
11 right cannot and must not be considered by you in your
12 deliberations. Under your oath you are to reach no
13 inference and draw no conclusion whatsoever from the fact
14 that a defendant in the case did not himself testify. This
15 issue I instruct you cannot even be discussed in the jury
16 room. Now, the defendant is charged in the bill of
17 indictment with the offense of shoplifting. I charge you,
18 section 16-13-110, Subsection A, of the South Carolina Code
19 of Laws in 1976 as amended: A person is guilty of
20 shoplifting if he or she takes possession of, carries away,
21 transfers from one person to another or from one area of a
22 store or other retail mercantile establishment to another
23 area, or causes to be carried away or transferred any
24 merchandise displayed, held, stored or offered for sale by
25 any store or other retail mercantile establishment with the

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1 intention of depriving the merchant of the possession, use
2 or benefit of the merchandise without paying the full
3 retail value. I also charge you that if a crime is
4 committed by two or more persons who are acting together in
5 the commission of that offense, the act of one is the act
6 of all. This is true if there are two or more than two
7 involved in the act. Two or more than two people can be
8 guilty of killing another when only one of the persons
9 fired the shot or committed the act that caused death, as
10 an example. If two or more people are together, acting
11 together, assisting each other in the commission of an
12 offense the law says that under those circumstances the act
13 of one is the act of all, the hand of one is the hand of
14 all. I will now instruct you on the forms of the verdict
15 in this case. Mr. Foreman, in a few minutes you will have
16 the indictment, in the lower left corner there's an area
17 that is labeled verdict. Once the jury has reached a
18 verdict it will be your duty to write in the appropriate
19 verdict and sign your name and date the indictment and
20 notify the bailiff that you have reached a verdict. If the
21 State has failed to prove the guilt of the defendant beyond
22 a reasonable doubt your verdict would be two words, not
23 guilty. If the State has proved the guilt of this
24 defendant beyond a reasonable doubt your verdict would be
25 one word, guilty. The verdict that you render in this case

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1 must be the verdict of each and every juror, it must be
2 your unanimous verdict, all 12 jurors must agree on the
3 verdict which you authorize Mr. Foreman to write for the
4 jury. Mr. Foreman, I'm going to send y'all back to the
5 jury room, I'm going to ask you not to deliberate until I
6 send the indictment along with the exhibits back to you.
7 Once you begin your deliberations should somebody need a
8 restroom break or smoke break or whatever cease your
9 deliberations until all 12 are back intact and in the jury
10 room. Should somebody refuse to take part in the
11 deliberations you will need to notify me as quickly as
12 possible so I can take corrective measures. The bailiff
13 will be stationed close by, if you need anything just knock
14 on the door. Once again, it will have to be a unanimous
15 verdict as I have already said. If y'all will step back, I
16 have got to check in with counsel one last time and we will
17 put you to work in hopefully just a few minutes. I need
18 the alternate to remain with us.

19 (The jury left the courtroom.)

20 THE COURT: I'm going to ask you to stay with us a few
21 minutes and make sure they get started.

22 (The alternate left the courtroom.)

23 THE COURT: Gentlemen, anything for the record?

24 MR. COOK: Nothing from the State, Your Honor.

25 MR. GRIER: No, Your Honor. The charge was everything

1 I would have expected.

2 (The jury began deliberations.)

3 THE COURT: I understand the jury has reached a
4 verdict. Bring them in.

5 (The jury returned to the courtroom.)

6 THE COURT: I understand you've reached a verdict.

7 THE JUROR: Yes, sir.

8 THE COURT: Would you pass it up? It is signed and
9 dated, you may publish it.

10 THE CLERK: Case 2010-GS-29-262, State versus Steve
11 Barry McFarland, indicted for shoplifting third or
12 subsequent offense. We, the jury, find the defendant
13 guilty. Signed Mr. Mcdermott, 7/29/10. Ladies and
14 gentlemen, if this be your verdict so say you all by the
15 raising of your right hands. Let the record reflect all
16 jurors raised their right hands.

17 THE COURT: Thank you, Mr. Clerk. Anything further of
18 the jury from the State or defense?

19 MR. COOK: Nothing from the State, Your Honor.

20 MR. GRIER: Judge, I would ask that they be polled.

21 THE CLERK: James Mcdermott, is this your verdict and
22 is this still your verdict?

23 THE JUROR: That's correct.

24 THE CLERK: Daniel Williams, is this your verdict and
25 is this still your verdict?

JURY VERDICT

1 THE JUROR: Yes, sir.

2 THE CLERK: Ricky Coley, is this your verdict and is
3 this still your verdict?

4 THE JUROR: Yes, sir.

5 THE CLERK: Tosha Marsh, is this your verdict and is
6 this still your verdict?

7 THE JUROR: Yes, sir.

8 THE DEFENDANT: Michael Broome, is this your verdict
9 and is this still your verdict?

10 THE JUROR: Yes, sir.

11 THE CLERK: Melinda Catoe, is this your verdict and is
12 this still your verdict?

13 THE JUROR: Yes, sir.

14 THE CLERK: Diane Able, is this your verdict and is
15 this still your verdict?

16 THE JUROR: Yes, sir.

17 THE CLERK: James Barnes, is this your verdict and is
18 this still your verdict?

19 THE JUROR: Yes, sir.

20 THE CLERK: Benjamin Parra, is this your verdict and
21 is this still your verdict?

22 THE JUROR: Yes, sir.

23 THE CLERK: Nora Edwards, is this your verdict and is
24 this still your verdict?

25 THE JUROR: Yes, sir.

JURY VERDICT

1 THE CLERK: Gary Neisler, is this your verdict and is
2 this still your verdict?

3 THE JUROR: Yes, sir.

4 THE CLERK: Inez Irvin, is this your verdict and is
5 this still your verdict.

6 THE JUROR: Yes, sir.

7 THE COURT: Anything further?

8 MR. GRIER: Your Honor, I would just make post trial
9 motions at the appropriate time.

10 THE COURT: Okay.

11 MR. GRIER: Judge, I would ask that the Court stand as
12 the 13th juror and I would ask for a directed verdict from
13 the Court as the 13th juror. I would submit that the State
14 did not meet the burden of proof, most certainly there was
15 evidence lacking that should have been produced by the
16 State that was not which I believe in the capacity of the
17 13 juror you could find that that negated the verdict and
18 I'm asking that for a dismissal notwithstanding the
19 verdict.

20 MR. COOK: The jury spoke, Judge. I think they heard
21 all of the evidence, I don't think there is any reason for
22 you to stand in on this one.

23 THE COURT: Based on the evidence before the Court I
24 will have to deny your motion, I see no problem with the
25 findings of the jury. All right, we move onto mitigation.

SENTENCING HEARING

1 Now, ladies and gentlemen of the jury, I have got good news
2 for you in that we will not be having anymore jury trials,
3 we have got numerous pleas and other things to do today and
4 tomorrow. At this time if you would like to leave you are
5 free to do so and I'm not going to prevent you from leaving
6 if you would like to if you've got some pushing matter you
7 would like to go to. I would personally ask that you stay
8 and watch this mitigation because I think you're going to
9 hear some things that will be of interest to you. Okay.
10 But if anybody needs to go you are certainly free to go.

11 (Break in proceedings.)

12 MR. COOK: Please the Court, Your Honor? I will go
13 through Mr. McFarland's record. First I've got a record
14 going back to 1980 --

15 THE COURT: This is what I want y'all to hear.

16 MR. COOK: He has got a record going back to 1980 of
17 driving under the influence. Simple possession of
18 marijuana public in 1982. Disorderly conduct in 1982.
19 Public disorderly conduct, resisting arrest in 1986.
20 Public disorderly conduct in 1987. Open container in 1987.
21 Assault and battery in 1987. Disorderly conduct in 1987.
22 Assault and battery in 1988. Assault and battery in 1989.
23 Indecent exposure in 1989. Disorderly conduct in 1990.
24 Violation of ABC law in 1990. Assault and battery in 1994.
25 Driving under suspension in 1995. 1996 open container.

SENTENCING HEARING

1 Simple assault and shoplifting in 1997. Another
2 shoplifting in 1997. Petty larceny in 1998. Shoplifting
3 in 1998. Another petty larceny in 1998. Shoplifting in
4 1999. Property offense third or subsequent in 1999. A
5 second property subsequent in 1999 which he received a
6 three year sentence on. A third property offense third or
7 subsequent and a fourth property offense third or
8 subsequent in 1999. Shoplifting in 2000. DUS, operating
9 motor vehicle, property offense third and subsequent in
10 2003, and another property offense third or subsequent in
11 2006 which he received a two year sentence on. Your Honor,
12 that's the extent of his record. The State at this time --
13 I'll tell you what our offer was, our offer was active
14 sentence of five years, went to trial and the State at this
15 time would ask for the maximum sentence on property offense
16 third or subsequent shoplifting which is a ten year
17 sentence. He's had a two year stint, a three year stint
18 and Mr. McFarland can't seem to keep his hands off other
19 people's stuff and we think a ten year sentence may help
20 with that.

21 THE COURT: Mr. Grier?

22 MR. GRIER: Judge, I would ask for a split sentence in
23 this case. Mr. McFarland -- Your Honor having heard the
24 extensive record, it has all been petty stuff. That
25 doesn't excuse, that doesn't minimize it, that doesn't

SENTENCING HEARING

1 suggest that anybody should tolerate that, but what it does
2 suggest is that Mr. McFarland might benefit from a mental
3 health assessment which he has never had and potentially
4 certainly for society that would be a remedy that I'm
5 asking the Court to consider. I understand that it would
6 be extremely unlikely that you would not give him at least
7 a sentence equal to one that's been imposed previously.
8 Judge, I would submit that the maximum sentence is reserved
9 for people that have other serious -- serious in terms of
10 violent, long term, having been to prison for long
11 stretches of time and that nature and while his longest
12 stretch of time has been three years, Your Honor. And so
13 certainly if the Court -- I would submit that a five year
14 sentence would certainly be a considerable longer sentence
15 than he has served in the past. And Judge, I'm not
16 pointing any fingers at anybody, perhaps had he received
17 some sort of help in the past he wouldn't be before you
18 today. But Judge, he's never had a jury trial before and
19 this is the first time he's ever requested a jury trial
20 because on all of these cases he's pled guilty. The jury
21 has made their finding and certainly had sufficient
22 evidence to do so, but Mr. McFarland maintains that under
23 these circumstances involved that certainly every
24 indication from his past record that folks wouldn't believe
25 him if I would have put him up and it would have been

1 disastrous for him to testify but had he been guilty he
2 would have pled and he would have taken the deal. Judge,
3 I'm asking that you split a sentence because I believe
4 society would benefit more from attempting to find out if
5 there is perhaps some reason that may contribute to the
6 pattern that has been established over the years and some
7 split sentence that would allow him to do some time, and I
8 would ask for no more than three years which he's done in
9 the past, hang a big number over his head and require as a
10 special condition of some probationary sentence and/or any
11 parole or whatever that he receive a mental health
12 assessment and comply with any recommendations that they
13 would commit or find that he should comply with. Judge, he
14 maintains that substance abuse hasn't been part of -- isn't
15 an explanation and he doesn't make excuses for his past, he
16 has already admitted it. He says he doesn't understand his
17 past and he's had a very difficult life and that's no
18 reason to go out and steal and certainly plenty of folks
19 with difficult lives are able to stay away from that. But
20 he is a person, Judge, that I think the environment that he
21 came through contributed to that lengthy record that you've
22 heard, Judge. Judge, he's a 47 year old man, he's got an
23 11th grade education. He has worked odd jobs and, of
24 course, because of his record certainly once it became a
25 felony record been unable to maintain employment and to get

SENTENCING HEARING

1 employment. Judge, he has no children. Obviously he has
2 somebody committed enough from the defense's perspective
3 was willing to come forward and tell their version of what
4 happened at this time, and he does have people and he does
5 have support out there and people that are hopeful that
6 this would be his last brush with the law. Judge, Mr.
7 McFarland, I have not asked him whether he wants to speak
8 or not but I would take the opportunity if I might to ask
9 him.

10 THE COURT: Mr. McFarland, you certainly have a right
11 to speak if you so desire.

12 THE DEFENDANT: Like Mr. Grier said, that record right
13 there, I have never stepped foot in this courtroom and said
14 I didn't do it, I have never took a jury trial, this is my
15 first. That's all I have to say.

16 THE COURT: I need -- and of course, Mr. Grier will
17 cover this with you -- you need to be aware that the
18 appellate rights certainly apply and you've got to file a
19 notice of appeal within ten days of sentencing to secure
20 your appellate rights, I need to put that on the record and
21 make sure you hear that.

22 MR. GRIER: Judge, we have had the conversation since
23 before the verdict came out about it also and I will have
24 another one.

25 THE COURT: All right. I've worked in about every

SENTENCING HEARING

1 county in this state except for about three now. It seems
2 that -- now burglarizing, can't point the finger at him
3 about that, I didn't hear anything in the record about
4 that -- but burglaries and stealing is rampant and epidemic
5 in Lancaster and Chesterfield counties. Every day there
6 are thefts going on, and when an incident like this happens
7 it costs everybody, whether it's Wal-Mart, K-Mart or the
8 local grocery when they lose money and all of that food had
9 to be destroyed it costs everybody because the price of
10 food goes up to cover those losses. Now, you've already
11 done a three year stint as well as another prison stint.
12 What does it take? I remember about nine or ten years ago
13 I was holding court up there in the old courtroom, we had a
14 burglary case up and one of the defense attorneys wanted
15 the jury to be asked if their home had ever been
16 burglarized and I will never forget it as long as I live,
17 we had 52 people on the jury and 18 of them had had their
18 houses burglarized in Lancaster County. Now, somebody has
19 got to put a stop to it and unfortunately for you the
20 people of South Carolina have put me in the position to be
21 the one to put a stop to it. You're not going to be
22 stealing anybody else's property for the next long time.

