

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Appeal from Spartanburg County

S.C. SUPREME COURT

Honorable R. Ferrell Cothran, Circuit Court Judge

CHUCK EDWARD MCCULLOUGH,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2016-001416

APPENDIX

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STATE OF SOUTH CAROLINA COURT OF GENERAL SESSIONS

**COUNTY OF SPARTANBURG 2011-GS-42-2412, 2413
2012-GS-42-2465, 2466, 2467**

The State of South Carolina,

Plaintiff,

-VS-

Chuck Edward McCullough,

Defendant.

TRANSCRIPT OF RECORD

August 1, 2012
Spartanburg, South Carolina

Ordered: May 20, 2014

Delivered: June 23, 2014

B E F O R E:

The Honorable J. Mark Hayes, II, Presiding Judge.

A P P E A R A N C E S:

Mr. Scott Spivey, Esquire
Assistant Solicitor Appearing for the State

Mr. James Cheek, Esquire
Mr. Richard Wheelchel, Esquire
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Circuit Court Reporter

PAMELA FAUCETTE, CVR - 864-574-9534 or 336-260-2864

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EXHIBITS

State's Exhibits:	Marked:	Received:
1 - (DVD - Withdrawn)		
2 - (Photo of Container)	15	15
3 - (Meth Lab Worksheet)	15	15
4 - (Summary of Purchases)	15	15
5 - (Search Warrant/Summary)	15	15
6 - (Statement of Carissa McCullough)	15	15
7 - (Statement of Amanda Padgett)	15	15
8 - (DSS Summary)	15	15

Defendants' Exhibits:	Marked:	Received:
(None)		

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REPORTER'S NOTES: This transcript contains quoted material. Such material is reproduced as read or quoted by the speaker.

REPORTER'S NOTES: Some of the names in this transcript are spelled phonetically.

PAMELA FAUCETTE, CVR - 864-574-9534 or 336-260-2864

August 1, 2012

11:57 A.M.

(Off-The-Record Comments)

(Brief Pause)

MR. SPIVEY: Your Honor, Chuck McCullough is here on several indictments, the first of which is 2011-2412, possession with intent to distribute methamphetamine third offense, Your Honor. He's pleading to that as possession third offense.

He's also here on indictment 2011-2413 for manufacturing methamphetamine third offense. He's pleading to that straight up.

He's here on several direct indictments which have been true billed; indictment 2012-2465, unauthorized removal of a dead body; indictment 2012-2466, exposing a child to methamphetamine first defense;

Indictment 2012-2467 for unlawful neglect of a child. Your Honor, the State is dismissing a disposal of methamphetamine waste charge as a condition of the plea.

Your Honor, he's represented by Dick Whelchel and James Cheek both. Mr. Cheek is — has spoken with him in the past, but I'm thinking just Mr. Whelchel for the purpose of this plea.

MR. WHELCHER: Mr. Cheek and I both represent him, Your Honor. Mr. Cheek when he was arrested and has spoken to him. This is going to be an *Alford* plea, Your Honor.

MR. SPIVEY: Yes, Your Honor.

(Brief Pause)

THE COURT: You are Mr. McCullough?

MR. MCCULLOUGH: Yes, sir.

1 **THE COURT:** Sir, please raise your right hand and allowed the
2 clerk of court the opportunity to swear you in.

3 **(The Defendant complied with the Court's Request.)**

4 (Whereupon,

5 **CHUCK E. MCCULLOUGH**

6 first being duly sworn, testified as follows:)

7 **THE COURT:** All right, Mr. McCullough, if you would, I need you
8 to really speak up. We're making a recording of everything that happens here
9 and you don't have the benefit of a microphone.

10 And, if ever during this process, if you can't hear me, let me know and I
11 will speak up as well. Okay?

12 **MR. MCCULLOUGH:** Okay – okay.

13 **THE COURT:** Were you able to hear the solicitor when he
14 announced the charges that are against you?

15 **MR. MCCULLOUGH:** Yes, sir.

16 **THE COURT:** The manner in which he announced those charges
17 to me, is that consistent and the same as to what you understand you will be
18 pleading to today?

19 **MR. MCCULLOUGH:** Yes, sir.

20 **THE COURT:** How old are you?

21 **MR. MCCULLOUGH:** Thirty-six (36).

22 **THE COURT:** How far did you go in school?

23 **MR. MCCULLOUGH:** Fifth grade.

24 **THE COURT:** Did you ever obtain a GED?

25 **MR. MCCULLOUGH:** Yes, sir. But I'm enrolled now at the

1 seventh school district area here in the County.

2 THE COURT: Are you married, single, divorced, widowed?

3 MR. MCCULLOUGH: I'm married but we're getting a divorce.

4 THE COURT: Do you have children?

5 MR. MCCULLOUGH: Yes, sir.

6 THE COURT: How many?

7 MR. MCCULLOUGH: Four.

8 THE COURT: How old is the oldest and how young is the
9 youngest?

10 MR. MCCULLOUGH: The youngest is four (4) and the oldest is
11 18.

12 THE COURT: Prior to your arrest on these charges, did you have
13 a job outside the home?

14 MR. MCCULLOUGH: Yes, sir.

15 THE COURT: What were you doing?

16 MR. MCCULLOUGH: Driving a wrecker for Truman Williams.

17 (Brief Pause)

18 THE COURT: How long had you been doing that kind of work?

19 MR. MCCULLOUGH: About a year.

20 THE COURT: Ever serve in the military?

21 MR. MCCULLOUGH: No, sir.

22 THE COURT: On these charges, how long have you been in jail?

23 MR. WHELCHER: Five hundred and four (504) days, Your Honor.

24 THE COURT: Five hundred and four (504)?

25 MR. WHELCHER: Yes, sir.

1 **THE COURT:** Okay. Over the last 24 hours, have you consumed
2 any type of substance that is adversely affecting your ability to understand
3 what we are doing today?

4 **MR. MCCULLOUGH:** No, sir.

5 **THE COURT:** Have you ever received any type of substance
6 abuse treatment for a drug or alcohol problem?

7 **MR. MCCULLOUGH:** I went to SEDAC one time for probation, to
8 complete my probation, in 2009.

9 **THE COURT:** And was that for drugs, alcohol, or both?

10 **MR. MCCULLOUGH:** Drugs.

11 **THE COURT:** And was it successful back in 2009?

12 **MR. MCCULLOUGH:** Yes, sir.

13 **THE COURT:** Are you satisfied with the work that you lawyers
14 have done for you?

15 **MR. MCCULLOUGH:** Yes, sir.

16 **THE COURT:** Do you feel like you've had enough time to talk to
17 them about the facts behind the cases, the legal elements of the offenses that
18 you charged with, and any possible defenses you might have?

19 **MR. MCCULLOUGH:** Yes, sir.

20 **THE COURT:** Has anybody come to you and threatened you in
21 any way or have they made you any promises in order to get you to make the
22 decision to enter the plea to these charges?

23 **MR. MCCULLOUGH:** No, sir.

24 **THE COURT:** I'm correct in concluding that your decision to enter
25 these pleas is a free and voluntary decision?

1 **MR. MCCULLOUGH:** Yes, sir.

2 **THE COURT:** Sir, I need for you to understand that, under the
3 law, you are presumed innocent of every one of these charges and you do
4 have a right to have a jury trial on any or all of these charges.

5 At any jury trial that would take place, it would be the State that has the
6 burden of proof. And the State would have to convince all 12 members of a
7 jury that you are, in fact, guilty beyond a reasonable doubt of all of these
8 charges. Now, do you understand that you have a right to that jury trial on
9 these charges?

10 **MR. MCCULLOUGH:** Yes, sir.

11 **THE COURT:** And do you wish to have a jury trial on any of these
12 charges?

13 **MR. MCCULLOUGH:** No, sir.

14 **THE COURT:** Sir, I need for you to understand that there are
15 other very important constitutional rights in which you are entitled to but that
16 you have to give up in order to enter these pleas. You have to give up your
17 right to confront and cross examine the State's witnesses.

18 You also have to give up your right to present evidence which you or
19 your lawyers might feel would establish a defense to these charges. And you
20 have to give up your right of subpoena and you have to give up your right to
21 remain silent. Do you understand all of those rights?

22 **MR. MCCULLOUGH:** Yes, sir.

23 **THE COURT:** And you wish to give up all those rights?

24 **MR. MCCULLOUGH:** Yes, sir.

25 **THE COURT:** All right. Sir, if you would, I need for you to,

1 please, listen to the Solicitor. He is going to tell me the facts behind these
2 cases. And, then, I have some more questions for you.

3 **MR. SPIVEY:** Thank you, Your Honor. Before I forget, at the
4 appropriate time, the State would like to something for sentencing. And Mr.
5 Hutchins is here as well, who is the charging officer. He is here.

6 Bess Stewart (phonetic) is here, but I don't believe she wishes to
7 speak. Thank you, Your Honor.

8 On March 17th of 2011, deputies received a call that it was suspected
9 that Noah McCullough, the two-month-old son of Chuck and Carissa
10 McCullough, had passed away. They received information that Chuck and
11 Carissa McCullough were driving in a green Chevy truck.

12 They went to 169 Aleda Street (phonetic) in Roebuck, South Carolina,
13 looking for the couple because that's where they believed they had stayed the
14 night before. They were not present.

15 They received another call from a family member of Carissa, Carissa's
16 sister, who lived at Flat Wood Drive in Roebuck. They stated that they
17 had information that Chuck and Carissa were riding in a Chevy truck with the
18 body of McCullough -- Noah McCullough in the back.

19 She also gave a written statement which included Chuck's comment
20 that, "The baby was dead and they were running out of time."

21 Investigators with the sheriff's office waited near the Flat Wood
22 Drive address until the green truck pulled up. At that time, they met with
23 Carissa McCullough, who was the registered owner of the truck, and she gave
24 verbal and written permission to search that truck at that time.

25 Noah's body, Noah McCullough's body, the two-month-old son, was

1 found inside of a -- a blue Tupperware box. Your Honor, I -- I got a picture of
2 it. I don't really know how to describe it. It's sort of -- of -- about the size of a
3 mail crate. The -- the top was closed and locked with a padlock.

4 They cut the -- the lock off and there were no physical signs of trauma
5 to the body. They did notice that it had what appeared to be some dried vomit
6 on the -- the baby and the baby --- and the bed clothes, which were also in the
7 box.

8 Because they found no physical injury, they -- they began looking for
9 poisons. And so -- because they suspected some foul play.

10 Carissa gave a written statement after *Miranda* warnings that -- saying
11 that she and Chuck McCullough had been at Aleda Street the night
12 before.

13 She said she had fed the baby around 12:30 or 1:00 in the morning,
14 burped him, and put him face down on the bed.. She stated that they slept on
15 the couch.

16 She woke up in the morning of -- of March 17th, and the baby was face
17 down with vomit on the bed. She said she went hysterical because she knew
18 that the baby had -- was already gone.

19 She stated, then, Chuck, then, to the baby, with the -- with the
20 comforter, and put him in the crate and locked it. And that's when they started
21 driving around in the truck.

22 They sought -- investigators sought and obtained a search warrant for
23 the Aleda Street address looking for poisons. After entering the house, it
24 took only a few minutes before they recognized what they believed to be a
25 methamphetamine lab.

1 They, then, obtained a narcotics search warrant and called in narcotics
2 Investigators Hutchins and Stewart to handle the processing of that particular
3 search warrant.

4 They discovered numerous items used in the manufacturing of
5 methamphetamine using the one-pot method. The -- they found old one-pot
6 cooks, various components, and trash bags, burn piles, an outbuilding, and
7 several of the rooms in the trailer. (Phonetic)

8 Your Honor, there was heavy corrosion around the sink, which
9 indicated that numerous old one-pots had been dumped down the sink. So
10 methamphetamine had been manufactured in the house for over an extensive
11 period of time in their belief.

12 While going through several of the trash bags, they found meth waste.
13 And they also found baby -- baby diapers right beside it, in the same trash,
14 which would indicate that the baby and the meth labs were present at the
15 house at the same time.

16 They also found the personal effects of both Carissa and Chuck
17 McCullough in the house. They found receipts for pseudoephedrine tablets,
18 diagrams and meth lab apparatus, shopping lists with meth lab ingredients in
19 the house. And they also found trace amounts of methamphetamine on many
20 of these objects.

21 Your Honor, there was an unrelated DSS case that was pending prior
22 to the occurrence. So a caseworker went to the jail to interview Chuck and
23 Carissa McCullough separately after they were arrested.

24 She obtained a statement from Chuck McCullough in which he said
25 they had cooked manu -- manufactured methamphetamine the weekend

1 before, on the 12th of March. And that Carissa was present with Noah
2 McCullough with her. And so that, that manufacturer actually occurred with
3 that baby present.

4 Your Honor, when they search the green truck later the next day, they
5 found 2.13 grams of methamphetamine product, a digital scale, a glass pipe,
6 and Walgreen receipts for pseudoephedrine and EZ Ziploc bags.

7 (Brief Pause)

8 MR. SPIVEY: Your Honor, Chuck also made numerous phone
9 calls while he was in jail. Those phone calls had prerecorded warnings that
10 say, "You're being recorded and/or being monitored," and just to give the --
11 him a heads up that, "Hey, this isn't a private phone call."

12 In one of those phone calls, he tells his aunt that he had learned a
13 lesson right here because, "I got too comfortable with what I was doing.
14 Nobody knew nothing, you know what I'm saying?

15 "Quit spending my money on it and started doing it myself. I didn't --
16 you know what I'm saying? I didn't have to worry about it." He -- he was
17 talking to his aunt at this time. And in the same phone call she says, "And
18 cooking drugs is your fault. Yes, that is your fault and I ought to kick you in
19 your ass for that shit." Chuck responded with, "Well, I agree with that."

20 In another phone call was on April 7, 2011, just don't -- less than a
21 month after the -- he was arrested. Chuck McCullough also admitted to
22 paying rent for the address at least partially in methamphetamine.

23 Your Honor, investigators also checked with a local pharmacy and
24 pseudoephedrine logs were obtained from -- from there. And they extensively
25 show that both Chuck McCullough and Carissa McCullough were purchasing

1 pseudoephedrine in the months leading up to the date of the incident.

2 Your Honor, I do want to point out to you that -- that the toxicology
3 report -- there was a toxicology report done on the -- the child, as well as an
4 autopsy. And both of those are -- the autopsy is inconclusive as to how the
5 baby died.

6 They -- they did note that there was vomit and -- or what appeared to
7 be vomit and that the baby had probably asphyxiated on that.

8 The toxicology did come back negative for any drugs. And they did not
9 find any of the caustic substances that you would expect to be found in the --
10 in the baby's tissue if it had inhaled the meth lab. So I do think that's
11 important to -- to be fair to -- to everyone that we're clear on that fact.

12 Your Honor, as part of the -- the record, I -- many of the items which I
13 told you about; the phone calls, a photo of the -- of the -- the box in which the
14 body was placed, a copy of the meth lab search warrant return, and the items
15 and where they were found, I would like to enter that into evidence.

16 There is a -- the meth check records, which showed the
17 pseudoephedrine logs, there is a copy of that I would like to enter which
18 shows their purchases leading up to the incident date.

19 And, Your Honor, there's Carissa McCullough's statement, which was
20 given after *Miranda* warnings, and the statement of her sister, Amanda
21 Padgett.

22 Your Honor, also a copy of the DSS notes from the interview which he
23 gave in jail, we want to enter all of those in as exhibits so that the record could
24 appropriately reflect what I've summarized.

25 MR. WHELCHER: I have reviewed those, Judge.

1 (Brief Pause)

2 THE COURT: Were you able to hear the Solicitor when he told
3 me the facts?

4 MR. MCCULLOUGH: Yes, sir.

5 THE COURT: Do you believe that as he stated the facts to me
6 that he is substantially correct?

7 MR. MCCULLOUGH: Yes, sir.

8 THE COURT: All right. What's -- you got -- these have not been
9 marked by the court reporter yet. You've got -- you've got a tab on the DVD.
10 What is that?

11 MR. SPIVEY: Yes, sir. That is just a -- just to help the court
12 reporter so that she'll know how to mark them as -- as exhibits.

13 THE COURT: Now, the tab is on the DVD.

14 MR. SPIVEY: Oh, I'm sorry. That is the phone calls that Chuck
15 McCullough makes, from the time he's in jail on March 7, 2011 until I believe
16 May of this year when it was pulled, Judge.

17 THE COURT: Do you -- do you have those transcribed?

18 MR. SPIVEY: I do not. I've --- I've read a portion of --- of one
19 phone call and summarized another. I do not have them transcribed, Your
20 Honor.

21 THE COURT: Okay.

22 MR. SPIVEY: They ---they were provided in discovery to Defense
23 Counsel. And I believe they've reviewed those.

24 THE COURT: Well, I mean, if -- if I am -- if we're making a record
25 and I'm being presented information, I have to actually read things, take a look

1 at them, in order for them to be considered for being a basis for me having
2 issued a -- a sentence.