23 THE DEFENDANT: Your Honor, I have never been a
24 burglar in my life.

25 THE COURT: I'm not saying that and I am not

1 implicating that, I'm just telling you it all goes to
2 stealing. And I tell you something else I was not -- I
3 have to remain neutral to this point and then I am going to
4 do my job, but I was appalled that your witness got up
5 there when it was obvious to everybody in this courtroom
6 that she flew the coupe immediately, to get up there and
7 accuse those police officers that were doing their job of
8 brutalizing you. I'm not saying they didn't and I'm not
9 saying they did, but I'm telling you there is no way in the
10 world would I ever believe her in saying that she saw it.

11 THE DEFENDANT: Your Honor, the aftermath, the cast
12 and all, they took me to the emergency room, they x-rayed
13 it and they said it was broke.

14 THE COURT: Enough said, I'm not going to say any
15 further sermon, the record speaks for itself. I'm not
16 going to go along with the State and in a way that the
17 defense is not going to like I'm going to go along with a
18 split sentence. The sentence is ten years suspended to
19 nine years with five years of probation thereafter. He
20 gets credit for any jail time he has, and I will run the
21 contempt charge already leveled on you concurrent.
22 Solicitor, I will need you to fill out another sentence
23 sheet to cover that contempt.

24 MR. COOK: Okay.

25 THE COURT: Apologize y'all had to go through all of

SENTENCING HEARING

1 this but jury service is a necessary service and we all
2 understand our constitutional duties and I thank you for
3 doing your job. The jury is dismissed.

4 (END OF COURT PROCEEDINGS.)

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1 I, the undersigned, Michael C. Watkins, Official
2 Court Reporter for the Sixth Judicial Circuit of the State
3 of South Carolina, do hereby certify that the foregoing is
4 a true, accurate and complete transcript of record of the
5 proceedings had and evidence introduced in the trial of
6 the captioned case, relative to appeal, in the Court of
7 General Sessions for Lancaster County, South Carolina, on
8 the 28-29th days of July, 2010.

9 I do further certify that I am neither of kin,
10 counsel, nor interest to any party hereto.

11

12

December 21, 2010.

13

14

15

Michael C. Watkins
Court Reporter

16

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FORM 5

FILED

STATE OF SOUTH CAROLINA OFFICE OF CLERK
OF COURTCounty of LANCASTER 12 NOV 26 PM 4:03

IN THE COURT OF COMMON PLEAS

Steven B. McFarland

Full name and prison number (if any) of Applicant

v.

State of South Carolina

CLERK OF COURT
LANCASTER, SC

2012-CP-29-1668

APPLICATION FOR

POST-CONVICTION RELIEF

INSTRUCTIONS B READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention Wateree CORR. Institution
P.O. Box 189 Rembert, SC. 29128-0189
2. Name and location of Court which imposed sentence General Sessions
Court Lancaster, S.C.
3. Name(s) of co-defendant(s) (if any) None - but the state
claimed Cyndi Boston
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) 2010-65-29-S.C. Code 14-5-320 Contempt
of Court

- (b) 2010 MS-29262-S.C. code 16-13-110(b)(1)
 (c) 16-1-57 Sub. property crime

5. The date upon which sentence was imposed and the terms of the sentence:

- (a) 7-29-2010 Contempt of Court 90 days
 (b) 7-29-2010 Sub. property crime - 10 yrs Suspended
 (c) to 9 yrs and 5 yrs Probation

6. Check whether a finding of guilty was made:

- (a) after a plea of guilty NO
 (b) after a plea of not guilty Yes
 (c) after a plea of nolo contendere NO

7. Did you appeal from the judgment of conviction or the imposition of sentence?

Yes Conviction and Sentencing

8. If you answered Ayes@ to (7), list:

(a) the name of each Court to which you appealed:

i. S.C. Court of Appeals

ii. _____

iii. _____

(b) the result in each such Court to which you appealed:

i. affirmed

ii. _____

iii. _____

(c) the date of each such result:

i. October 12, 2012

ii. _____

iii. _____

(d) if known, citations of any written opinion or orders entered pursuant to such results:

i. On attach sheet # I

ii. _____

iii. _____

9. If you answered Ano@ to (7), state your reasons for not so appealing:

(a) did appeal

(b) _____

(c) _____

10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully: (See notarized attach sheet)

(a) Not objecting Judges' denial of continuous(b) Not objecting to being tried in my absence(c) Not objecting to obsessive sentencing

11. State concisely and in the same order the facts which support each of the grounds set out in (10): (See notarized attach sheet)

(a) See Attach sheet #1 Bor A, b, & C(b) See attach sheet # 1 + 3(c) Charge jury hands of one is hands of all (J.P. 88 11r 3-1)

12. Prior to this application have you filed with respect to this conviction:

(a) any petition in a State Court under South Carolina Law? Appeals Court(b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? N/A(c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? only(d) any other petitions, motions or applications in this or any other Court? N/A

13. If you answered Ayes@ to any part of (12), list with respect to each petition, motion or application:

(a) the specific nature thereof:

i. Appeals Court Attach sheet # I

ii. _____

iii. _____

iv. _____

(b) the name and location of the Court in which each was filed:

i. S.C. Appeals Court Columbia, S.C.

ii. _____

iii. _____

iv.

(c) the disposition thereof:

i.

AbBirmed

ii.

iii.

iv.

(d) the date of each such disposition:

i.

October 10, 2012

ii.

iii.

iv.

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

i.

See Attached sheet # 1 Appeal Court Ruling

ii.

iii.

iv.

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

Yes, Appeals Court

15. If you answered "yes" to (14) identify:

(a) which grounds have been presented:

i.

denied continuous

ii.

tried in absence

iii.

Sentencing

(b) the proceedings in which each ground was raised:

i.

Appeals Court - nothing was preserved

ii.

for Appellate Review

iii.

19. State clearly the relief you seek in filing this application:

A trial of 12 of my peers with a
chance to confront my accuser with
an attorney not of the Public Defender's Office due
to prejudice.

20. Are you now under sentence from any other court that you have not challenged?

Yes

Revised 3/2003

STATE OF SOUTH CAROLINA)

County of Lancaster)

VERIFICATION

I, Steven B. McFarland, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

Steven B. McFarland
263704

SWORN to and subscribed before me this 19th
 day of November, 2014.

Tom Adams (L.S.)
 Notary Public

My Commission Expires: 02/15/17 JS
02/15/17

I have presented Photo ID # 263704

APPLICATION TO PROCEED WITHOUT PAYMENT
OF COSTS AND AFFIDAVIT

Steven McFarland IN SUPPORT THEREOF

I, Steven McFarland, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

- (1) I am the applicant in this action and I believe I am entitled to redress.
- (2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.

Steven McFarland

Applicant

SWORN or affirmed to and subscribed before me this

19th day of November, 2012.

John Salvo
Notary Public

My Commission Expires: 02/15/14

FILED
OFFICE OF CLERK
OF COURT
2012 NOV 26 PM 4:04
CLERK OF COURT
LANCASTER, SC

Notarized Attach sheet for Questions (10 + 11)

State concisely the grounds on which you base your
 allegation that you are being in custody unlawfully
 Not objecting Judges' denial of continuation
 Not objecting to being tried in my absence.
 Not objecting to obessive sentencing.

Failure to call two(2) witness under subpoena
 Not objecting hear say testimony of Officer Funderburk.
 Failure to object to jury charge.

State concisely and in the same order the facts which
 support each of the grounds set out in 10.

See attach sheet #1 for A, B, and C.

See attach sheet # 2 + 3 for answer 10(d) (T.P. 49 lines 1-6)

See T.P. 28 - lines 24 + 25 (T.P. 32 - lines 22 + 23)

See T.P. 88 - lines 3 - 14)

Sworn or affirmed to and
 subscribed before me this
19th day of November 2012

Jon Salter
 Notary Public

Sharon McFarland
 Applicant

My Commission Expires 02/13/17

FILED
 OFFICE OF CLERK
 OF COURT
 2012 NOV 26 PM 4:04
 CLERK OF COURT
 LANCASTER, SC

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

The State, Respondent,

v.

Steve McFarland, Appellant.

Appellate Case No. 2010-168967

Appeal From Lancaster County
Paul M. Burch, Circuit Court Judge

Unpublished Opinion No. 2012-UP-586
Submitted October 1, 2012 – Filed October 31, 2012

AFFIRMED

Appellate Defender Kathrine H. Hudgins, of Columbia,
for Appellant.

Attorney General Alan McCrory Wilson, Chief Deputy
Attorney General John W. McIntosh, Senior Assistant
Deputy Attorney General Salley W. Elliott, and Assistant
Attorney General Mark Reynolds Farthing, all of
Columbia; and Solicitor Douglas A. Barfield, Jr., of
Lancaster, for Respondent.

PER CURIAM: Steve McFarland appeals his conviction of shoplifting, third offense, arguing the trial court erred in: (1) refusing to grant McFarland's motion for a continuance and beginning the trial *in absentia*; (2) sentencing McFarland for contempt; and (3) imposing an excessive sentence because McFarland opted for a jury trial. We affirm¹ pursuant to Rule 220(b), SCACR, and the following authorities:

1. As to whether the trial court erred in refusing to grant McFarland's motion for a continuance: *State v. Babb*, 299 S.C. 451, 454, 385 S.E.2d 827, 829 (1989) ("The granting or denial of a motion for a continuance is within the sound discretion of the trial [court] whose ruling will not be disturbed on appeal absent an abuse of discretion resulting in prejudice to the appellant."); *State v. Ravenell*, 387 S.C. 449, 455, 692 S.E.2d 554, 557 (Ct. App. 2010) ("Reversals of refusal of a continuance are about as rare as the proverbial hens' teeth.").

2. As to the remaining issues: *State v. Hoffman*, 312 S.C. 386, 393, 440 S.E.2d 869, 873 (1994) ("A contemporaneous objection is required to properly preserve an error for appellate review."); *State v. Blalock*, 357 S.C. 74, 79, 591 S.E.2d 632, 635 (Ct. App. 2003) ("In order to preserve an error for appellate review, a defendant must make a contemporaneous objection on a specific ground."); *State v. Passmore*, 363 S.C. 568, 583, 611 S.E.2d 273, 281 (Ct. App. 2005) ("Our courts have consistently refused to apply the plain error rule." (citation and internal quotation marks omitted)).

AFFIRMED.

FEW, C.J., and WILLIAMS and PIEPER, JJ., concur.

¹ We decide this case without oral argument pursuant to Rule 215, SCACR.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	SIXTH JUDICIAL CIRCUIT
COUNTY OF LANCASTER	)	
	)	
	)	2012-CP-29-1668
	)	
Steven B. McFarland, #263704,	)	
	)	
Applicant,	)	
	)	
v.	)	RETURN
	)	
State of South Carolina,	)	
	)	
Respondent.	)	

The Respondent, making its Return to the application for post conviction relief (PCR) filed November 26, 2012¹ and amendment filed May 13, 2013², would respectfully show this Court:

I.

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Lancaster County Clerk of Court. The Applicant was indicted at the February 2010 term of the Lancaster County Grand Jury for shoplifting, third offense (2010-GS-29-0262). The Applicant was represented by Mark Grier, Esquire. On July 29, 2010, the Applicant proceeded to jury trial. The jury returned a verdict of guilty for shoplifting, third offense. The Applicant was sentenced by the Honorable Paul M. Burch to confinement for a period of ten (10) years for shoplifting, third offense, provided that upon the service of nine (9) years, the balance will be suspended with probation for five (5) years³.

¹ Respondent notes that page 5 of the application was not included in the packet received by Respondent.

² Applicant's amendment is a claim for Default Judgment against the State for failure to file a Return in sixty days.

³ Upon information and belief, Applicant was also charged with and sentenced to a concurrent ninety day sentence for contempt of court on July 29, 2010, following his failure to appear for the first day of his trial.

A timely Notice of Appeal was filed on the Applicant's behalf and an appeal was perfected. The South Carolina Court of Appeals dismissed the appeal. State v. McFarland, Op. No. 2012-UP-586 (filed October 31, 2012). The Remittitur was returned on December 3, 2012.

Attached herewith and incorporated herein are the records of the Lancaster County Clerk of Court regarding the subject conviction(s), the Applicant's records from the South Carolina Department of Corrections, Applicant's appellate records, and the trial transcript. The Respondent reserves the right to amend this Return upon receipt of any relevant materials.

II.

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

- I. Ineffective assistance of counsel, in that;
 - a. Counsel failed to object to trial court's denial of motion for continuance,
 - b. Counsel failed to object to Applicant being tried in his absence,
 - c. Counsel failed to object to excessive sentencing,
 - d. Counsel failed to call as witnesses two witnesses under subpoena,
 - e. Counsel failed to object to hearsay testimony of Officer Funderburk,
 - f. Counsel failed to object to jury charge.

III.

In a post-conviction relief action, the Applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). 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." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. 668. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of plea counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland. Second, counsel's 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." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

The Respondent submits that the Applicant cannot satisfy either requirement of the Strickland test. However, the allegation of ineffective assistance of counsel probably raises questions of fact that the record does not conclusively refute. Accordingly, the Respondent requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

IV.

In response to Applicant's amendment, which Respondent interprets as a Motion for Default Judgment against the State for failure to file a Return within sixty days, Respondent submits that this Motion lacks merit. For an applicant to be granted default judgment in post-conviction relief he must show prejudice from the State's delay in failing to timely answer his Application. See Kneece v. State, 269 S.C. 177, 236 S.E.2d 745 (1977); Herring v. State, 262

S.C. 597, 206 S.E.2d 885 (1974). To show prejudice, an Applicant must show that his application has merit. Herring. Furthermore, compliance with the statutory time limits is discretionary with the trial court. Guinyard v. State, 260 S.C. 220, 195 S.E.2d 392 (1973). Therefore, Respondent submits that this claim should be dismissed because Applicant has failed to demonstrate requisite prejudice or merit.

V.

Each and every allegation contained within the application not hereinbefore expressly admitted, qualified or explained is hereby denied.

VI.

WHEREFORE, having made its Return, the State requests that an evidentiary hearing be held.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Senior Assistant Deputy Attorney General

SUZANNE H. WHITE
Assistant Attorney General

By: Katherine Ratz for an
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
Telephone: (803) 734-3737

June 25, 2013.

STATE OF SOUTH CAROLINA)
COUNTY OF LANCASTER)
Steven B. McFarland, 263704)
Applicant)
State of South Carolina)
Respondent,)

IN THE COMMON PLEAS COURT

DOCKET NO.: 2012-CP-29-1668

AMENDMENT TO
POST CONVICTION RELIEF
APPLICATION

The Applicant through undersigned Counsel wishes to Amend his Application for Post Conviction Relief filed on November 26, 2012 as follows:

Applicant states that the State is currently in "procedural default" by the rules and have waived the original pleadings by not responding in a sixty (60) day time frame as stipulated by Rules 8 cd and 12 cb SCRPC thereby dictating on waiver based on such infraction of Rules and Procedures of Rules and Principles.

RESPECTFULLY SUBMITTED ON BEHALF OF
APPLICANT, Steven B. McFarland



Charles T. Brooks, III
Attorney for Applicant
309 Broad Street
Post office Box 3512
Sumter, South Carolina, 29150
(803) 418-5708

May 9, 2013

FILED
OFFICE OF CLERK
OF COURT
2013 MAY 13 PM 3:49
CLERK OF COURT
LANCASTER, SC

Lancaster County

Jeff Hammond
Clerk of Court

Clerk of Court of Lancaster County
Post Office Box 1809
Lancaster, S.C. 29721

Phone (803) 285-1581
Fax (803) 416-9388

STATE OF SOUTH CAROLINA
COUNTY OF LANCASTER

IN THE COURT OF COMMON PLEAS
6TH JUDICIAL CIRCUIT

Steven B. McFarland #263704

Applicant

CERTIFICATE OF SERVICE

2012-CP-29-1668
CASE# _____

VS

State of South Carolina

Respondent

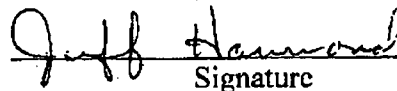
I certify that, on (date) 5/13/2013, I served a copy of the Amendment to Post Conviction Relief Application in this action dated May 13, 2013. By mailing to him/her, at his/her last known address, by depositing it in the U.S. Mail, in an envelope with sufficient postage affixed, addressed as follows:

Charles T. Brooks
309 Broad St.
PO Box 3512
Sumter, SC 29150

Suzanne White
PO Box 11549
Columbia, SC 29211
Via email at swhite@scag.gov

5/13/2013

Date


Signature

STATE OF SOUTH CAROLINA
COUNTY OF LANCASTER

Steven B. McFarland, 263704

Applicant

State of South Carolina

Respondent,

IN THE COMMON PLEAS COURT

DOCKET NO.: 2012-CP-29466

AMENDMENT TO
POST CONVICTION RELIEF
APPLICATION

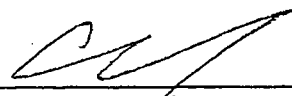
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CLERK OF COURT
LANCASTER, SC

The Applicant through undersigned Counsel wishes to Amend his Application
for Post Conviction Relief filed on November 26, 2012 as follows:

SEE ATTACHED PAGES 1-4

RESPECTFULLY SUBMITTED ON BEHALF OF

APPLICANT, Steven B. McFarland



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June 12, 2013

REQUESTED ARGUABLE P C R ISSUE

The Trial Court Erred And Abused Its Discretion In Failing To Grant A Reasonable Continuance To Allow The Defendant To Secure A Exculpatory Witness Necessary To Safeguard And Assure His Compulsory Process And Constitutional Right To A Fair Trial, And To Be Present At Most Critical Parts Of His Trial As Was Constitutionally Entitled.

- Tr.p.3. Trial Counsel, Mr. Grier (Public Defender) indicated that he had had multiple conversations with the Defendant (McFarland), that he had been "cooperative at every other occasion ... in showing up [for court]". And that the Defendant had been there [in the Courtroom] that morning where "they discussed the potential for another witness and asked him [the Defendant] if he was able to procure that witness that he would need to that would be helpful to his case...."

- Trial Counsel further stated before the Court that McFarland (Defendant) indicated in his contact subsequent thereto - shortly before announcement of the tentative 2:00 pm probability of McFarland's case being called to be heard in Court - that he had found the witness and that he was on his way to Court. Counsel indicated that his client wasn't there, that he didn't know if his client was in an accident or whatever; But that it was his [the Defendant's] first time ever not showing up. Nonetheless, moving for a continuance "at least until the next morning" as it would be inherently prejudicial to the Defendant. (See Tr. 3-4) Also admitted by the prosecution. (See Tr. 4, l. 5-9).

- Trial Counsel also revealed and argued that he had tried to call the numbers he had in order to reach the Defendant using the numbers that he and his office had been given by the Defendant (Tr. 3, l. 9-19), and also communicated that his communication with the Defendant was limited. Inasmuch as his Office had numbers to reach McFarland (Defendant), but he believed one of them he called was the cellphone of another individual where he (Counsel) spoke to a Sharon and didn't get the last name. And, at another number, he didn't get an answer; and another number he tried clearly wasn't the Defendant's number. Counsel indicated that he wasn't sure whether the Defendant had a cellphone. (Tr. 4, l. 17-5, l. 3).

The Defendant's contact with Mr. Grier, his calling in to the Public Defender's Office to indicate that he had found the witness and that he was on his way to the Courtroom with that Witness; and the voluntary relinquishment of different numbers or avenues in which to locate him of people he knew and places he frequented if he could not be located, and his several appearances to court without incident even when his case could have been called to trial - even on the morning in question -, coupled with his active role in pursuing evidence and witnesses in his case to prove that he was innocent clearly were not indicative of signs of conduct befitting of anyone (particularly a Defendant) intent on absconded or having "flown the coup" (See Tr. 5, l. 4-11).

- The Motion for CONTINUANCE until the following morning was denied. Tr. 5, l. 4-21. With No objection

Prejudicial Points To Expound On (without imputation of Legal Authority)

1. It is axiomatic that a Defendant has a substantial, protected U.S. and S.C. Constitutional Right to be present at every critical stage of the proceedings. Especially when he is facing an extensive incarcerative sentence on a third or subsequent offense of a criminal charge. The substantive, protected rights implicated abridged the Defendant's 6th Amendment constitutional right to be present and participate in the critical process of selecting a jury of his peers. And, likewise, extends to being present and actually participating in confronting, and facing (or the cross-examination as the Courts has recognized) of his accuser guaranteed by the U.S. Constitutions 6th Amendment, S.C. Const. Art. _____ § _____, and clearly established precedent law and Due Process/Equal Protection.

Here the testifying and accusing Officer (Mr. Ricky Funderpurke) testified that the Defendant made statements or extra-judicial comments [statements outside of court] before the jury when the Defendant was prohibited from actively participating and helping devise rigorous or vigorous cross-examination and legal challenges to combat (or refute) such testimony without having been present to assist his attorney. Or even hear of such testimony, that never appeared in the testifying officials Incident or Police Report on the case. Tr. 28, l. 6-25; Tr. 32, l. 14-23. Legal challenges which prejudicially affected the jury in a case that virtually hinged upon speculation regarding absent videotape footage from Wal-Mart of the incident; and most importantly, the credibility or successful believability of the testifying Officer or the Witness brought to Court to testify against her own interest by the Defendant McFarland.

The out-of-court and damaging statements testified by the Officer as having been originated from the Defendant, alleging a on-the-scene response of it being "hard times" as a result of his apprehension for the alleged shoplifting of Wal-Mart food merchandise, had no other effect other than to be inculpatory in nature and design before the jury in accepting culpability. And, the additional purported statement or comment testified before the jury by the Officer - unchallenged - that the Defendant responded: "That's my girlfriend, she had nothing to do with this" were both inherently prejudicial to be allowed before the jury uncontested and absent vigorous cross-examination. And both remained hallmark challenges and prime candidates for a Jackson v. Denno, hearing. And qualifiable for a determination under the Illinois v. Gates test of whether the statements originated from the Defendant, and whether they were Constitutionally Voluntary. All viable, plausible, and serious challenges left untested and without challenge and proper charge before the jury and jury instruction. And, most particularly, left without the vigorous cross-examination it necessitated. Chiefly, because the Defendant was not present to confront his accuser regarding this testimony to assist his Counsel. And the litany of authority on the issue all agree that the Sixth Amendment guarantee to confront ones accuser, is the right to Cross-Examination and to Present A Defense protected by the Due Process and Equal Protection Clause of the 14th Amendment.

2. Indeed, the most essential and substantial rights guaranteed - the rights to be present at all critical stages of the proceedings, to confront ones accuser (or right to meaningful, particularized, adversarial cross-examination); the right to have Compulsory Process for securing a favorable, exculpatory witness even if you are indigent, have a Public Defender and must pursue or seek to procure a witness on your own without the funds to hire an investigator or afford a cellphone; And compel the witness to court. And the essential right to a fair trial under the S.C. Constitution and 14th Amendment of the U.S. Constitution, most certainly deserved the utmost consideration of caution and particular thought and consideration to the totality of the circumstances and balancing of the interests of safeguarding those substantial rights with the details of the request for Continuance. And, furthermore, necessitated considerable caution from deprivation that a continuance of a mere eighteen (18) hours would have afforded, as evidenced in the case at bar. That being, until the next morning of court.

Particularly when:

1. The jury had not been selected, nor even sworn, and the motion for continuance was made in chambers (Tr.5, 1.4-6, 1.9);
2. The Defendant's rather lengthy record detailed absolutely no indication or offenses remotely resembling absconding, fleeing, or failure to appear--aside from the current resisting arrest he had yet to be convicted for arising from the pendant case (Tr.93, 1.12-94, 1.12);
3. The Defendant was represented by the Lancaster County Public Defenders Office where he had made several contacts with his Attorney, successfully kept several roll-call appointments and appearances to court on his case; and actively participated with his Public Defender (Mr. Grier) in consultation on trial tactics, procedures, and gathering witnesses and evidence;
4. The Defendant was released upon posting bail on the offense and remained free and in contact with his Public Defender and successful scheduled appearances for months after posting bail before his case was called, without incident; and
5. Essentially, the next morning of July 29, 2010 at 10:00am the Defendant did show up, and was present, after being notified that his trial had already begun, Tr.48, 1.23-50, 1.15 where he did successfully locate, procure and brought that intended witness with him to Court who testified to exculpatory information. Tr. 50; 1.19- 55, 1. 1 and Tr. 60, 1.22-61, 1.3. All within the knowledge of the trial judge to whom the Continuance motion was presented.

The infringement or violation of the Defendant's United States and South Carolina Constitutional rights - and the trial judges error in denying the continuance in order to safeguard them - was exacerbated when the Defendant was not present to assist his counsel with the particularized, vigorous cross-examination of the testifying Officer Funderburke about his Police Incident report and question him regarding the omission of any information of the way he was handled and hand broken during the arrest. Apart from the language which tended to purportedly bestow the indication that the Defendant was concerned only with his own welfare when being placed in cuffs due to a pre-existing hand injury.

Without such particularized cross-examination, it appeared to a reasonably thinking jury to only have originated from Cynthia Gaston, the only exculpatory and Defense witness brought in by the Defendant (without a video surveillance tape for which to corroborate), and also the Defendant's Ex-Girlfriend. A reasonable jury most probably viewed this witness and her testimony in this respect as a attempt to take the blame for her Ex in order to spare him of criminal liability or culpability, or to endue the matter with some sympathy in hopes to regain the Defendants favor. See Tr. 59, 1.23 - 60, 1.21). Cythia Gaston did testify that she and the Defendant (Steve McFarland) "quit talking after that." Tr. 70, 1.23-71, 1.5.

The Defendant explained that when he reported to Court the previous day, the court was conducting a unrelated jury trial. Therefore, he couldn't leave the courtroom, and it was 12:00 (noon) that day ~~before~~ he could talk with his attorney (Public Defender Mr. Grier) to find out that he would be tried that day. Tr. 50, 1. 16. And explained that he had repeatedly requested the Wal-Mart video that would show his actions negating a shoplifting. But that he never saw that, so he went to pursue and secure the witness and bring her to court himself. Tr. 50, 1.20-25.

Defendant further, and plausibly, indicated before the Court that:

DEFENDANT (McFarland): "...I brought them to court myself today and that's what took--sir, that was the only thing [defense] that I had, I have no driver's license.

THE COURT: Sir, you called in and said you were on the way from Great Falls.

DEFENDANT (McFarland): I was on the way. I was waiting on my witness, Your Honor. I was waiting on the witness to get here and my witness was going to bring me in.

THE COURT: You could have called.

THE DEFENDANT (McFarland): I did call, Your Honor.

THE COURT: You inconvenienced the Court and all of this court staff. 90 days. All right, are y'all ready to go forward?"

(Tr. 50, 1.25 - 51, 1. 11)

The fact that the Defendant "called in" to his attorney's Office had already been recognized and remained undisputed by trial counsel (Public Defender) and the trial judge in previous comments on the issue outlined, supra.