3 **MR. SPIVEY:** We'll -- we'll --

4 **(Off-the-Record Discussion)**

5 **MR. SPIVEY:** Your Honor, I'll -- I'll withdraw the CD from being an
6 exhibit if that will ----

7 **THE COURT:** Okay.

8 **MR. SPIVEY:** I think I've summarized and -- and actually read the
9 excerpts that I wanted.

10 **THE COURT:** Okay. All right.

11 **MR. SPIVEY:** I think that's --

12 **MR. WHELCHER:** That's fine, Your Honor.

13 **THE COURT:** Okay. All right, Exhibit -- then, Exhibit 2 is the
14 picture of the container.

15 **MR. WHELCHER:** Yes, Your Honor.

16 **THE COURT:** And, then, Exhibit....

17 **(Brief Pause)**

18 **THE COURT:** Again, so the record will be clear, we do not have
19 an Exhibit 1. That was withdrawn. And Exhibit 2 is the photograph. Exhibit 3
20 is the meth lab worksheet that came with six pages, which I have reviewed.

21 **(Brief Pause)**

22 **THE COURT:** Exhibit 4 is the business records from the drug
23 company that shows the purchases.

24 **MR. SPIVEY:** Your Honor, that's actually from a company out of
25 Kentucky that runs the database for SLED, which is required by law.

1 Pharmacies are basically required by law to keep a record of that. And it's all
2 done electronically.

3 **THE COURT:** And it shows the purchases?

4 **MR. SPIVEY:** Yes, Your Honor.

5 **THE COURT:** Okay.

6 **(Brief Pause)**

7 **THE COURT:** Exhibit 5 is the search warrant, which I believe also
8 contains the meth lab summary sheet.

9 **MR. SPIVEY:** Yes, Your Honor.

10 **THE COURT:** Which I've -- which I have reviewed.

11 **(Brief Pause)**

12 **THE COURT:** Exhibit 6 is the statement of Mrs. McCullough,
13 which I've reviewed.

14 **(Brief Pause)**

15 **THE COURT:** Exhibit 7 is the statement of Ms. Padgett, which
16 I've reviewed.

17 **(Brief Pause)**

18 **THE COURT:** And, then, Exhibit 8, which I've reviewed, that's the
19 South Caroline -- that's the DSS summaries?

20 **MR. SPIVEY:** Yes, Your Honor.

21 **THE COURT:** Okay.

22 **(Whereupon, State's Exhibits 2 through 8 were marked for**
23 **identification and admitted into evidence without objection)**

24 **THE COURT:** And, Mr. McCullough, do you understand that on
25 the unlawful manufacturing of methamphetamine, in the presence of a minor

1 child, that on the charge I could sentence you up to five years and/or fine you
2 up to \$5,000?

3 **MR. MCCULLOUGH:** Yes, sir.

4 **THE COURT:** And with that understanding, do you still wish to
5 enter the plea?

6 **MR. MCCULLOUGH:** Yes, sir.

7 **THE COURT:** And on the unlawful -- or rather the unauthorized
8 removal of a dead body, I could sentence you up to 60 days and/or fine you
9 between \$500 to \$1000?

10 **MR. MCCULLOUGH:** Yes, sir.

11 **THE COURT:** And, with that understanding of the possible
12 sentence on that charge, do you still wish to enter that plea?

13 **MR. MCCULLOUGH:** Yes, sir.

14 **THE COURT:** And on the unlawful neglect of a child charge, do
15 you understand I could sentence you up to 10 years on the charge?

16 **MR. MCCULLOUGH:** Yes, sir.

17 **THE COURT:** And you still wish to enter plea to that charge as
18 well?

19 **MR. MCCULLOUGH:** Yes, sir.

20 **THE COURT:** And on the possession of methamphetamine third
21 charge, you understand that I could sentence you up to 10 years and/or fine
22 you up to \$10,000 on that charge?

23 **MR. MCCULLOUGH:** Yes, sir.

24 **THE COURT:** And you still wish to enter a plea to that charge?

25 **MR. MCCULLOUGH:** Yes, sir.

1 **THE COURT:** And on the manufacturing of methamphetamine
2 third, do you understand that on the charge I'm required to sentence you to at
3 least 10, but could sentence you up to 30 years and I am required to issue a
4 fine of up to \$50,000?

5 **MR. MCCULLOUGH:** Yes, sir.

6 **THE COURT:** And do you understand that whatever sentence I
7 impose, on that particular charge, that it cannot be -- that no probation can be
8 given and that no parts of the sentence can be suspended?

9 **MR. MCCULLOUGH:** Yes, sir.

10 **THE COURT:** And do you also understand that, that particular
11 charge is classified as both a violent and also a serious offense under the
12 law?

13 **MR. MCCULLOUGH:** Yes, sir.

14 **THE COURT:** And you've been able to talk to your lawyer as to
15 the consequences and ramifications of that offense being classified as both a
16 violent and serious offense?

17 **MR. MCCULLOUGH:** Yes, sir.

18 **THE COURT:** Understanding the sentence I could impose, as
19 well as the classification of violent and serious and ramifications of those
20 classifications, do you still wish to enter this plea?

21 **MR. MCCULLOUGH:** Yes, sir.

22 **THE COURT:** Are you in fact guilty of the charge of
23 manufacturing methamphetamine third offense?

24 **MR. MCCULLOUGH:** Yes, sir.

25 **THE COURT:** I'm sorry.

1 **MR. MCCULLOUGH:** Yes, sir.

2 **THE COURT:** Let me go back. In regards to the charge of
3 manufacturing methamphetamine third offense, do you believe that the State
4 could produce sufficient evidence to prove your guilt of this charge beyond a
5 reasonable doubt and, if you went to trial, a jury would most probably find you
6 guilty of that charge?

7 **MR. MCCULLOUGH:** Yes, sir.

8 **THE COURT:** And, in regards to the possession of
9 methamphetamine third offense, do you believe that the State could produce
10 sufficient evidence to prove your guilt of that charge, beyond a reasonable
11 doubt, and that if you went to trial, a jury would most probably find you guilty of
12 the charge?

13 **MR. MCCULLOUGH:** Yes, sir.

14 **THE COURT:** And, in regards to the charge of unlawful neglect a
15 child, do you believe that the State could produce sufficient evidence to prove
16 your guilt of that charge, beyond a reasonable doubt, and that, if you went to
17 trial, a jury would most probably find you guilty of that charge?

18 **MR. MCCULLOUGH:** Yes, sir.

19 **THE COURT:** In regards to the charge of unauthorized removal
20 of dead body, do you believe that the State could produce sufficient evidence
21 to prove your guilt of that charge, beyond a reasonable doubt, and that, if you
22 went to trial, a jury would most probably find you guilty of that charge?

23 **MR. MCCULLOUGH:** Yes, sir.

24 **THE COURT:** And, in regards to the manufacturing -- unlawful
25 manufacturing of methamphetamine, in the presence of a minor child, do you

1 believe that the State could produce sufficient evidence to prove your guilt of
2 that charge, beyond a reasonable doubt, and that, if you went to trial, a jury
3 would most probably find you guilty of that charge?

4 **MR. MCCULLOUGH:** Yes, sir.

5 **THE COURT:** Have you been able to hear all of my questions so
6 far?

7 **MR. MCCULLOUGH:** Yes, sir.

8 **THE COURT:** Have all of your answers been truthful and honest?

9 **MR. MCCULLOUGH:** Yes, sir.

10 **THE COURT:** Discovery has been shared with the Defense?

11 **MR. SPIVEY:** Yes, Your Honor.

12 **THE COURT:** Prior record?

13 **MR. SPIVEY:** Your Honor, 2003, possession of
14 methamphetamine first; 2003, possession of drug paraphernalia; 2004, grand
15 larceny; 2005, possession of methamphetamine second.

16 **THE COURT:** On behalf of the victim, do you have anyone to
17 speak or any other information on behalf of the victim?

18 **MR. SPIVEY:** No, Your Honor.

19 **THE COURT:** And did you say that the officers did wish to
20 address the Court?

21 **MR. SPIVEY:** Your Honor, I believe Mr. Hutchins does.

22 **THE COURT:** If you would, sir, just be sure you speak up loud
23 enough so that both the court reporter and I can hear you. I'll be more than
24 happy to hear from you.

25 **OFFICER HUTCHINS:** I'm Investigator Matt Hutchins with the

1 Spartanburg County Sheriff's Office Narcotics Unit. Your Honor, being in law
2 enforcement 14 ½ years, this has been the most disturbing case that I've
3 worked.