STATE OF SOUTH CAROLINA)

IN THE COMMON PLEAS COURT)

COUNTY OF LANCASTER)

DOCKET NO.: 2012-CP-29-1668)

Steven B. McFarland, 263704)

Applicant)

AMENDMENT TO
POST CONVICTION RELIEF
APPLICATION)

State of South Carolina)

Respondent,)

FILED
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CLERK OF COURT
LANCASTER, SC

The Applicant through undersigned Counsel, in response to the Attorney General's Return to PCR Application that was filed less than forty-five (45) days of hearing, wishes to add the following amendment to PCR application:

Ineffective Assistance of Counsel

Mark Grier had in his possession facts of false statement included by affiant that was before the Grand Jury that was true billed. In *Jerome Franks v State of Delaware*, No. 77-5176, Delaware Supreme Court 373 A2d 578 the defendant makes substantial preliminary showing that a false statement knowingly and intentionally or with reckless disregard for the truth was included by affiant and affidavit and if allegedly false statement is necessary to the finding of probable cause, Fourth Amendment requires that a hearing be held at defendant's request.

Applicant requests that the Honorable Judge Newman hear this issue on the week of August 5, 2013.

RESPECTFULLY SUBMITTED ON BEHALF OF

APPLICANT, Steven B. McFarland



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July 15, 2013

1 STATE OF SOUTH CAROLINA
2 COURT OF GENERAL SESSIONS
3 COUNTY OF LANCASTER
4 2012-CP-29-01668
5

6 Steve McFarland

7 vs.

8 State of South Carolina
9
10

11 Lancaster, South Carolina

12 August 5, 2013

13 Before the Honorable Clifton Newman
14

15 APPEARANCES

16 For the State: Suzanne White

17 For the Applicant: Charles Brooks
18

19 Reported by: Michael C. Watkins

20 Official Court Reporter
21
22
23
24
25

1	Steve McFarland:	4
2	Mark Grier:	34
3	Certificate:	49

4

5

NO EXHIBITS

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1 MS. WHITE: We're calling the case of Steven McFarland
2 versus the State, it's case number 2012-CP-29-1668. He is
3 represented today by Mr. Charles Brooks. Mr. McFarland was
4 convicted July 29, 2010 of shoplifting third or subsequent,
5 received a sentence of ten years suspended to nine years and
6 five years of probation. He was represented at the trial by
7 Mr. Mark Grier. He's alleged various claims of ineffective
8 assistance of counsel. And Your Honor should have copies, I
9 believe he filed two recent amendments that were in there as
10 well. Counsel failed to object to the Court's denial of a
11 continuance, failed to object to the applicant being tried
12 in his absence, failed to object to excessive sentencing,
13 failed to call two witnesses that were under subpoena,
14 failed to object to the hearsay testimony of Officer
15 Funderburke, failed to object to the jury charge, and then I
16 believe the amendments reference an issue with the grand
17 jury documents. So I will turn it over to Mr. Brooks at
18 this time, Your Honor.

19 THE COURT: All right. Mr. Brooks?

20 MR. BROOKS: May it please the Court, Judge? We're
21 ready to begin, I will go ahead and call Mr. McFarland to
22 the stand.

23 THE COURT: You may come forward, sir.

24 MR. BROOKS: Ready, Judge?

25 THE COURT: Yes, sir.

TESTIMONY OF STEVE MCFARLAND

1 The witness, STEVE MCFARLAND, was first duly
2 sworn and testified as follows, on:

3 DIRECT EXAMINATION

4 BY MR. BROOKS:

5 Q. Mr. McFarland, who was your lawyer?

6 A. Mr. Grier was in the courtroom, sir, he was my lawyer,
7 I think.

8 Q. And he was court appointed to represent you?

9 A. Yes, sir.

10 Q. Now, I'm going to ask you a couple of housekeeping
11 questions. These are some things that you and I discussed
12 that we need to go ahead and put them on the record.

13 A. Yes, sir.

14 Q. Now, you've basically got a year and a half left to do;
15 is that correct?

16 A. That's exactly right, sir, and five years of probation,
17 which will be a total of six and a half years left.

18 Q. And you understand from the course of my conversations
19 with you that if Judge Newman grants you your
20 post-conviction relief with the right of the State to appeal
21 that you probably more than likely would not get your
22 retrial until way after you are out on the street.

23 A. Yes, sir. And I think my answer to that was if a
24 injustice is done it don't matter when it's done, let's get
25 it on the record today.

TESTIMONY OF STEVE MCFARLAND

- 1 Q. I've got you, just bear with me.
- 2 A. All right.
- 3 Q. You understand that and it is still your desire to go
4 forward and ask for your PCR; is that correct?
- 5 A. Yes, sir.
- 6 Q. Now, in this matter you were found guilty as a result
7 of a shoplifting trial in your absence; is that correct?
- 8 A. Well, it started in my absence. I was told by my
9 attorney to be there at 9:00 the next morning, I get there
10 at 9:00 the next morning and the State has already closed.
11 They conveniently closed after they started my trial at 3:15
12 in the evening and it was over with at 5:00.
- 13 Q. So they had started your case 3:15 the preceding day.
- 14 A. The preceding day. They picked the jurors, you know,
15 after they found out everybody was in the retail business,
16 because that's not one of my issues so I'm not going to
17 speak on that.
- 18 Q. I understand.
- 19 A. After they found out everybody that was in the retail
20 business, they elaborated on that real hard, sir.
- 21 Q. Okay.
- 22 A. And then that left an hour and 15 minutes, that's for
23 the jury selection and the State to produce their two
24 witnesses against me and for them to close.
- 25 Q. Okay. Now, during the time of the testimony being

TESTIMONY OF STEVE MCFARLAND

1 taken you weren't there but you had the opportunity to
2 review your transcript; is that correct?

3 A. Yes, sir.

4 Q. And that's part -- in your review that's how you came
5 up with some of the allegations in your PCR; is that
6 correct?

7 A. That's how I come up with all of them.

8 THE APPLICANT: If it please the Court if you will hold
9 on one second. My files got messed up. Can I stand one
10 second to get my file?

11 THE COURT: Yes, sir.

12 THE APPLICANT: Thank you, sir.

13 A. You're probably familiar with the case of Cole versus
14 Payton (phonetically)?

15 Q. Yes, sir.

16 A. And in that case it tells you about how nine out of ten
17 defendants after they go to court they never realize their
18 rights is violated until after their appeal, and we do have
19 an appeals ruling on this today to be presented to the
20 Court, you know. Page five somehow or another mysteriously
21 got left out of my PCR application and that's the one where
22 it says I believe on question 18 was anything ruled on in
23 another court, all right, appeals court that I've already
24 went through and nothing was preserved for appealable issue,
25 all three of four merits was not preserved for appealable

TESTIMONY OF STEVE MCFARLAND

1 issue because nobody objected. That's going to be one of my
2 issues as we go further in the court.

3 Q. Let me ask you this, Mr. McFarland --

4 A. So other words the answer to your question, I did not
5 know my rights was violated, I did not have no knowledge of
6 the law. I relied on an attorney.

7 Q. Okay. I've got you there. Now, after looking at the
8 transcript you told me you had an issue with the witness
9 that testified; is that correct?

10 A. Yes, sir.

11 Q. What was the issue?

12 A. Well, the issue with the witness that testified wasn't
13 half as bad as the issue I got with the attorney that let
14 him testify.

15 Q. We're coming to that, we've just got to set some
16 background.

17 A. Well, when you sit up in the courtroom and you've got a
18 man with hearsay testimony -- I think the definition of
19 hearsay testimony is that it's not hearsay testimony unless
20 it's used to prove a fact in the case to prove the case, and
21 in my case all the evidence comes from the same chair that
22 I'm sitting in that I never saw. This man testified that
23 the notorious shoplifter was accused, myself, that after I
24 was arrested he says, "Times is hard, that's why he
25 shoplifted," uncontested, not objected to by my attorney.

TESTIMONY OF STEVE MCFARLAND

1 That's one thing. The second thing, "Oh, that's my
2 girlfriend, she had nothing to do with it." No Jackson
3 versus Denno, no test whatsoever to see if the defendant
4 said that, the one that was tried in his absence.

5 Q. So basically, Mr. McFarland, you're saying your trial
6 lawyer never tried to challenge the admissibility of these
7 statements; is that correct?

8 A. Exactly right. That's one issue, we have got about
9 nine more to go now.

10 Q. Now, if these statements had been challenged and
11 perhaps thrown out, do you think that would have changed the
12 outcome of your case?

13 A. I think it would have changed the credibility of only
14 the officer that I was prosecuted, I was convicted and found
15 guilty for shoplifting. He was the onliest one that seen
16 anything.

17 Q. And the officer who supposedly seen everything, was he
18 the one that testified?

19 A. Yes, sir.

20 Q. Okay. Go ahead.

21 A. And also, you know, I mean, I've been around a few
22 courts in my life somehow or another --

23 Q. Yes, sir.

24 A. -- and when you've got an on-the-scene officer, this
25 man actually walks in the door and sees this shoplifting

TESTIMONY OF STEVE MCFARLAND

1 going on, I believe he states something like, "Well, they
2 had a buggy and they pushed it up to the door, and then
3 after he went out the first door then shoplifters take that
4 stuff out of the buggy and put it on their person to walk to
5 the car with it." I don't know how long that man had been
6 shoplifting but that don't happen, it ain't no way. The
7 stuff was already stole, why don't you take that buggy and
8 push it on to the car? It would have sounded a lot better
9 if he would have said buggy ran hot or had a flat tire or
10 something, some reason they had to get the stuff out of the
11 buggy. But none of that is contested whatsoever. They just
12 out here in the breezeway in front of God and everybody and
13 the cameras and decide to take it out of the buggy and put
14 it in this man here and let him walk on out there to the
15 car. Oh, it was raining, I guess they didn't want to get it
16 wet, something, I know he's got a logical explanation for
17 that.

18 Q. Now, let's go through your other issues that you wanted
19 to raise.

20 A. All right. Well, you want the major ones or minor ones
21 or do you want to put it altogether in one shooting match?

22 Q. This is your day to ask for your PCR.

23 A. My day in court? Well, you would like to enter some
24 stuff into evidence too, wouldn't you?

25 Q. Whatever you want to do, you are here to testify about

TESTIMONY OF STEVE MCFARLAND

1 your allegations. I think it's easier for the Court to
2 listen to you and determine whether or not you should be
3 granted a new trial like we discussed.

4 A. All right. Well, yeah. One of them is the denial of
5 the motion for a continuance for my attorney, Mr. Grier
6 right there. He did ask for a continuance but when the
7 Judge denied it and didn't make a finding of record -- a
8 finding of fact on the record that I had a notice to be
9 present, he didn't make a finding on the record that I was
10 to be tried in my absence. He did not put a bailiff on the
11 stand and say he announced my name three or four times
12 throughout the courtroom. He didn't make no finding
13 whatsoever. Matter of fact if the State would like to hear
14 the Judge's --

15 Q. The Court has a copy of the transcript.

16 A. Everybody in here probably needs to hear it. If they
17 could do this thing like who wants to be a millionaire and
18 pull the jury is out there -- pull the audience will be fine
19 with me.

20 Q. So he did not ask for a continuance. He tried to ask
21 for a continuance but did not put the issue on the record
22 about whether or not you had been called by a bailiff or had
23 notice to be there.

24 A. He did not object to the denial of a continuance and
25 make the Judge specifically rule.

TESTIMONY OF STEVE MCFARLAND

1 Q. I got that. What's the next issue?

2 A. The next issue is actually being tried in my absence.

3 The 6th Amendment guarantees you the right -- you've got

4 seven amendment rights, and it's a constitutional -- I don't

5 think I have to read them for y'all, but just for the record

6 the 6th Amendment of the U.S. Constitution affords criminal

7 defendants seven discreet personal liberties. The right to

8 a speedy trial, I got that, there's no problem with that

9 one. But the right to a public trial, the right to a

10 impartial jury, that's questionable. The right to be

11 informed of pending charges. Now, listen to this one,

12 number five, the right to confront and to cross examine

13 adverse witness. The right to compel favorable witnesses to

14 testify at trial through subpoena. I wonder if that rings a

15 bell. And the power to the judiciary and the right to legal

16 counsel. I believe that's effective legal counsel.

17 Q. Now, Mr. McFarland, you talked about one of those

18 issues being favorable witnesses. Were there witnesses that

19 you wanted to come and testify?

20 A. Just two that was under subpoena that -- may I stand

21 up?

22 THE COURT: Yes, sir.

23 THE APPLICANT: I'm sorry, I'm not trying to disrupt

24 the Court, sir.

25 THE COURT: Just try when you stand up not to hit that

TESTIMONY OF STEVE MCFARLAND

1 mic. because it makes that noise.

2 A. The last thing that was said in the courtroom --

3 THE APPLICANT: Can I stand up, sir?

4 THE COURT: No, sir, sit down when you testify.

5 THE APPLICANT: Your Honor, I had this in a little
6 better shape and the county took all of my staples out and
7 that's why it took so long.

8 A. Well, on the 28th Mr. Grier -- last day of the trial
9 Mr. Grier said -- he said -- Mr. Grier, "Judge, I do
10 intend -- I've got Mr. Allen, I've got Mr. Allen under
11 subpoena. I told him I would give him a notice. I would
12 like to have the opportunity to call him in the morning.
13 It's 5:00. Witnesses who were needed to get called today --
14 personal reasons" -- hear that, personal reasons -- "have
15 been called. I would like to have the opportunity to call
16 him in the morning." For personal reasons the two people
17 that only testified against me had been called today. I
18 would sure like to have the explanation of them personal
19 reasons of me getting somebody to testify in my absence. I
20 could not confront -- cross or help cross examine or refute
21 hearsay testimony. I mean, "Just for personal reasons they
22 have been called. I would like to call Mr. Allen in the
23 morning." Mr. Allen is with Wal-Mart. Mr. Allen is the
24 gentleman that is over the surveillance. And guess what day
25 he was subpoenaed on?

TESTIMONY OF STEVE MCFARLAND

1 Q. What day was that?

2 A. The reason the Judge denied the continuance until the
3 next morning was because the State claimed -- you want the
4 trial script page of that or have you got it?