4 This is a man, Mr. McCullough, standing before you that's not only
5 shown disregard for his own kids, but is shown disregard for public safety and
6 other kids. This is the head of the manufacturing of methamphetamine snake.

7 In the drug investigative end, we tend to work up a drug chain. This is
8 a man manufacturing methamphetamine, putting it out for other kids, and
9 destroying other families. We ask that you take that into consideration.

10 You know, when lawmakers make laws, they set ranges. We feel that
11 this is -- the circumstances in this case is probably what lawmakers had in
12 mind when they set the maximum range. And that's what we ask you to
13 consider today. Thank you.

14 **THE COURT:** Thank you.

15 **OFFICER STEWART:** I don't have anything.

16 **THE COURT:** All right. Anything else from the State?

17 **MR. SPIVEY:** Yes, Your Honor. With regards to sentencing, I
18 listened to all of Mr. McCullough's phone calls while he was in jail. One of the
19 phone calls he made on his own end was to a gentleman that he had met in
20 jail. I do not know his name.

21 He -- apparently, they discussed how to manufacture
22 methamphetamine together. And they created a plan that, once they both got
23 out of prison, they would join together and manufacture methamphetamine
24 together.

25 They believed that North Carolina and Virginia were prime places in

1 which they could go and manufacture methamphetamine.

2 In fact, Mr. McCullough described it as being wide-open in one of the
3 phone calls.

4 Your Honor, the -- he -- on one of the phone calls, he actually -- they
5 discussed -- the -- the other gentleman got out of jail before Mr. McCullough
6 obviously, and he discusses the fact that he had attempted -- he couldn't wait
7 all Mr. McCullough and he was attempting to make it himself. And so he's
8 actually out shopping for the ingredients as they speak on the phone.

9 It was later determined, after writing each other some letters, that, that
10 gentlemen actually purchased regular cold medicine and had not purchased a
11 -- a cold medicine with ephedrine or pseudoephedrine in it. And so that is why
12 the methamphetamine cooks were not working for him.

13 Your Honor, most disturbing about this is that it's -- and -- and I think
14 it's offensive to our judicial system, is that he actually says on the tapes,
15 "When I get out of jail, as soon as they take me back to the jail and release
16 me, I will get a ride to meet you at the county line. We'll go up to Greenville,
17 North Carolina, and we will begin cooking methamphetamine together."

18 And it's basically a "hold on and wait. I'll get probation this week, and
19 when I get probation, this is what we'll do."

20 I find that disturbing. That happened -- these phone calls happened in
21 the spring of this year, when Mr. McCullough had an earlier court date in
22 which his case was not reached.

23 To have been sitting in a jail for a year, on manufacturing
24 methamphetamine charges, when the facts are such that everyone is sitting
25 around scared thinking that perhaps the manufacturing methamphetamine

1 contributed to the death of an -- of an infant; and to sit there in jail for a year
2 and sober up and still not have any remorse is unconscionable.

3 Your Honor, I'm in agreement with Investigator Hutchins that -- that --
4 that this Court should consider the maximum sentence of this case.

5 Your Honor, the Defendant has -- has shown no remorse. I'm not sure
6 that he's entitled to any mercy.

7 (Brief Pause)

8 **THE COURT:** All right. Thank you. Yes, sir?

9 **MR. WHELCHER:** Your Honor, as you already know, Mr. McCullough
10 is 36. He's not well educated. And he obviously has a drug problem.

11 He admitted to me that he's been involved in drugs since his high
12 school years, Your Honor, which would be approximately half of his life. And
13 he's been involved with his meth addiction that he has for about 10 years.

14 From everything I've seen, in the volumes of discovery that has been
15 provided to me, I -- I didn't see anything that said Mr. McCullough was the
16 kingpin of the meth producers in Spartanburg County.

17 You will note his prior record includes two possession of meth and a
18 grand larceny if I remember correctly.

19 The real problem with this case, Your Honor, is --- it's obvious to all of
20 us. There was a young child who died.

21 The police believed that the young child died as a result of the meth lab
22 that they found when they were executing the search warrant.

23 The direct indictment charges did not result for over a year. And the
24 bottom line, after they did the autopsy and after all the toxicology was done,
25 was the -- the child obviously choked on his own vomit when it threw up.

1 There's nothing to suggest that any meth lab, or any of the items there had
2 anything to do with that child's death.

3 That same thing would have happened whether that child had been in
4 my home or the prosecutor's home or any home. Those things happen, Your
5 Honor.

6 Unfortunately, they happen all too often with young children; a child
7 two months old.

8 Mr. McCullough and Mrs. McCullough have had to deal with that. As
9 you know, my client has been incarcerated since the time of his arrest on the
10 initial drug charges and the -- several charges that came later by way of direct
11 indictment.

12 There is no question but that he has a drug problem. He uses the
13 drugs himself. And we would ask that Your Honor fashion a sentence that
14 would address his drug problem and address the fact that, again, his prior
15 record shows that he's possessed them prior -- twice prior to this.

16 And they've elevated this to a -- a third offense, which we all know is
17 due. But there are no prior convictions for manufacturing itself, Your Honor.

18 I don't know how they can talk about whether or not he's remorseful
19 because they don't see him in the jail. And they haven't talked to him the way
20 Mr. Cheek and I have talked to him.

21 They don't have to live, as he does, with the nightmare of finding your
22 two-month-old child dead. And he's uneducated and he panicked. They both
23 panicked.

24 They've shown you the photograph of how they transported the child.
25 And they were calling relatives not knowing what to do.

1 He worked, for the past year before he was incarcerated, Your Honor.
2 And I believe he can get the job back because I've talked to Truman Williams
3 about this.

4 He has a record, Your Honor, with Truman Williams. That's one of the
5 people who were involved and contacted the police when this first came
6 about. Everything that's here today comes about because of this unfortunate
7 death of his two-month-old child.

8 And I don't -- you know, I understand the police or the sheriff's
9 department investigating and wondering if -- if there's a relation between the
10 two. But the fact of the matter is, there was no relationship between the drugs
11 and the child dying. It just happened. It's a tragedy.

12 You know, as -- as a parent myself, I remember when the children
13 were that young and worrying about them, wondering if you're doing a good
14 enough job.

15 Obviously, he's made mistakes with his drug problems, but, he's owned
16 up and he's pleading here today.

17 Mr. Cheek may have other things he would like to tell Your Honor.

18 **MR. CHEEK:** Only by way of some clarification, Your Honor.
19 May it please the Court?

20 Your Honor, I had met Mr. McCullough almost I guess a month since
21 he's been in -- in the Spartanburg County detention facility. And one of the
22 things that he found happened to him, as a result of this -- this arrest, was that
23 immediately he became isolated from his wife's family, which is the only family
24 he has in this community.

25 He has one elderly aunt who he's not very close to, although they have

1 communicated.

2 We ask the Court to consider that he acknowledged, during this period
3 of time, that this horrible situation happened; that a very unfortunate situation
4 happened, where he did not immediately call law enforcement when they
5 discovered that the child was dead.

6 He acknowledges further that he made some mistakes, Your Honor,
7 but, despite all of this, Truman Williams made extreme efforts to try to help
8 Mr. McCullough get out of jail, to get back out on bond.

9 He found him to be a valuable employee, a dependable employee, a
10 trusted employee.

11 Mr. Williams knew about the family, Carissa McCullough's family,
12 distancing themselves from Chuck McCullough. And basically I can't blame
13 them for that because they were doing all they could in order to better the
14 position of Carissa McCullough.

15 Your Honor, Carissa McCullough had the child. She had the full
16 responsibility for the child. Mr. McCullough was only supposed to visit the
17 child in supervised situations.

18 Carissa chose to take the child over to his house that night, showed up
19 over there and all of this occurred.

20 Your Honor, we'd ask the Court to consider further that Mr. Truman
21 Williams even went to the extent of believing in Mr. McCullough to such an
22 extent that he made arrangements for him to actually stay at the mission
23 across the street from his business because he knew that their problem with
24 transportation and all of that since Mr. McCullough's family actually lives in
25 Oconee County and the other parts of the community a great distance from

1 Spartanburg.

2 So, Your Honor, we just ask the Court to consider that he -- that this all
3 happened.

4 He and I talked about why he had those conversations out at the jail
5 with the other gentlemen who had been incarcerated at Spartanburg County.

6 And he was very frank about it. He said, "Mr. Cheek, I'm -- I'm in
7 trouble this time because I didn't have any money, I didn't have anybody
8 looking out for me here at the jail and this guy offered me some money.

9 "He paid me \$50." He said, "He wanted to know about meth." He said,
10 "I -- we had a conversation, but I didn't intend to really follow up.

11 "He was going to send me money while I was here in jail. And I was
12 going to, you know, take advantage of situation."

13 So, again, he took advantage of a situation and now that -- that
14 situation is taking advantage of him, Your Honor.

15 But it doesn't -- he said he didn't really have any intent of continuing to
16 be engaged in this kind of activity and he certainly would have never been
17 able to leave the state, Your Honor.

18 He knew that he, if would be involved and be lucky enough to get
19 probation, he certainly would have that experience in the community.

20 He knew he couldn't travel to North Carolina. He couldn't travel to
21 Virginia or anywhere else and be involved with this -- this other person.

22 But he did get himself in trouble trying to talk to him over the phone.
23 And he did not give him full information on what to purchase, when he first
24 communicated with him, which is why the guy just kept writing back and
25 calling him and just pressuring him.

1 So, finally, he just gave him a reason, hoping that, that was the end of
2 that conversation, Your Honor.

3 But, Your Honor, I don't think that's reflective of a person who doesn't
4 have any remorse, just a person who is desperate and -- and -- and isolated
5 and -- and a volatile (phonetic) situation in the jail.

6 But, Your Honor, that would not be the case back in the community..
7 He would have an opportunity to go back to work. He's welcomed back at
8 Truman Williams Wrecker Service any time that he's available for employment
9 there. We just ask the Court to consider all of that.

10 Your Honor, during the protective services treatment, the write up
11 dictates that he had -- Ms. Dawn Kind (phonetic) spoke, I believe, at Carissa
12 McCullough's sentencing and did not speak very favorably of Mr. McCullough
13 at that time; but, previously, Your Honor, at DSS, she -- she said glowing
14 things Mr. McCullough's efforts in the community.

15 His employment, his going through the efforts of helping that family
16 repairing, using his skills to make sure that things happened not only in his
17 and Carissa's household, but also the other extended members of the family,
18 Your Honor.

19 He did all he could to try to turn a bad situation into a good and positive
20 situation while fighting and battling his drug addiction, but that addiction
21 became active again and all of this occurred.

22 Your Honor, we ask the Court to consider what he actually is being
23 prosecuted for. We asked the Court to try to take into consideration that there
24 are some things that are really inflammatory. Regardless of those situations,
25 we ask the Court to put a cooling aspect on all of that as the Court fashions a

1 sentence because there's nothing to show that any of his involvement with
2 drugs extended beyond himself and Carissa McCullough's use, Your Honor.

3 (Brief Pause)

4 THE COURT: Mr. McCullough, were you able to hear the
5 statements that were made by both of your lawyers?

6 MR. MCCULLOUGH: Yes, sir.

7 THE COURT: Do you agree with the statements made by your
8 lawyers?

9 MR. MCCULLOUGH: Yes, sir.

10 THE COURT: Mr. McCullough, is there anything that you would
11 like to say or — or want me to know or consider?

12 MR. MCCULLOUGH: I'm just ashamed to be in front of you. And I
13 apologize to the Court and everyone; the time that they've had to spend on
14 this case.

15 And I just take this fact to be a lesson learned. And I just — I pray that
16 you'll have mercy on me. That's it.

17 (Brief Pause)

18 THE COURT: Thank you, sir.

19 (Brief pause while the Court fills out paperwork.)

20 Sentencing

21 THE COURT: I find that there's a substantial factual basis for the
22 plea; and that the Defendant's decision to enter the plea has been made
23 freely, voluntarily, knowingly, and intellectually by him.

24 Therefore, I will accept the plea.

25 (Brief Pause)

1 **THE COURT:** On -- on the unauthorized removal of dead body,
2 that's a 60-day sentence on that charge. He gets credit for the 504 days he's
3 already served.

4 That charge will run concurrent with the remaining sentences. And all
5 the sentences will run concurrent with each other.

6 On the manufacturing of methamphetamine there offense, it's a 30-
7 year sentence at the Department of Corrections. He'll receive credit for the
8 504 days.

9 I've indicated my desire that he receive the Addiction Treatment Unit
10 while he's at the Department of Corrections and follow any type of substance
11 abuse treatment that they might require.

12 In the event, under any of these charges, that there is some type of
13 release, he will have to be screened for drug testing, as well as undergo the
14 appropriate counseling.

15 It's a 10-year sentence on the possession of methamphetamine third
16 offense, a 10-year sentence on the unlawful neglect of child. And it is a five-
17 year sentence under the unlawful manufacturing of methamphetamine in the
18 presence of a minor child. Good luck to you, sir.

19 **MR. SPIVEY:** Thank -- thank you, Your Honor.

20 **(Whereupon, the proceeding concluded at 12:45 p.m.)**

21

22

23

24

25

REPORTER'S CERTIFICATE

I, the undersigned **PAMELA FAUCETTE**, Official Court Reporter for the Seventh Judicial Circuit of the State of South Carolina, do hereby certify that I acted as the court reporter at the foregoing proceeding; that the foregoing pages, numbered 1 through 29, were transcribed by me and represent a true and accurate transcript of said proceeding to the best of my knowledge and belief.

I do further certify that I am not of counsel for or in the employment of either of the parties to this action, nor am I interested in the results of this action.

June 23, 2014



Pamela S. Faucette
Official Court Reporter
Seventh Judicial Circuit

STATE OF SOUTH CAROLINA	)	IN THE GENERAL SESSIONS COURT
	)	SEVENTH JUDICIAL CIRCUIT
COUNTY OF SPARTANBURG	)	
	)	MOTION OF RECONSIDERATION OF
		SENTENCE
State of South Carolina	)	
Plaintiff	)	Charge(s): Unlawful manuf.of Meth/exposure of
		Minor -1st Off. ;Children/legal custodian/neglect of
		child/helpless person; Trafficking Crack(10-28 g)-1st;
		Dist. Meth-1st
vs.	)	
	)	Indictment(s): 2011-GS-42-2412,
		2011-GS-42-2413, 2012-GS-42-02466,
		2012-GS-42-02467
CHUCK EDWARD MCCULLOUGH	)	
Defendant	)	Date of Arrest: March 17, 2011

To: Scott Spivey, Assistant Solicitor, Seventh Judicial Circuit

YOU WILL PLEASE TAKE NOTICE, that the undersigned attorney for the Seventh Judicial Circuit Public Defender Office, on behalf of the aboved-named Defendant, will move before The Honorable J. Mark Hayes II on October 22, 2012 or as soon thereafter as counsel may be heard, for a reconsideration of the sentence handed down on August 1, 2012 on the above indictments. This motion is made because it is the Defendant's understanding and belief that, during the plea before the court on August 1, 2012, certain information was presented to the Court which was not accurate and which affected the outcome of the case. The Defendant hereby requests a hearing in order to correct any information presented to the Court and which the Defendant may not have had adequate time to prepare a response on the date of the plea.

Respectfully submitted,

Richard H. Whelchel
 Richard H. Whelchel, Assistant Public Defender
 Seventh Judicial Circuit Public Defender Office
 Spartanburg, South Carolina

Dated: August 10, 2012

Service Accepted by:

[Signature]
 Solicitor's Office, Seventh Judicial Circuit

FILED
 CLERK OF COURT
 SPARTANBURG COUNTY
 2012 AUG 13 AM 10:39
 M. HOPE BLACKKEY

W

STATE OF SOUTH CAROLINA	)	GENERAL SESSIONS
	)	
County of Spartanburg	)	2011-GS-42-2412; 2413
	)	2012-GS-42-2465; 2466;
	)	2467
	)	
Chuck McCullough,	)	
	)	
	)	
vs.	)	TRANSCRIPT OF RECORD
	)	
State of South Carolina.	)	
	)	
	)	
	)	

May 23rd, 2013
Spartanburg, South Carolina

BEFORE:

THE HONORABLE J. MARK HAYES, II, JUDGE.

APPEARANCES:

SCOTT DANIEL SPIVEY, ASSISTANT SOLICITOR
Attorney for the State

RICHARD H. WHELCHER, ASSISTANT PUBLIC DEFENDER
Attorney for the Defendant

AMINAH R. HARDY, CM
Official Court Reporter

EXHIBITS

No.	Description	Page
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(No exhibits were marked.)

P R O C E E D I N G S

THE COURT: All right. I've reviewed the motion filed on behalf of Mr. McCullough seeking me to reconsider the previous sentences that I imposed on the unlawful neglect of a child on the two charges of possession of -- or on the charges of methamphetamine. That manufacturing with possession of methamphetamine third charges, the third charges of possession of methamphetamine and manufacturing methamphetamine third and subsequent drug offense, as well as the charge of unlawful neglect of child.