5 Q. Just go ahead.

6 A. The transcript says that we've been on notice for two
7 days. In your subpoena right here -- Mr. Grier, do you know
8 what day it's dated? Mr. Grier, do you want to tell them,
9 or is that --

10 Q. No, you testify.

11 A. July 28th, the same day as my trial.

12 Q. Okay.

13 A. They didn't have no notice, they didn't appear in court
14 and they didn't get found in contempt, but that was my
15 witnesses. Picture that. How did that happen?

16 Q. What did you expect them to testify to favorably for
17 you?

18 A. I expected -- Wal-Mart has got 24 surveillance, they've
19 got every kind of case -- state of the art cameras. I
20 expected them to bring their camera in there and show this
21 crime, them being committed. You know, the one where the
22 buggy ran hot and they had to unload it and run to the car?
23 They had all of it on tape, they had every tape -- they've
24 got everything but the State failed to get the tape. And
25 Mr. Grier, speaking of the tape, the transcript reveals that

TESTIMONY OF STEVE MCFARLAND

1 Mr. Cook, the solicitor, the one he works for or ever who
2 because that's the he did -- he did his investigator for,
3 Mr. Cook asked him to try to retrieve the tape, they
4 couldn't get it 30 days prior to my trial. It's undisputed
5 in the record. My defense was the videotape. You know when
6 I was told about the videotape?

7 Q. When is that?

8 A. 12:00 the day of my trial when I was sent after the
9 witness. Because they had no video I go to get the witness,
10 hey, my trial starts while I'm gone at 3:15 in the evening
11 and I'm found guilty. The State has done closed at 5:00.
12 They've got 17 -- how many pages of jury -- qualifying the
13 jurors -- about 15 pages of qualifying the jurors and just a
14 few pages of testimony and the defense closed. Can you
15 picture that?

16 Q. Let me ask you this: What other issues do you need to
17 raise?

18 A. The trial in absence and the continuance.

19 Q. We've covered that.

20 A. And I also have appeals court ruling on that where them
21 three issues were brought up in appeals court, and after two
22 and a half years they determined that it was not preserved
23 for appealable issue by the defense. I guess I should have
24 called in and objected and told them I wasn't coming, but my
25 defense attorney never got around to that.

TESTIMONY OF STEVE MCFARLAND

1 Q. I've got that. What other issue do you have to raise?

2 A. The excessive sentence. Sir, I am no rocket scientist,
3 they qualified all of this in the thing there, said that I
4 had at best an 11th grade education. This Judge on a zero
5 to 10 sentenced me to ten years, suspended to nine and five
6 years of probation. I'm not a rocket scientist, but nine
7 and five, that ain't no ten.

8 Q. I've got you.

9 A. But we didn't get no objection on that neither that was
10 right down the guidelines, Mr. Grier. Why didn't you --

11 Q. He'll get a chance to testify, this is your chance to
12 testify.

13 A. Then failed to call two witnesses, we've done covered
14 that one.

15 Q. We've covered that one.

16 A. But the third witness that was failed to call was the
17 arresting officer, Mr. Funderburke, guess who was with him?
18 When the witness, this notorious shoplifter in Wal-Mart,
19 guess who was in the store with him.

20 Q. Who was that?

21 A. That was his superior officer, Lieutenant Walker was
22 with him in the store according to the affidavit, you know.

23 Q. Right.

24 A. And based on the following facts of the affidavit. But
25 did you know that superior officer, his word must not have

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1 been good because they would not call that man to court,
2 they would not put that man on the stand to testify. My
3 attorney there, it was brought to his attention -- two
4 things was brought to his attention, the video and the
5 warrant. The warrant stated, "Based on the following facts
6 Lieutenant Walker and Officer Funderburke" -- well, let me
7 find that right here, I don't want to misquote nothing and
8 get out of line here. "I further state there is probable
9 cause to believe the defendant named above did commit the
10 crime that is set forth, that the probable cause is based on
11 the following facts: One, Steven Barry McFarland did shop
12 at Wal-Mart." Not shop, I think it's shoplift, ain't it --
13 "shoplift at Wal-Mart located at 805 Highway 9 Bypass on
14 11/20/09. Officer Funderburke and Walker were in the store
15 on the above incident and location and witnessed white
16 female placing unknown items underneath the jacket of the
17 while male suspect, McFarland, who appeared to be acting in
18 a nervous manner. Officers ordered both suspects to stop,
19 both suspects ignored officers and -- officers -- ignored
20 the officers and left the store with the hidden merchandise.
21 McFarland was apprehended and arrested, but the female was
22 able to flee the scene. The stolen merchandise was valued
23 at \$220.71. McFarland with more than three property crime
24 convictions on his criminal history. This incident was
25 investigated and reported by, again, Officer Funderburke and

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1 Lieutenant Walker." Do you know what I would like to see
2 them prove right here just to speculate on today just to
3 show? I would like for them to show how Officer Funderburke
4 and Lieutenant Walker observed this in this store, but yet
5 225-pound me was apprehended by the rookie cop, but
6 Lieutenant Walker let 120-pound female get away and they
7 were standing between the doorway and the parking lot. How
8 does that happen?

9 Q. I've got you.

10 A. There has got to be a fly in the milk there somewhere.
11 That has not been discussed yet in the trial.

12 Q. All right. And obviously you feel that that is an
13 issue that your lawyer should have raised.

14 A. That's going to be an issue -- wait a minute, let me
15 get this thing back in order here, you're getting a little
16 bit ahead of me. This big old long hour and 15 minute trial
17 and all of these issues, it's hard to keep up with. We done
18 went through the hearsay testimony, I'll put it over here.

19 Q. I believe we've covered just about them all.

20 A. No, sir. We have got jury charge to go.

21 Q. Jury charge.

22 A. We've got jury charge to go. We also got failure to
23 challenge indictment, that's why we're at right now.

24 Q. All right. Let's talk about the failure to challenge
25 the indictment. You felt that --

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1 A. According to Franks versus State there, you're probably
2 familiar with that case?

3 Q. Let me ask you this, Mr. McFarland. What you're saying
4 is your lawyer should have moved to quash the indictment; is
5 that correct?

6 A. Exactly right, sir.

7 Q. And he did not do so.

8 A. Yes, sir. And on this indictment issue, guess what
9 else that was never brought to trial?

10 Q. What was that, Mr. McFarland?

11 A. You are not going to believe this one right here.

12 Every time they questioned the officer, guess what he told
13 them?

14 Q. What did they tell him?

15 A. "Do you mind if I look at my report?"

16 Q. And your lawyer didn't raise any issue about that.

17 A. Not even raise the issue. I ain't even talking about
18 that, sir, he didn't even present it to the Court as
19 evidence in the courtroom. Do you know why he couldn't
20 report it in the courtroom?

21 Q. Why is that, Mr. McFarland?

22 A. We're fixin' to have to tell you right now. "On that
23 above date and time I was on foot patrol --"

24 MS. WHITE: Your Honor, I'm going to object. If he's
25 going to read something into the record I would prefer for

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1 it to be placed in evidence instead of him to be reading
2 documents.

3 THE COURT: The objection is sustained. We don't need
4 you to read us anything that's already before us. You can
5 refer to anything you want to.

6 THE APPLICANT: Your Honor, I didn't know if it was
7 there or not, it was -- somehow or another some of my
8 paperwork got lost that was filed.

9 THE COURT: Proceed.

10 Q. Basically -- and we're just going to shorten this, Mr.
11 McFarland -- what you're saying is your lawyer should have
12 moved to quash the indictment.

13 A. Yes, sir. When the warrant that is the officer's
14 statement, the onliest one that testified against me for the
15 record, the onliest one that testified against me --

16 Q. Timeout, hold on. She's objected to that coming in and
17 the Court has ruled.

18 A. Well, I'm not reading the warrant, sir. I'm saying he
19 failed to introduce the State witness, the onliest one that
20 testified against me, his incident report that is a matter
21 of fact -- I mean, record in this case, he failed to
22 introduce it as evidence. It was used in the courtroom, he
23 called off of it, Mr. Grier questioned him about it and read
24 some of it in the court, but it was never introduced to
25 evidence. And do you know why?

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1 Q. Why is that?

2 A. Because every place that was stipulated in there is I,
3 it's never a we observed, we entered Wal-Mart, none of that.
4 I, I, I. I believe there's about 12 I's in there, no we's.

5 Q. So you felt that was something in there that Mr. Grier
6 should have cross examined and impeached the officer on; is
7 that correct?

8 A. Yes, sir. It discredits the officer's credibility, the
9 onliest officer that I was found guilty by the officer's
10 statement. The onliest thing in the world that they had was
11 a receipt that the woman from Wal-Mart testified and said
12 she made the receipt and also testified she never seen me
13 with a thing.

14 Q. Now, let me ask you this, Mr. McFarland: The next
15 issue -- and I think this is the last issue that you raised
16 about the jury charges; is that correct?

17 A. Yes, sir.

18 Q. And go ahead and tell the Court what your issue is
19 about the jury charges.

20 A. The jury charge. Well, three times in Mr. Grier's
21 closing statement, guess what he used the word as? Officer
22 Funderburke tried to insinuate Mr. McFarland was forming
23 some kind of conspiracy. Then the next word comes out, on
24 down in there, McFarland -- something to do with -- the
25 record is there if you need it -- a conspiracy again. Third

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1 time McFarland was like they were working together for some
2 kind of conspiracy again. The jury charge. The Judge gets
3 up there and charges the jury, charges the jury the
4 shoplifting and reads out the elements of shoplifting. "And
5 I also charge you with hands of one, hands of all in a court
6 of law," and then he gives a murder example of that. And if
7 it please the Court? Now, I don't think it's before the
8 jurors, the record indicates -- and I just happened to run
9 across this and brought it with me -- he also charged the
10 jury with that hands of one, hands of all doctrine and he
11 used a murder example saying if two go in a store to rob a
12 store and one fires the shot and actually kills the clerk,
13 even though there was no intent to go in there and kill
14 nobody, both were guilty of murder because hands of one is
15 the hands of all in a South Carolina court of law.

16 Q. Let me help you out, Mr. McFarland. You think your
17 lawyer should have objected to that because you were the
18 only one that was charged and tried; is that correct?

19 A. I was the onliest one that was charged until the
20 witness that he advised me to bring in that I went out and I
21 missed my first day of trial to get, you know, all hour and
22 15 minutes of my trial, both people that testified for the
23 State testified in my absence while I was gone to get this
24 witness.

25 Q. Okay. Now, Mr. McFarland, I think we have covered all

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1 of your issues here today in your PCR.

2 A. Sir, for the record, you know, this proceeding today,
3 nothing has come up about my appeal that's took two and a
4 half years, nothing has been presented into evidence about
5 the appeal ruling. You also know the 6th Amendment right
6 guarantees me a right to -- got my tongue tied for a minute,
7 can you imagine that -- afforded me assistance of counsel.
8 And in this hearing here, am I afforded the same thing or am
9 I afforded a minimum assistance of counsel? So what I would
10 like to do is make sure that every bit of evidence that's in
11 these folders is like she said, is passed up for evidence.

12 Q. Well, all your amendments you sent to me we filed and
13 the attorney general has a copy as well as the clerk and the
14 Court now has.

15 A. Is the officer's statement, is it turned in?

16 Q. Whatever you sent that's been filed.

17 A. The officer's statement is not sent in. And the last
18 time I checked this thing, they used the Strickland versus
19 Washington and you've got to prove a two-pronged test. You
20 have got to prove in the effective assistance -- you've got
21 ineffective assistance of counsel and you also have to prove
22 prejudice, how the prejudice denied you of a fair trial and
23 how the trial would have had a different outcome, and I'm
24 prepared to do that today if the Lord is willing and the
25 Court allows it.

TESTIMONY OF STEVE MCFARLAND

1 Q. Mr. McFarland, I think we've raised all of the issues
2 and you've elaborated on them.

3 A. But elaboration is nothing without proof, is it? Or
4 are we going to get all of this later in the State's case?

5 Q. You testified about your issues and why they were
6 important and why they impacted the outcome of your case.

7 A. You are my counsel, again. All right. You know this
8 hearing right here is a PCR hearing, what happens after
9 that? If this Honorable Judge Newman was to rule in my
10 favor, what's going to happen? The State is going to appeal
11 it.

12 Q. That's correct.

13 A. If this Honorable Judge Newman rules in the State's
14 favor, what's going to happen?

15 Q. I'll file a notice of intent to appeal for you,
16 Mr. McFarland.

17 A. Either way where is this case going to?

18 Q. It's going to the court of appeals.

19 A. The supreme court, ain't it? And anything that's not
20 in that record here today will not be admissible in court,
21 will it?

22 Q. But you're testifying about all of these things so now
23 it's in the record, Mr. McFarland.

24 A. You don't have to enter none of this stuff, all of this
25 here?

TESTIMONY OF STEVE MCFARLAND

1 Q. All of your amendments we filed, that's in the record.

2 Remember all of the things you sent to me?

3 A. Yeah.

4 Q. Well, I filed them, they've got the clerk of court's
5 stamp on them, that's in the record, that's in the record.

6 All of your testimony here, that's in the record.

7 A. All right. And also in the record on the first three
8 charges right here, the continuance and -- oh man, do you
9 know what you forgot?

10 Q. The transcript from the trial, that's in the record.

11 A. Do you know what you forgot?

12 Q. What did I forget, Mr. McFarland?

13 A. I can't believe you forgot this one, it's just a small
14 matter, about the -- you know, to be able to be tried in
15 your absence and denial of a continuance. Denial of a
16 continuance is only if -- I've got everything right here.

17 Can I read this here for you and get this in the record?

18 The State -- denial of a continuance, what is it --

19 Mr. Grier can probably tell you -- according to State versus

20 Ravenel, and the onliest way you can prove error of law is
21 abuse of discretion. There ain't but one way for me to

22 prove abuse of discretion and it has not been put before

23 this Court today. And would you like to hear that one? I

24 know you're eager to hear it.

25 Q. Go ahead, Mr. McFarland.

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1 A. Well, this one here, the Judge sentenced me to contempt
2 of court and sentenced me to 90 days right there in the
3 courtroom. Can you hold on one minute? I ain't going to be
4 long with you because it ain't took me three years to gather
5 all of this. PCR -- State versus Passmore (phonetically)
6 says that the power to punish for contempt is inherently in
7 all courts is the existence of a central and preservation of
8 the court order, judicial proceedings and enforcement of
9 judgments and orders, rights of the courts and consequently
10 the administration of justice. The determination of
11 contempt resides in the sound discretion of the trial judge.
12 So in other words, you gone have to have something against
13 that sound discretion, wouldn't you, for that to be
14 overturned? I was sentenced to 90 days in the courtroom in
15 front of God and everybody by a bench trial, no warrant, no
16 nothing. Judge Burch was the judge, jury and executioner of
17 the charge. I would have never knowed what offense code I
18 was charged under, but it happens to be on my sentencing
19 sheet. I don't think the State has that. If you would like
20 to have it I would give it to you. 14-5-320 is the charge
21 he used, and it reads, "Contempt of court is a specific
22 criminal offense and a party charged therewith has the same
23 and honorable right to be able in his defense as he would
24 against a charge of murder or any other charge." Do you
25 think they would have a bench trial in front of a judge for

TESTIMONY OF STEVE MCFARLAND

1 a murder trial? But then, you know, they probably would say
2 probably will. But then if you go to this case right here,
3 State versus McKinley, the defendant has not -- let's see, a
4 trial court denial for motion for continuance is not
5 disturbed absent a clear abuse of discretion.

6 Q. Mr. McFarland, let me help you out here. What you're
7 saying is your lawyer did not object to the Court issuing a
8 contempt citation against you in the middle of court?

9 A. He did not even open his mouth from the time the Judge
10 called me up there, the Judge questioned me and then it was
11 like he was not in the courtroom, he didn't get a contempt
12 of the court for not being in the courtroom. The transcript
13 goes blank from the end of the charge of 2008 until 2009
14 until after the judge asks me where I'm at and everything
15 goes undisputed and Mr. Grier, the cat has his tongue or
16 something again, he didn't have nothing to say. But you
17 know what he had to say after that? He did enter a few
18 things in the record. Guess what he entered in the record?
19 "Your Honor, we would have did this yesterday but beings the
20 jurors never left the courtroom I think it would be an
21 aggregate time today." He did the State's job. "I would
22 like to keep the clerk of court from having to be put on the
23 stand," the gentleman that he is, "and let them recognize
24 this is a property crime enhancement." All right. All
25 right. After that then guess what he does then?

TESTIMONY OF STEVE MCFARLAND

1 Q. What's that, Mr. McFarland?

2 A. He gives this powerful direct verdict. Man, I tell
3 you, it will make cold chills go up your back. "Your Honor,
4 I would also like to enter -- I would also like to make a
5 motion for a directed verdict at this time. Your Honor, I'm
6 just making my motion for a directed verdict." Boy that
7 thing was so encouraging, wasn't it? That was the directed
8 verdict. And then -- that's nothing, the third thing he
9 said in the transcript is, "Your Honor, I think it would be
10 the opportune time for you to go over with my client that he
11 has the right to testify or not testify." Then when they
12 get through with this ordeal guess what he says? That's
13 preserved. And just the issue we preserved that I done
14 answered all of them questions up there that I should
15 haven't answered that he was supposed to be representing me
16 on, but he made sure he preserved that, but he did not
17 object to no error of law, and the appeals court has ruled
18 on error of laws and said it was not preserved for
19 appealable issue. And again --

20 Q. And Mr. McFarland, I think you've laid out all of your
21 issues.

22 A. All right. But look a here, do you also have to prove
23 a two-part test today in Strickland versus Washington? How
24 on earth are we going to do this if we don't talk about
25 that? Is the State going to come up here and -- or how are

TESTIMONY OF STEVE MCFARLAND

1 we going to do this?

2 Q. Mr. McFarland, it's our job to ask you questions to lay
3 out your allegations, you have done it in two different
4 ways, everything that you've written that you have sent to
5 me, that is filed, it's in the record, as well as your
6 testimony here about these issues and why they are important
7 and why they had a direct impact on the outcome of your
8 trial.

9 A. All right. Well, Strickland versus --

10 Q. I believe -- hold on -- I believe we have covered all
11 of those issues for the Court.

12 A. Well, look a here, have you got the State's response?
13 Have you read the State's response?

14 THE APPLICANT: Can I ask a question, Your Honor?

15 THE COURT: No, sir.

16 THE APPLICANT: I can't?

17 THE COURT: He has to ask the questions.

18 A. Can you ask the Judge this question?

19 Q. Okay. Let me ask you this, Mr. McFarland: Is there
20 any issue, issue, about Mr. Grier's representation that we
21 have not covered that you have not talked about for the last
22 30 minutes on the stand? I believe that you have.

23 A. Can you answer this question?

24 Q. No, no.

25 A. I believe we have got all of the issue. But the matter

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1 of law, all of these issues is not good if you don't apply
2 law to them. Do have I to argue with my attorney again?

3 Q. Mr. McFarland, it's in the record. The Court
4 understands you're asking for your PCR, your application and
5 your amendments are in the record.

6 A. All right. When I step down, sir, with all due
7 respect, not trying to talk while you talk, this man right
8 here, he has got the opportunity to sit up here and if he
9 can come up with a trial strategy is within the moral --

10 Q. Mr. McFarland, let me explain to you, I'm going to sit
11 down. Do you see this lady right there?

12 A. Yes, sir.

13 Q. She's going to have the opportunity to cross examine
14 you.

15 A. Cross examine who?

16 Q. You?

17 A. Yes, ma'am.

18 Q. Then when she's done then she may call Mr. Grier to the
19 stand and ask him questions. And guess what? I'll cross
20 examine him.

21 A. You will or he will?

22 Q. I will.

23 A. Well, that's where the problem comes in at, that's what
24 he was supposed to do last time when I was afforded
25 effective assistance of counsel, this time I'm only afforded

TESTIMONY OF STEVE MCFARLAND

1 minimum assistance of counsel. We're going to talk about
2 that thing right over there because we've got everything.

3 Q. I believe we have raised all of those issues; is that
4 correct? Okay? All right?

5 A. Yes, sir.

6 Q. All right.

7 MR. BROOKS: No other questions, Judge.

8 THE COURT: All right. Cross examination.

9 MS. WHITE: Thank you, Your Honor.

10 CROSS EXAMINATION

11 BY MS. WHITE:

12 Q. Mr. McFarland, you said that you had been told to come
13 back the next morning at 9:00 a.m. on the day of your trial?

14 A. Yes, sir -- I mean ma'am.

15 Q. Isn't it true that your attorney spoke in front of the
16 Court and indicated that he had told you -- you were there
17 at noon and that he had told you that the jury would be
18 picked and that you should be back by 2:00 p.m.

19 A. Ma'am?

20 Q. I'm going to ask -- I know you talked a lot, I just
21 need yes or no answers.

22 A. Yeah, he told me that. And he also told me at 3:00 to
23 be there at 9:00 the next morning, didn't he? There was two
24 conversations, only one in the record. He needs to talk to
25 you about that one, too.

TESTIMONY OF STEVE MCFARLAND

1 Q. Mr. McFarland, so you were told to be back in the
2 courtroom at 2:00 p.m. Were you back in the courtroom when
3 the jury was struck?

4 A. No, ma'am, I sure wasn't.

5 Q. Thank you. When -- you're testifying that you wanted
6 the video.

7 A. Yes, ma'am.

8 Q. Doesn't it indicate -- didn't the testimony indicate
9 that not only were you found with some of the stolen items
10 on you --

11 A. That was a lie.

12 Q. Mr. McFarland, you need to wait until I'm finished with
13 my question.

14 A. All right.

15 Q. You were found with some of the stolen items on you.

16 A. No. Point blank, no.

17 Q. You were not found with any sausage on you?

18 A. I was found -- not found with any sausage on me. And
19 if you would look at the officer's incident report that's
20 been entered, it's not on there. And if you look at based
21 on the following facts, they've got a row of pennies off of
22 me. Was some pennies stole from Wal-Mart? No. There's no
23 record of nothing, no sausage, no nothing in either one of
24 them. That's why we're in here today. Picture the sausage,
25 and not to talk about --

TESTIMONY OF STEVE MCFARLAND

1 Q. When the officer testified at trial did he testify that
2 he found sausage on you?

3 A. That's another point --

4 Q. Yes or no.

5 A. Yes, in my absence he did. And this man here didn't
6 cross examine him, and it's not in no statement, no nothing.
7 Why do you think we're in here?

8 Q. Now, you also had the manager of the Wal-Mart testify
9 at your trial, is that not right?

10 A. Yes. She testified to everything that she picked up
11 off the ground.

12 Q. And she testified that there was a line of meat, rib
13 roast, that there was bacon, that there was sausage, that
14 there was pecans and there was cheddar cheese all following
15 you as you ran out.

16 A. Following me? You got a way with words. Yeah, she
17 testified to that in my absence, too. And do you know what
18 she also testified to? That she picked it all up. Guess
19 what Officer Funderburke testified to? That he picked it
20 all up and got the service manager. He also testified that
21 it was no witnesses. He also testified he got the customer
22 service manager, the customer service manager testified
23 there wasn't -- the Wal-Mart lady flagged her down, the one
24 that wasn't there and all of this happened in her area that
25 seen nothing? But Officer Funderburke and Lieutenant

TESTIMONY OF STEVE MCFARLAND

1 Walker, they saw everything.

2 Q. Your defense witness was the lady that was with you at
3 the Wal-Mart that did not get arrested; is that correct?

4 A. The lady that was with me? There you go putting words
5 that's not in the transcript, nowhere it says she was with
6 me.

7 Q. Mr. McFarland, did she not testify that she was with
8 you that day?

9 A. She testified that she was with me that day, we were
10 not in the Wal-Mart together, we did not. She also
11 testified that we didn't go into Wal-Mart together. She
12 also testified that I had nothing to do with the shoplifting
13 and the State still used hands of one, hands of all with no
14 objection from Mark Grier.

15 Q. She testified that she was trying to shove items up
16 your jacket, is that not right?

17 A. That's exactly right. And she also testified she did
18 not successfully get nothing on me, didn't she Mark Grier?

19 Q. Mr. McFarland, was she not also subsequently taken into
20 custody following her testimony because of her involvement
21 in this shoplifting?

22 A. Again, Judge Burch, judge, jury and executioner.

23 Q. Is that a yes?

24 A. Yes.

25 Q. Thank you.

TESTIMONY OF MARK GRIER

1 MS. WHITE: Your Honor, I think that's all I have for
2 this witness.

3 THE COURT: Anything further?

4 MR. BROOKS: No other questions.

5 THE COURT: You may step down. Your next witness?

6 MR. BROOKS: Judge, that's the applicant's case.

7 MS. WHITE: Your Honor, the State would call Mark
8 Grier.

9 The witness, MARK GRIER, was first duly sworn
10 and testified as follows:

11 DIRECT EXAMINATION

12 BY MS. WHITE:

13 Q. Would you state your name for the record, please?

14 A. My name is Marion H. Grier Jr., Mark is my nickname.

15 Q. And Mr. Grier, you were appointed to represent Mr.
16 McFarland?

17 A. I was appointed to represent Mr. McFarland.

18 Q. And in what capacity were you employed when you were
19 appointed to represent him?

20 A. Well, I was appointed as a public defender, that was in
21 2010, so that would have been after the statewide system. I
22 was the contract public defender prior to that. I don't
23 know if I was appointed under contract prior to the
24 establishment of the statewide system or not.

25 Q. How many years have you been practicing law in general?

TESTIMONY OF MARK GRIER

1 A. I have been practicing law since 1990.

2 Q. And in that time what percentage has been criminal law?

3 A. This would be a wild speculation, I started -- I worked
4 for four years with George Speedy principally doing criminal
5 work with him, and I would say something in the neighborhood
6 of in private practice probably 30 to 40 percent, and
7 obviously since 2006 when I got the contract it has been
8 95 percent at least. Yeah.

9 Q. Now, had you ever had any contact with Mr. McFarland
10 prior to this case?

11 A. I don't believe so.

12 Q. And did you have a chance to meet with him prior to the
13 trial to discuss any possible defenses, witnesses?

14 A. We met several times. He was always, you know -- as
15 far as I know I don't recall having any difficulties with
16 him showing up, in fact.

17 Q. And specifically he appeared the day of the trial the
18 day the trial was started; is that right?

19 A. He was noticed to be -- he was on the trial list. We
20 met, we had various conversations obviously about his offer
21 and about some other things that Mr. McFarland had asked me
22 to try to negotiate and dealt with those issues prior to
23 that day to try to, you know, either put it off or get a
24 better offer. And on that day most certainly he was told to
25 be there and he was there that morning.

TESTIMONY OF MARK GRIER

1 Q. And jumping back real quick to something, you said
2 about an offer. Was he offered a deal to plead guilty by
3 the State?

4 A. He was.

5 Q. And what was his offer?

6 A. His offer was a five year sentence.

7 Q. And his answer was no to that?

8 A. His answer was no.

9 Q. Now, you said that he was present on the morning of the
10 day his trial was to begin. What conversation did you have
11 with him at the time of a break or anything about returning?

12 A. Well, my notes indicate that we had had some prior
13 conversation about the female that he had -- as a defense it
14 said certainly that she was putting meat on him unbeknownst
15 to him. And, you know, if we were going to trial I thought
16 that was probably somebody we needed to have available,
17 probably the most important witness that he could possibly
18 have, it would be someone that would say that if, in fact,
19 they would have. Of course, we had not found her prior to
20 that.