Yes, sir, Mr. Whelchel?

MR. WHELCHER: May I approach, Your Honor? I'm handing up items that I've already allowed Mr. Spivey, the assistant solicitor in this case to see before I handed it to the Court for your review.

THE COURT: Okay.

MR. WHELCHER: Your Honor, back on the first day of August of last year, first day of August 2012, we were before the court and entered the plea to the items that you just detailed on the record. It was an Alford plea in all of those cases, Your Honor. And during the course of the plea, there were statements made by the investigator who was I think here again today. And we take -- we wanted to come back before the Court to have the Court

1 reconsider its sentence, specifically the sentence on the
2 indictment -- beg the Court's indulgence -- for indictment
3 2011-2413 for the manufacture of methamphetamine, that
4 being a third offense, Your Honor. Carried 10 to 30
5 years, and the court sentenced Mr. McCullough to 30 years.

6 There were some statements made regarding this kind
7 of conduct being done and these kind of drugs getting to
8 children, but there was nothing in the record that
9 reflected -- that I had, in any of the discovery I had --
10 that Mr. McCullough had ever been involved with the
11 distribution of these type of drug to any kind of children
12 or anything. Your Honor may recall that Mr. McCullough
13 had a codefendant -- were arrested or stopped at one point
14 when they were very emotional about the fact that their --
15 they had found their child dead and the child was found in
16 the automobile, Your Honor.

17 We would ask that the Court reconsider its sentence
18 specifically on that particular charge. I believe
19 Mr. McCullough would like to address the Court if the
20 Court would so desire. And specifically, Your Honor, he
21 has already obtained the GED which was part of your order
22 while he's been incarcerated in the Department of
23 Corrections since August of last year. In addition, part
24 of your earlier order, Your Honor, was that he attend the
25 ATU unit while in the Department of Corrections. That's

1 for the substance abuse, and what he tells me and I ask
2 him to correct me if I'm wrong about this, was that when
3 he got to Department of Corrections, they informed him
4 that they signed him up for the ATU so that he'll be able
5 to get it at the very end of his sentence, which, at this
6 point, will be about 30 years from now, or a little bit
7 less than 30 years from now.

8 They gave him the form so that he could self-enroll,
9 which will speed up the process, and he's done that, but
10 has not received any information back about when he'll be
11 able to attend the ATU classes.

12 THE DEFENDANT: They said it would take up to three
13 years.

14 THE COURT: Let your lawyer finish and then we'll...

15 MR. WHELCHEL: As you heard, Your Honor, they tell
16 him it will take up to three years before he can get into
17 the ATU program. Based on those items, we would ask the
18 Court to reconsider the sentence earlier imposed.

19 THE COURT: Mr. McCullough, I need to remind you that
20 you remain under oath. Do you understand that?

21 THE DEFENDANT: Yes, sir.

22 THE COURT: Sir, were you able to hear the statements
23 that were just made by your lawyer?

24 THE DEFENDANT: Yes, sir.

25 THE COURT: Do you agree with those statements?

1 THE DEFENDANT: Yes, sir.

2 THE COURT: Is there anything else that you would
3 like me to know or consider with regard to this motion?

4 THE DEFENDANT: Yeah, I wanted to be -- the program,
5 the substance abuse program I'm trying to enroll in, they
6 said that the way it works, it does -- it is the last part
7 of the sentence. Whatever your sentence is, it's the last
8 six months, because it's only a six-months program, 90
9 days to six-months program. And they usually enroll you
10 but it's invalidated toward the end of your sentence. So
11 I have the form to fill out to go ahead and enroll myself,
12 and I have done that. They said it could take up to three
13 years or longer to get into the program because of the bed
14 space.

15 Also just like for you just to consider the tragedy I
16 had to live through, still living through. It's been a
17 major issue. My wife is -- we're still currently married,
18 but she's not even keeping me up to date on my daughter,
19 her well being, how she's doing in school or -- I don't
20 have family or any of that. I just beg -- ask you to
21 consider a little lesser time.

22 THE COURT: Thank you, sir.

23 MR. WHELCHER: I would add, Your Honor, if I may,
24 speaking of family Mr. McCullough on several occasions in
25 letters to me has given me the phone number for the

1 Parnells that are relatives of his, and they've actually
2 call me in the last week, maybe last week, Your Honor, and
3 I attempted to contact them for or I called the phone
4 number that he had given me and they had given me twice
5 yesterday and there was no answer. I don't know.

6 Beg the Court's indulgence.

7 THE COURT: They live in Pickens county, Your Honor,
8 and I think finances are -- prevent them from coming up
9 and that's something that they told me before.

10 Yes, sir.

11 MR. SPIVEY: Thank you, Your Honor. Your Honor, the
12 other -- just very briefly, your sentence was possession
13 third of -- was ten years; for manufacturing meth, third
14 was 30 years; unauthorized removal of a dead body was 60
15 days, time served; exposing a child to methamphetamine was
16 five years; unlawful neglect of a child was ten years.
17 Your Honor, the state also dismissed a disposing of
18 methamphetamine waste. And Your Honor, the possession of
19 methamphetamine, third offense was actually a reduction
20 from a possession with intent to distribute
21 methamphetamine, third offense, which would have carried
22 10 to 30 years.

23 Your Honor, the defendant did plead straight up on
24 all the other charges. He did receive credit for time
25 served of 504 days. Your Honor, the facts of this case

1 occurred back in March 17th of 2011. Your Honor, deputies
2 received a call that it was suspected that Noah
3 McCullough, who was a two-month-old at that time son of
4 Chuck and Carissa McCullough, had passed away. Your
5 Honor, the deputies received information that Mr. and
6 Mrs. McCullough were driving in a green Chevy truck, and
7 they began looking for that. Your Honor, they also went
8 to Louisa Street in Roebuck, South Carolina, to look
9 for the couple. That was an address they had that the
10 defendants stayed at. They were not present at the house
11 Your Honor.

12 Your Honor, they received another call from a family
13 member of Ms. McCullough, Carissa, who lived at
14 Flatwood Drive in Roebuck. Your Honor, they stated that
15 they had information that Chuck and Carissa were riding
16 around in their green Chevy truck with the body of Noah
17 McCullough in the truck. Your Honor, that person gave a
18 written statement which included Chuck's comment that the
19 baby was dead and they were running out of time.

20 Your Honor, investigators with the Sheriff's Office
21 waited near Flatwood Drive until they saw the green
22 truck pull up. They met the co-defendant, Carissa
23 McCullough, who owned that truck, she gave verbal and
24 written permission to search the truck. Your Honor, the
25 child's body was found inside a blue Tupperware container,

1 a face-down among a king sized bed comforter. Your Honor,
2 that container had a padlock that had to be cut off. Your
3 Honor, they saw no physical trauma to the baby, but
4 noticed there appeared to be vomit on the child dried on
5 the comforter and the baby's face.

6 Your Honor, Carissa McCullough gave a written
7 statement after Miranda warnings, saying that she and
8 Chuck McCullough went to Louisa Street at or near dark
9 on the evening of March 16th, 2012. Your Honor, she
10 stated that she fed the baby at around 12:30 or 1:00 that
11 morning, burped him, and put him face down on the bed.
12 She then stated she and Chuck slept on the couch. Your
13 Honor, she stated that she woke up in the morning on the
14 17th, the baby was face down in its vomit. She stated
15 she went hysterical and didn't know what to do because he
16 was already gone. Then she stated that Chuck took him and
17 put him in the crate and they drove to her sister's.

18 Your Honor, investigator sought and obtained a search
19 warrant for the Louisa Street house, and the truck --
20 the green Chevy truck looking for poisons to figure out
21 what had caused the death, Your Honor. Your Honor,
22 shortly after entering the residence, which was the
23 defendant's residence, they noticed evidence of
24 methamphetamine lab.

25 Your Honor, they obtained a narcotics search warrant,

1 called narcotics investigators for meth lab treatment and
2 clean up. Your Honor, they discovered numerous items used
3 to manufacture methamphetamine using a one-pot method.
4 One piece of apparatus was made an old pill bottle that
5 had the codefendant's name on it. Your Honor, old
6 methamphetamine cooks from a prior occasion were still --
7 and various components were found in trash bags, burn
8 piles, and out buildings and other components were found
9 in other areas of the house, Your Honor. Your Honor,
10 heavy corrosion around the kitchen sink indicated that old
11 meth lab cooks were poured down the drain. While going
12 through several trash bags, investigators found diapers in
13 the same trash bags with methamphetamine waste.