21 Q. And had that been someone that you had attempted to
22 find?

23 A. Well, I had no information on her whereabouts or
24 anything. Mr. McFarland, as I recall, had said that they
25 had fallen out but that they were in some communication. He

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1 was attempting to get ahold of her.

2 Q. But at that time he had not provided you with an
3 address or phone number.

4 A. No. He said he would find her and speak with her and
5 had not provided me with any contact information.

6 Q. Did you tell Mr. McFarland to reappear at 2:00 p.m.
7 this day?

8 A. I did.

9 Q. And was he present at 2:00 p.m.?

10 A. He was not.

11 Q. Did you -- you made a motion for a continuance, is that
12 not right?

13 A. I did.

14 Q. And that was based on the fact that you felt it was
15 prejudicial for him to be tried in his absence?

16 A. Well, my recollection is that we had had some
17 conversation -- of course, Mr. McFarland was looking for
18 this witness that he felt was critical, and I agreed was
19 critical, and that he was going to find her, but that he
20 would be back. And I asked the Court to continue it to give
21 us the opportunity for my client to find the -- grant a
22 continuance to give us a little bit more opportunity to find
23 a critical witness and for him to be able to be present at
24 the trial.

25 Q. And that was denied by the trial court?

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1 A. It was.

2 Q. Was there anything that he had mentioned to you or
3 anything that you had seen in regards to the indictments
4 that you felt would warrant a motion to quash?

5 A. I don't recall having any conversation about that with
6 Mr. McFarland, if we did I do not recall it. And I don't
7 have any notes indicating we had any conversation about an
8 issue with him and indictments.

9 Q. Apparently from his testimony because there was another
10 officer present with him he seems to be concerned that one
11 officer's affidavit indicates, "I saw this, I saw that." Is
12 that anything that had you known about prior or had you paid
13 particular attention to would have been -- or would have
14 warranted a motion?

15 A. Would having the --

16 Q. The statement just saying, "I saw this and I saw that,"
17 would that have been something that would have triggered do
18 you think a motion to quash an indictment?

19 A. Well, having two officers say they saw it as opposed to
20 one I would think would be an issue that would not be
21 beneficial to him. But given that the testimony at trial
22 was that Mr. Funderburke saw him only, in retrospect that
23 may have had some benefit, but not with the jury. That
24 wouldn't have been a jury issue. I don't -- as far as
25 attempting to quash the indictment in retrospect, which is

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1 all this is from my perspective, I don't think that would
2 have been beneficial. As far as the jury issue there wasn't
3 one.

4 Q. In regards to the videotape, he testified that he
5 wanted the surveillance video and that they were unable to
6 retrieve it, or the State had not gotten it at that point.
7 Was that something that you wanted to have presented at
8 trial?

9 A. Well, you know, be careful what you ask for. But most
10 certainly the fact that it wasn't available was -- just as
11 Mr. McFarland says, you know, they've got video cameras
12 everywhere and if they want a video it appears they always
13 have it available. So from my analysis of that was the
14 absence of it was a pretty powerful argument for the
15 defense. We had attempted to obtain that well in advance of
16 the trial and they had indicated that there just simply
17 wasn't one and they were not going to be able to produce it.
18 I did subpoena two of the personnel that would have been
19 able to just say, no, we don't have a video as well but that
20 was -- there simply wasn't a video that they were going to
21 produce.

22 Q. Overall what was the general defense strategy that you
23 had discussed with Mr. McFarland?

24 A. That they did not have video, that another person was
25 the culprit in the shoplifting and he was simply a

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1 by-standard who became part of the -- wrapped up in
2 something that somebody else was doing, that he was innocent
3 and that there was a mistake and that someone else was
4 trying to evade prosecution and simply sticking the
5 shoplifted items on him.

6 Q. Did the fact that he ran from police, circle the car
7 several times running from the police and had to be tased
8 did that affect his defense?

9 A. Certainly fleeing is not a beneficial fact in terms
10 of -- it doesn't necessarily indicate guilt and I argued
11 that it didn't indicate guilt, but it is another difficult
12 fact about his case that could be argued to demonstrate
13 culpability.

14 Q. And to your understanding Mr. McFarland was not a new
15 person to the judicial system. He had had charges from back
16 in 1987, at least nine prior shopliftings and so on; is that
17 correct?

18 A. He had a very extensive criminal record. But most
19 of -- his criminal record was no physical violence, it was
20 public drunks, some disorderly conducts and I believe, if I
21 recall correctly, 12, 13 or 14 property crimes.

22 MS. WHITE: I think that's all I have at this time,
23 Your Honor.

24 THE COURT: All right. Mr. Brooks?

25 THE APPLICANT: Your Honor, permission to speak, sir?

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1 THE COURT: Yes, sir.

2 THE APPLICANT: Me and Mr. Brooks is not getting
3 together on the cross examining of this witness, there's a
4 few critical questions that need to be asked. I hear the
5 State here --

6 THE COURT: No. I don't need to know the questions,
7 you can confer with Mr. Brooks and then we will proceed.
8 Speak with him, Mr. Brooks.

9 (Break in proceedings.)

10 CROSS EXAMINATION

11 BY MR. BROOKS:

12 Q. Mr. Grier, do you recall how long you had been on
13 Mr. McFarland's case prior to it going to trial?

14 A. No, not specifically. I may have something in the file
15 which would say -- let's see. My first note was March of
16 2010 when the trial was -- March 9th of 2010, which
17 apparently he was not able to make that and he was
18 apparently back the next day, so it was either rescheduled
19 or he didn't show up.

20 Q. So based on your notes you had about three months
21 between the time you were starting to represent him and the
22 time it went to trial, is that fair to say?

23 A. That's the information in my file, yes.

24 Q. And as a part of your representing Mr. McFarland in
25 your duties and your capacity as his court appointed counsel

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1 you did file a Rule 5 in this case; is that correct?

2 A. Yes, I did.

3 Q. And the State turned over the discovery to you?

4 A. Yes, they did, what they had. No video.

5 Q. And did you -- after talking with Mr. McFarland, after
6 talking with Mr. McFarland about the lady, did you perhaps
7 try to hire a private investigator to help track down this
8 lady?

9 A. Did not.

10 Q. And Mr. McFarland had indicated to you in the course of
11 conversations as representing him that this lady may have
12 actually taken the particular items out of the store and
13 that would have been a defense of his; is that correct?

14 A. I believe it would have been.

15 Q. And it's fair to say that you never got that lady to
16 come to court; is that right?

17 A. I did not, did not.

18 Q. And you never, in fact, did talk to that lady; is that
19 correct?

20 A. I talked to her and called her as a witness in the
21 trial, so she came the second day of the trial when he
22 showed up, or perhaps that afternoon. I'm not really sure
23 if he did come in later that day after court was over. I
24 believe it was the next morning that he showed up with her,
25 and we talked before putting her up, yes.

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1 Q. And did she provide an adequate defense for him?

2 A. Apparently not. But, you know, we -- it was the
3 defense that we had and the defense that Mr. McFarland chose
4 to, you know, go with after all of our conversations about
5 what probably made sense and what didn't.

6 Q. Also you knew about potential videos at the store
7 because of the heavy surveillance; is that correct?

8 A. I did, yes.

9 Q. Do you think it would have been prudent to have an
10 investigator go and check those out for you?

11 A. You know, not really. I don't know that the
12 investigator could have done any more than I did or the
13 solicitor did, I just don't. Either -- if we would have had
14 any evidence of fraud or the fact that they were withholding
15 evidence that would have been some other issue, but I don't
16 believe an investigator could have really done anything
17 about it other than what I attempted to do.

18 Q. And you didn't go to the store either, did you?

19 A. No. Not for the specific purpose of asking -- I've
20 been to the store most certainly, and, in fact, went -- you
21 know, had been there and thought about the dynamics of this
22 case, but not for the purpose of trying to procure a video.

23 Q. Now, Mr. McFarland was out on bond; is that correct?

24 A. He was.

25 Q. And you testified that you told him to come back at

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1 2:00 o'clock that day when the trial had started.

2 A. Yes.

3 Q. And did you tell him that the trial was going to start
4 that afternoon?

5 A. I was told by the solicitor that the jury is coming in
6 this afternoon and we were going forward with Steven
7 McFarland. And I told Mr. McFarland the information that I
8 had, not that it was an absolute certainty but that I was
9 being -- just as you never know what the State is going
10 to do what they say they're going to do under the
11 circumstances, it's not an absolute certainty. But I told
12 him he needed to be there, that the trial was likely to
13 start at 2:00.

14 Q. And the time that you had this conversation would have
15 been around noon that day; is that correct?

16 A. I'm not really certain about when that time was, all I
17 know it was in the morning.

18 Q. In the morning?

19 A. Yes. I believe it would have been in the a.m. but I
20 don't know.

21 Q. Do you recall if you had, in fact, relayed that to him
22 that that case was coming up per the solicitor that
23 afternoon so that he would know he needed to be in court?

24 A. I have certainty of that, yes.

25 Q. Officer Funderburke testified.

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1 A. He did.

2 Q. Did you raise any hearsay objections in the course of
3 his testimony?

4 A. Well, my notes indicate that a Jackson versus Denno,
5 and I don't know if -- I simply had a note of Jackson versus
6 Denno prior to the commencement of his testimony, so --

7 Q. And, of course, it's been a little over three years,
8 and so you would pretty much rely on the transcript. You
9 have no -- you have no reason to challenge what's left in
10 the transcript.

11 A. I don't have anything other than a note. I don't know
12 if that was just my thought on what to do or what I did but
13 I apparently didn't if the transcript is complete, and I
14 assume that it is.

15 Q. You did not challenge the indictment; is that correct?

16 A. I did not.

17 Q. And at the end Mr. McFarland was cited for contempt, do
18 you recall that?

19 A. I do.

20 Q. Did you raise any objection to that?

21 A. I don't recall, no. I did not as far as the transcript
22 goes, but I don't recall raising one either.

23 Q. Mr. Grier, can you tell me what that is?

24 A. It's a discovery Rule 5 Brady what we call.

25 Q. Can you read line one?

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1 A. Paragraph?

2 Q. Right. Does that pertain to any statements given by
3 the defendant?

4 A. It does.

5 Q. And in the last paragraph on the second page, that's
6 basically making a request to make sure you have those
7 things; is that correct?

8 A. I don't know. The very last paragraph? I think eight
9 is about the criminal record, isn't it?

10 Q. That's correct, criminal record, I'm sorry. Did you
11 get those items? Did you get a statement by the defendant,
12 and did you have a statement by the defendant disclosed to
13 you by the State?

14 A. There was no written statement, and my recollection is
15 there was no reference to that in the police report. That
16 was a statement that was made at trial, or if I inquired
17 about it prior to Mr. Funderburke's statement that I learned
18 immediately prior to his testimony.

19 Q. In paragraph eight of your Rule 5 that talks about a
20 copy of the co-defendant's --

21 A. Criminal record?

22 Q. Right. Did you get that?

23 A. Well, there were no co-defendants until the codefendant
24 became a codefendant upon her admission during the trial, so
25 no, I did not.

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1 Q. So she didn't get arrested on the case until --

2 A. No. She never was arrested to my knowledge. To my
3 knowledge, I don't know. Certainly I think we would have
4 known, and she would have -- she just wasn't arrested prior
5 to trial, I'm certain of that, yeah.

6 MR. BROOKS: Beg the Court's indulgence, Your Honor.

7 (Break in proceedings.)

8 Q. Now, Mr. Grier, there was a jury charge of the hand of
9 one, hand of all that was given to the jury?

10 A. Uh-huh.

11 Q. And you just said that there was no co-defendants. Did
12 you object to that?

13 A. Did I object to that jury charge?

14 Q. Correct.

15 A. Not -- no.

16 MR. BROOKS: No other questions, Judge.

17 THE COURT: Any redirect?

18 MS. WHITE: Nothing, Your Honor.

19 THE COURT: All right. Thank you, sir.

20 MS. WHITE: And the State has no other witnesses, Your
21 Honor.

22 THE COURT: All right. Mr. Brooks?

23 MR. BROOKS: Just briefly, Judge. Based on the
24 testimony of Mr. McFarland and the testimony of Mr. Grier we
25 feel that we have proven our case based on all of the

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1 allegations that we've raised for post conviction relief and
2 that Mr. McFarland should be granted a new trial on this
3 matter.

4 THE COURT: All right. And by the State?

5 MS. WHITE: Thank you, Your Honor. Obviously the State
6 would disagree and argue that he failed to meet a burden of
7 proof of either deficiency or any resulting prejudice. In
8 this case I think it was a case of overwhelming evidence.
9 He was found fleeing from the police, the items that were
10 being stolen were in his wake as he fled, and the testimony
11 at the trial was significant enough to convict him
12 obviously. And I think at this point the post conviction
13 relief application should be denied.

14 THE COURT: I'll review the record in the case and take
15 the matter under advisement.

16 MR. BROOKS: Thank you, Judge.

17 MS. WHITE: Thank you, Your Honor.

18 (End of the hearing.)

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1 I, the undersigned, Michael C. Watkins, Official Court
2 Reporter for the Sixth Judicial Circuit of the State of South
3 Carolina, do hereby certify that the foregoing is a true,
4 accurate and complete transcript of the proceedings had and
5 evidence introduced in the trial of the captioned case,
6 relative to appeal, in the Court of Common Pleas for
7 Lancaster County, South Carolina, on the 5th day of August,
8 2013.

9 I do further certify that I am neither of kin, counsel,
10 nor interest to any party hereto.

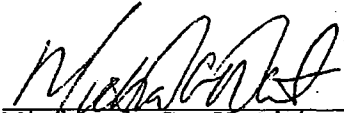
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February 7, 2014

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Michael C. Watkins
Court Reporter

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(Reported by Margaret A. Woods, edited by

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Michael Watkins)

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STATE OF SOUTH CAROLINA
COUNTY OF LANCASTER

Steven B. McFarland, #263704,
Applicant,

v.

State of South Carolina,
Respondent.

IN THE COURT OF COMMON PLEAS
SIXTH JUDICIAL CIRCUIT

2012-CP-29-1668

ORDER OF DISMISSAL

FILED
OFFICE OF CLERK
OF COURT
2013 DEC 16 AM 11:4
CLERK OF COURT
LANCASTER SC

This matter comes before the Court by way of an Application for Post-Conviction Relief filed November 26, 2012, and amendments filed May 13, 2013¹, and July 18, 2013. The Respondent made its Return on or about June 25, 2013. An evidentiary hearing into the matter was convened on August 5, 2013, at the Lancaster County Courthouse. The Applicant was present at the hearing and was represented by Charles T. Brooks III, Esquire. Suzanne H. White, Esquire, of the South Carolina Attorney General's Office, represented the Respondent.

At the hearing, the Applicant testified on his own behalf. Mark Grier, Esquire, also testified. This Court also had before it a copy of the records of the Lancaster County Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, the Return, the Appellate Court records, and the trial transcript.

PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Lancaster County Clerk of Court. The Applicant was indicted at the February 2010 term of the Lancaster County Grand Jury for shoplifting, third

¹ Applicant's first amendment was a claim for Default Judgment against the State for failure to file a Return in sixty days.

offense (2010-GS-29-0262). The Applicant was represented by Mark Grier, Esquire. On July 29, 2010, the Applicant proceeded to jury trial. The jury returned a verdict of guilty for shoplifting, third offense. The Applicant was sentenced by the Honorable Paul M. Burch to confinement for a period of ten (10) years for shoplifting, third offense, provided that upon the service of nine (9) years, the balance will be suspended with probation for five (5) years².

A timely Notice of Appeal was filed on the Applicant's behalf and an appeal was perfected. The South Carolina Court of Appeals dismissed the appeal. State v. McFarland, Op. No. 2012-UP-586 (filed October 31, 2012). The Remittitur was returned on December 3, 2012.

ALLEGATIONS

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

1. Ineffective assistance of counsel, in that;
 - a. Counsel failed to object to trial court's denial of motion for continuance,
 - b. Counsel failed to object to Applicant being tried in his absence,
 - c. Counsel failed to object to excessive sentencing,
 - d. Counsel failed to call as witnesses two witnesses under subpoena,
 - e. Counsel failed to object to hearsay testimony of Officer Funderburk,
 - f. Counsel failed to object to jury charge.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review 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

² Upon information and belief, Applicant was also charged with and sentenced to a concurrent ninety day sentence for contempt of court on July 29, 2010, following his failure to appear for the first day of his trial.

findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80 (2003).

Ineffective Assistance of Counsel

The Applicant alleges he received ineffective assistance of counsel. In a PCR action, "[t]he burden of proof is on the applicant to prove his allegations by a preponderance of the evidence." Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (citing Rule 71.1(e), SCRCP). Where ineffective assistance of counsel is alleged 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." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, Id. The Applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

First, the Applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625, citing Strickland. Second, counsel's 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." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland).

In addition to the claims raised in the application, Applicant testified that Counsel was ineffective for failing to challenge the indictment pursuant to Franks v. State. Applicant testified that he was sentenced to ninety days for contempt of court and Counsel never objected.

Counsel testified that he has practiced law since 1990 and at least 30-40% of his practice was criminal until 2006, at which time he began practicing primarily criminal law. Counsel testified that he was appointed the Sixth Circuit Public Defender in 2010. Counsel testified that he and the Applicant met several times prior to trial. Counsel testified that he filed Brady and Rule 5 motions and received discovery materials from the Solicitor's office. Counsel testified that he did not recall any conversation with the Applicant regarding problems with the indictments. Counsel acknowledged that he did not challenge the indictment or object to the contempt charge.

This Court finds that the Applicant has failed to meet his burden of proof as to any of these claims. The Applicant offered no testimony or evidence that had Counsel made these objections or challenges, the outcome of the proceedings would have been any different. Therefore, this claim is denied and dismissed.

*Failure to object to denial of motion for continuance and
failure to object to Applicant being tried in his absence*

The Applicant testified that Counsel did make a motion for continuance, but failed to argue against a trial in Applicant's absence. The Applicant testified that Counsel informed him that he needed to be at the courthouse by 9:00 am the morning of his trial, but Applicant testified that the case had already been called.

Counsel testified that the Applicant was given notice of the trial date and was actually present during the morning trial began. Counsel testified that Applicant was on bond during the

trial and left at lunch after indicating that he wanted to find the female involved. Counsel testified that he advised the Applicant to return to the courthouse that afternoon by 2:00 pm because the trial would begin. Counsel testified that he did not hire a private investigator to try and find the female involved in the shoplifting incident. However, Counsel testified that the female did appear on the second day of trial and Counsel did speak with her prior to calling her as a witness.

The South Carolina Supreme Court has held that notice of the term of court in which a defendant will be tried is sufficient notice to enable the defendant to make an effective waiver of his right to be present at his trial. State v. Ravenell, 387 S.C. 449, 456, 692 S.E.2d 554, 558 (Ct. App. 2010)(citing Ellis v. State, 267 S.C. 257, 261, 227 S.E.2d 304, 306 (1976)). Further, the deliberate absence of a defendant who knows that he stands accused in a criminal case and that his trial will begin during a specific period of time indicates nothing less than an intention to obstruct the orderly processes of justice. Id. The record reflects that the Applicant, after being present the morning of his trial, failed to return following a lunch break. Further, Counsel made a motion for continuance in order to locate the Applicant, but the trial court denied that motion based upon the fact that the Applicant had been present earlier that day. The Court found on the record that the Applicant had notice of the trial and voluntarily waived his right to be present.

The Applicant has failed to meet his burden of proof of establishing that Counsel was ineffective for failing to object to the denial of the motion for continuance or object to the Applicant being tried in absentia. As the record reflects, the Applicant was present the second day of trial and was able to testify and present his defense. Therefore, this Court finds that even if Counsel was deficient for not objecting to beginning the trial in Applicant's absence, there is

no prejudice as the Applicant was present for the remainder of his trial and was able to present his defense. This claim is denied and dismissed.

Failure to object to excessive sentencing

The Applicant testified that he is currently incarcerated with one and a half years left in confinement and then five years of probation. Applicant testified that the judge improperly sentenced him to nine years of confinement and five years of probation, which is more than the maximum of ten years on his charge. The court has broad discretion in imposing criminal sentences. State v. Franklin, 267 S.C. 240, 226 S.E.2d 896 (1976). Absent a showing of partiality, prejudice, oppression or corrupt motive by the sentencing court, or absent a showing that the statutory punishment in and of itself constitutes cruel and unusual punishment, the post-conviction relief court has no authority or jurisdiction to review or change a sentence falling within statutory limits. State v. Cogdell, 273 S.C. 563, 257 S.E.2d 748 (1979). Further, the trial judges are given the discretion at the time of the sentence to provide for a suspension of a part of such imprisonment and to then place the defendant on probation, after serving a designated portion of the term of imprisonment. Moore v. Patterson, 203 S.C. 90, 26 S.E.2d 319, 321 (1943). Therefore, Counsel had no obligation to object to a sentence that is within the sentencing guidelines and within the judge's discretion. This claim is denied and dismissed.

Failure to call two witnesses under subpoena

The Applicant testified that there were witnesses under subpoena regarding the lack of a Wal-Mart surveillance video, but they did not testify. Applicant also testified that Lieutenant Walker was in the store with Applicant, but did not testify. Counsel testified that the surveillance video was unavailable and Applicant's argument was that because the video was unavailable, he should not be found guilty. Counsel testified that he did not believe that there was anything an

investigator could have discovered that he and the Solicitor's office had not discovered. Prejudice from trial counsel's failure to interview or call witnesses cannot be shown where the witnesses do not testify at post-conviction relief. Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Bassette v. Thompson, 915 F.2d 932 (4th Cir. 1990), cert. denied, 499 U.S. 982 (1991). The Applicant's mere speculation as to what a witnesses' testimony would have been cannot, by itself, satisfy his burden of showing prejudice. Clark v. State, 315 S.C. 385, 434 S.E.2d 266 (1993); Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995). An Applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial. Bannister v. State, 333 S.C. 298, 509 S.E.2d 807 (1998). The Applicant failed to offer the testimony of either witness that he claims Counsel was ineffective for failing to call at trial. Therefore, this Court would be required to speculate as to what, if any, testimony would have been given had those witnesses been called at trial. This Court finds that the Applicant failed to meet his burden of proof as to this claim and it is denied and dismissed.

Failure to object to hearsay testimony of Officer Funderburk

The Applicant testified that Counsel did not challenge the statements of the officer regarding statements allegedly made by Applicant. In regards to the Applicant's allegation that Counsel was deficient in his cross-examination of Officer Funderburk, this Court finds that the Applicant has failed to meet his burden of proof. Applicant also argued that Counsel was ineffective for failing to introduce the incident report as evidence during Officer Funderburk's testimony, when the report uses the word "I" repeatedly, but it should be "we" since both Officers Funderburk and Walker were present. Counsel acknowledged that he did not object to

the testimony of Officer Funderburk regarding statements made by the Applicant or introduce the incident report because he saw no need to do so.

The nature and scope of cross-examination is inherently a matter of trial tactics. United States v. Nersesian, 824 F.2d 1294, 1321 (2nd Cir. 1987). "[A] defendant has a 'burden of supplying sufficiently precise information,' of the evidence that would have been obtained had his counsel undertaken the desired investigation and of showing 'whether such information . . . would have produced a different result.'" United States v. Rodriguez, 53 F.3d 1439, 1449 (7th Cir. 1995). The Applicant did not proffer any questions counsel allegedly failed to ask, and did not present any testimony showing the witnesses' answers at trial would have been different. Accordingly, the Applicant has not shown that a different approach to cross-examination would have been beneficial to the defense. This claim is dismissed.

Failure to object to jury charge

The Applicant testified that Counsel failed to object to the jury charge about conspiracy and "hands of one, hands of all." The facts must support a jury instruction for it to be proper. State v. Crosby, 355 S.C. 47, 584 S.E.2d 110 (S.C. 2003). South Carolina law dictates that jury instructions, when analyzed, must be considered in their entirety. See Todd v. State, 355 S.C. 396, 585 S.E.2d 305 (2003). The jury charge was based upon the facts presented to the trial judge and this Court finds nothing improper in the charge. The Applicant offered no evidence or testimony to support his claim that Counsel was ineffective for failing to object to the jury charge. Therefore, this claim is denied and dismissed.

Summary

This Court finds in regards to the allegation of ineffective assistance of counsel, the Applicant's testimony is not credible. This Court further finds Counsel adequately conferred

with the Applicant, conducted a proper investigation, was thoroughly competent in his representation, and that Counsel's conduct does not fall below the objective standard of reasonableness.

Accordingly, this Court finds the Applicant has failed to prove the first prong of the Strickland test – that Counsel failed to render reasonably effective assistance under prevailing professional norms. The Applicant failed to present specific and compelling evidence that Counsel committed either errors or omissions in his representation of the Applicant.

This Court also finds the Applicant has failed to prove the second prong of Strickland – that he was prejudiced by Counsel's performance. This Court concludes the Applicant has not met his burden of proving Counsel failed to render reasonably effective assistance. See Frasier supra. Therefore, this allegation is denied.

CONCLUSION

Based on all the foregoing, this Court finds and concludes that the 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.

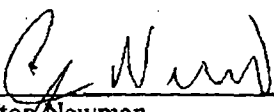
This Court cautions Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCP, provides that if the applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for

appeal.

IT IS THEREFORE ORDERED:

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

AND IT IS SO ORDERED this 12th day of December, 2013.



Clifton Newman
Presiding Judge

WITNESSES

15
Underbark - LPD #09-18744

G. B. Smith

The State of South Carolina
County of Lancaster

FILED
OFFICE OF CLERK
OF COURT

2010 FEB 19 A 10:47

COURT OF GENERAL SESSIONS

Clerk of Court
LANCASTER COUNTY, SC

FEBRUARY TERM 2010

ARREST WARRANT NUMBER/DOA

K374376 (DOA-11-23-09)

ACTION OF GRAND JURY

THE STATE

vs.

Steve Barry McFarland

John P. McFarland
Foreperson of Grand Jury
Date: FEB 18 2010

VERDICT

Guiltily

TRUE BILL

John P. McFarland
Foreperson of Petit Jury
Date:

7/39/10

Indictment for
Shoplifting 3rd or Subsequent
Property Crime

SC Code: § 16-13-0110(B)(1), § 16-01-57
CDR Code: 2367
Class: Felony, E

STATE OF SOUTH CAROLINA)
)
COUNTY OF LANCASTER)

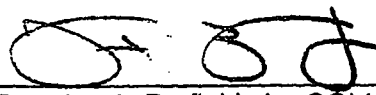
INDICTMENT

At a Court of General Sessions, convened on February 18, 2010, the Grand Jurors of Lancaster County present upon their oath:

Shoplifting 3rd or Subsequent Property Crime

That Steve Barry McFarland did in Lancaster County on or about November 22, 2009, take possession of and carry away, transfer from one person to another or from one area of the store or other retail mercantile establishment to another area, or cause the same to be done, merchandise, to wit: meat, cheese, and nuts, valued at \$1000.00 or less, displayed, held, stored, or offered for sale by Wal-Mart with the intention of depriving the merchant of the possession, use, or benefit of the merchandise without paying the full retail value, the defendant having been twice or more previously convicted of a property crime the term of imprisonment for which was contingent upon the value of the property involved in violation of §16-13-110(B)(1) and § 16-1-57, *Code of Laws of South Carolina, (1976), as amended.*

Against the peace and dignity of the State, and contrary to the statute in such case made and provided. ::



Douglas A. Barfield, Jr., SOLICITOR