14 Your Honor, they also found pseudoephedrine tablets,
15 receipts for pseudoephedrine tablets, diagrams of meth lab
16 apparatus, shopping list with meth lab ingredients, and
17 Ziplocks with trace amounts of methamphetamine inside of
18 them. Your Honor, they also found the personal effects of
19 both the defendant, Chuck McCullough, and Mrs. McCullough
20 in the house. Your Honor, they searched the green truck
21 after it was impounded and found 2.13-grams of
22 methamphetamine, a digital scale, a glass pipe, a
23 Walgreen's receipt for pseudoephedrine, and empty Ziplock
24 bags.

25 Your Honor, there was an unrelated Department of

1 Social Services case pending in regard to other children
2 that they shared, and so a DSS worker went to jail to
3 interview both the defendant and the codefendant. Your
4 Honor, the defendant told the caseworker that he and
5 Carissa McCullough, his wife, and Noah were all in the
6 outbuilding on March 12th, 2011, while he was cooking
7 meth. He told the caseworker that he was one that knew
8 how to cook the meth, but Carissa had assisted him while
9 she was holding Noah there in the outbuilding. Your
10 Honor, while the defendant was in jail, he also made
11 numerous phone calls. Your Honor, prerecorded warnings on
12 those phone calls are given twice that there --
13 essentially told you're being recorded on this phone call.
14 Your Honor on April 3rd, 2011, after being arrested, he
15 was on the phone with who we believe to be his aunt, and
16 he stated, "I can't go back to where I was at. I mean, I
17 can, but I don't want to. I want a new start." His aunt
18 stated, "I know." Defendant stated, "I've got to change
19 my life. I'm done with it." The aunt stated, "Well, you
20 said that last time, Chuck." And then the defendant said,
21 "This is a lesson learned right here, because I got too
22 comfortable with what I was doing. Nobody knew nothing,
23 you know what I'm saying? I quit spending my money on it
24 and starting do it myself. I didn't, you know what I'm
25 saying, I didn't have to worry about," and he tailed off.

1 Your Honor, the aunt later stated in the
2 conversation, "And cooking drugs is your fault, yes, that
3 is your fault and I ought to kick you in your ass for that
4 shit." Defendant replied, "Well, I agree with that."

5 Your Honor, another phone call to his aunt on
6 April 7, 2011, the defendant admitted to paying rent for
7 the Louisa Street address in methamphetamine. Your
8 Honor, investigators also checked locate pharmacy
9 pseudoephedrine logs and found that both he and the
10 codefendant made numerous purchases in the months prior
11 the incident date. They obtained surveillance tapes of
12 pseudoephedrine.

13 Your Honor, I did tell you last time and I will tell
14 you again: When they did an autopsy of the child, they
15 also did toxicology and they sent the some tissues off to
16 be tested by SLED. Your Honor, methamphetamine nor any of
17 them chemicals used to cook methamphetamine were ever
18 found in any of those tissues or samples taken, Your
19 Honor. Your Honor, his record at that time was possession
20 of methamphetamine, first offense, 2003. 2003, drug
21 paraphernalia. 2004, grand larceny. 2005, possession of
22 methamphetamine, second offense.

23 Your Honor, I also told you at -- during the
24 sentencing portion of the hearing that unrelated to the
25 facts of the case, the defendant made several phone calls

1 while in jail to a gentleman he met while he was in jail.
2 Your Honor, they discussed in code how to manufacture
3 methamphetamine, and that person did ask the defendant for
4 help because what he told in jail was not working out in
5 real life. Your Honor, they attempted to troubleshoot the
6 issues that person was having. Your Honor, the defendant
7 eventually determined that in his estimation that one the
8 ingredients was incorrect, and he probably did not have
9 pseudoephedrine in the cold medicine that he was using.

10 Your Honor, the defendant told the gentleman that he
11 should wait until his court date, which he thought was
12 impending at that time, which he believed he would be
13 getting a probationary sentence. Your Honor, he told the
14 gentleman that as soon as he was released on probation, he
15 would get a ride to meet the gentleman, they would move to
16 North Carolina, manufacture meth together, and sell it in
17 North Carolina and Virginia because those areas are wide
18 open. Your Honor, I did state at the end that I felt that
19 this was a case in which the defendant had sat in the jail
20 for a while while the SLED results were coming back, and I
21 essentially at that time, the state was investigating
22 whether or not there was going to be an additional charge
23 as it related the death of the child. Your Honor, it
24 didn't turn out there was not enough evidence to pursue
25 any further charges, but the defendant found that out and

1 during that time wasn't showing any remorse or concern
2 about what happened. He instead chose to potentially
3 conspire with another defendant that he met in jail to get
4 out and go cook methamphetamine. Your Honor, I thought it
5 showed extreme lack of remorse and potentially -- Your
6 Honor, I ask for what would be the maximum sentence in the
7 case for 30 years.

8 THE COURT: Any reply?

9 MR. WHELCHER: Your Honor, I would emphasize that at
10 this hearing and at the previous hearing, the Court was
11 informed that there was no evidence whatsoever from any of
12 the results of the autopsy that any of this involvement
13 with methamphetamine had anything to with the death of
14 that child.

15 THE COURT: There was no toxicology report, no
16 medical report that indicated the child had any
17 methamphetamine in the child's system?

18 MR. WHELCHER: No, sir.

19 THE COURT: All right.

20 Yes, sir, did you'd wish to --

21 THE DEFENDANT: Yeah, I'd like to elaborate on the
22 phone call he was just talking about.

23 THE COURT: Okay.

24 THE DEFENDANT: It was my roommate and he did --

25 MR. WHELCHER: Your Honor --

1 THE DEFENDANT: When he got out, he was sending me
2 money because I don't have money coming from home. And
3 all I did was -- not what I was supposed to been doing,
4 but I did -- was talking to him about that, hoping he
5 would keep sending me money. But I had no intentions of
6 following up anything that was said, period. To this day
7 I've not called that man back, wrote that man or nothing.
8 I've changed my ways. I've learned a lesson. I just want
9 you to know that.

10 THE COURT: All right. And let the record reflect
11 that what I have been provided, because these are the
12 original documents so I'd like to give these back to the
13 defendant. Is one, two, three, Rock of Ages prison
14 ministry disciplinary institute certificate of completion
15 prevented to Chuck McCullough on April 1st, 2013, for
16 course grade 105, course grade 97, and another one for
17 course grade 97. Been provided the original official
18 transcript of GED test for Chuck McCullough, and also the
19 laminated certificate, South Carolina high school
20 equivalency diploma awarded to Chuck McCullough on
21 February the 28th, 2013. I do want to congratulate you on
22 that. That's very impressive.

23 All right. Anything else?

24 MR. SPIVEY: Nothing, Your Honor.

25 THE COURT: All right. I'll let you know.

1 MR. WHELCHER: Thank you, Your Honor.

2 (Whereupon, the proceedings were concluded.)

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Aminah R. Hardy, CM

STATE OF SOUTH CAROLINA)
)
 COUNTY OF SPARTANBURG)

IN THE COURT OF GENERAL SESSIONS

STATE,)
)
 v.)
)
 CHUCK MCCULLOUGH,)
)
 Defendant.)

ORDER DENYING DEFENDANT'S MOTION
 TO RECONSIDER SENTENCE

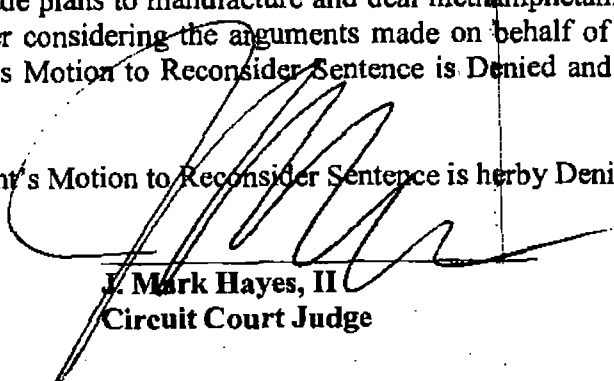
2011GS4202412; 2011GS4202413;
 2012GS4202465; 2012GS4202466;
 2012GS4202467

This matter comes before the Court on Defendant's Motion to Reconsider the Sentence imposed on Defendant on August 1, 2012. The Defendant's sentence was imposed after Defendant entered an Alford plea as to the charges of Manufacturing Methamphetamine 3rd offense, Unlawful Neglect of a Child, Exposing Child to Methamphetamine 1st offense, Unauthorized Removal of a Dead Body, and Possession of Methamphetamine 3rd offense (reduced from Possession with Intent to Distribute Methamphetamine 3rd offense). The State dismissed a charge of Disposing of Methamphetamine Waste 1st offense. Defendant received the maximum sentencing for each charge. All sentences were to be served concurrently.

On May 24, 2013, a hearing was held on Defendant's Motion to Reconsider the Sentence. Defendant was represented by Assistant Public Defender, Richard Welchel. The State was represented by Assistant Solicitor, Scott Spivey. Matt Hutchins of the Spartanburg County Sheriff's Office was also present. The primary contention was that the sentence was influenced by improper comments made by law enforcement at the time of the original plea. The 30 year sentence in question does not fall outside of the range of sentencing allowed by the Legislature, nor was it contended that the sentences were unconstitutional.

The facts underlying these crimes are substantial. The Court carefully listened to the arguments presented at the hearing and may have been persuaded to slightly modify the sentence but for the information regarding certain recorded phone calls. The recorded phone calls indicate that even after Defendant's arrest, Defendant counseled another individual on the proper way to manufacture methamphetamine and also made plans to manufacture and deal methamphetamine subsequent to his release from prison. After considering the arguments made on behalf of the Defendant, this Court rules that Defendant's Motion to Reconsider Sentence is Denied and his sentence shall not be altered.

It Is Therefore Ordered that Defendant's Motion to Reconsider Sentence is hereby Denied.


 J. Mark Hayes, II
 Circuit Court Judge

May 28, 2013

SPARTANBURG COUNTY
 CLERK OF COURT
 FILED
 MAY 28 PM 4:31
 M. HOPE BLACKLEY

2013-CP-42-4979

FORM 5

STATE OF SOUTH CAROLINA)

COUNTY OF Spartanburg)

IN THE COURT OF COMMON PLEAS

Full name and prison number (if any) of Applicant.)

Chuck Edward McCullough #311608)

v.)

State of South Carolina)

APPLICATION FOR

POST-CONVICTION RELIEF

INSTRUCTIONS - 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 Spartanburg County Jail 5012 McCullough CI
2. Name and location of Court which imposed sentence. Spartanburg County
3. Name(s) of co-defendant(s) (if any) Carissa Anna McCullough
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:

- (a) 2011-GS-42-2412 (D) 2012-GS-42-02466
 (b) 2011-GS-42-2413 (E) 2012-GS-42-02467
 (c) 2012-GS-42-02465

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

- (a) 8-1-12 10 yrs concurrent (D) 8-1-12 5 yrs concurrent
 (b) 8-1-12 30 yrs concurrent (E) 8-1-12 10 yrs concurrent

Revised 3/2003

- (c) 8-1-12 60 days concurrent
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty ✓ Alford
- (b) after a plea of not guilty N/A
- (c) after a plea of nolo contendere N/A
7. Did you appeal from the judgment of conviction or the imposition of sentence?
yes
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
- i. South Carolina Court of Appeals
- ii. N/A
- iii. N/A
- (b) the result in each such Court to which you appealed:
- i. dismissed
- ii. N/A
- iii. N/A
- (c) the date of each such result:
- i. November 25, 2013
- ii. N/A
- iii. N/A
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. 2013 (d) (1) (B) (iv) (SCACR) to provide a sufficient
Explanation as required by this Rule
- ii. N/A
- iii. N/A
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) N/A
- (b) N/A
- (c) N/A
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

FILED
CLERK OF COURT
SPARTANBURG, SOUTH CAROLINA
2013 DEC 16 AM 11:49
JAMES L. BARNETT

- (a) Ineffective assistance of Counsel (Plea Counsel)
 (b) Ineffective assistance of Counsel (Plea Counsel)
 (c) Ineffective assistance of Counsel (Reconsideration Counsel)
 (d) Ineffective assistance of Counsel (Reconsideration Counsel)
11. State concisely and in the same order the facts which support each of the grounds set out in (10):
- (a) Failure to investigate and file motion to suppress illegal seized evidence
 (b) Induced Petitioners guilty plea based on faulty and erroneously legal advice
 (c) During plea sentence influenced by improper arguments made by law enforcement.
 (d) Defendant may not have had adequate time to prepare a response on day of plea
12. Prior to this application have you filed with respect to this conviction:
- (a) any petition in a State Court under South Carolina Law? Yes
 (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)? N/A
 (d) any other petitions, motions or applications in this or any other Court? N/A
13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:
- (a) the specific nature thereof:
- i. Motion of Reconsideration of Sentence
 ii. N/A
 iii. N/A
 iv. N/A
- (b) the name and location of the Court in which each was filed:
- i. IN The General Sessions Court Seventeenth Judicial Circuit
Spartanburg County
 ii. N/A
 iii. N/A
 iv. N/A
- (c) the disposition thereof:
- i. Denied
 ii. N/A
 iii. N/A

FILED
 CLERK OF COURT
 SPARTANBURG
 2013 DEC 16 AM 11:49

- iv. N/A
- (d) the date of each such disposition:
- i. May 28, 2013
- ii. N/A
- iii. N/A
- iv. N/A
- (e) if known, citations of any written opinions or orders entered pursuant to each such disposition:
- i. No citations used
- ii. N/A
- iii. N/A
- iv. N/A
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
15. If you answered "yes" to (14) identify:
- (a) which grounds have been presented:
- i. During plea on 1/2012 certain information was presented to the court which was not accurate and which affected the outcome of the case
- iii. Defendant may not have had adequate time to prepare an intelligent response on day of original plea.
- (b) the proceedings in which each ground was raised:
- i. Motion to Reconsider Sentence
- iii. Motion to Reconsider Sentence
16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:
- (a) Could not do it legally at the time.
- (b) Could not do it legally at the time.
- (c) N/A
17. (D) Were you represented by an attorney at any time during the course of:

- (a) your arraignment and plea? yes
- (b) your trial, if any? no
- (c) your sentencing? yes
- (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? no
- (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? yes

18. If you answered "yes" to one or more parts of (17), list:

- (a) the name and address of each attorney who represented you:

- i. Richard A. Wheeler 366 N. Duane St. Ste. 3000 Springfield, MA 01103
- ii. N/A
- iii. N/A

- (b) the proceedings at which each such attorney represented you:

- i. Plea
- ii. Motion to Reconsider sentence
- iii. N/A

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

Vacate, correct sentence, or set aside sentence,

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

no

FILED
 CLERK OF SUPERIOR COURT
 SPARTANBURG, SOUTH CAROLINA
 2013 DEC 16 AM 11:49
 JENNIFER L. JORDAN, CLERK

STATE OF SOUTH CAROLINA)

VERIFICATION

County of Spartanburg)Chuck McCullough

I, Chuck McCullough, 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.

Chuck McCullough

SWORN to and subscribed before me this 10
day of Dec, 2013

J. A. Franklin (L.S.)
Notary Public

My Commission Expires: 12-16-2019

FILED
CLERK OF COURT
SPARTANBURG, SOUTH CAROLINA
2013 DEC 16 AM 11:49
JENNIFER DUNNILEY

**APPLICATION TO PROCEED WITHOUT PAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF**

Chuck McElroy
I, _____, 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.

Chuck McElroy

Applicant

SWORN or affirmed to and subscribed before me this

10 day of Dec, 2013

D. K. Kramel

Notary Public

My Commission Expires: 12-16-2019

FILED
CLERK OF COURT
2013 DEC 16 AM 11:49
JUDICIAL DEPARTMENT

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	SEVENTH JUDICIAL CIRCUIT
COUNTY OF SPARTANBURG	)	
	)	2013-CP-42-4979
Chuck Edward McCullough, #311608,	)	
	)	
Applicant,	)	
	)	
v.	)	RETURN
	)	
State of South Carolina,	)	
	)	
Respondent.	)	

Respondent, making its Return to the application for post-conviction relief (PCR) filed December 16, 2013, 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 Spartanburg County Clerk of Court. He was indicted at the May 2011 term of the Spartanburg County Grand Jury for possession with intent to distribute methamphetamine or cocaine base – 3rd offense (2011-GS-42-2412), manufacturing methamphetamine – 3rd offense (2011-GS-42-2413), and subsequently indicted at the May 2012 term of the Spartanburg County Grand Jury for unauthorized removal of a dead body (2012-GS-42-2465), exposing child to methamphetamine (2012-GS-42-2466), and unlawful conduct toward a child (2012-GS-42-2467). The Applicant was represented by Richard Whelchel, Esquire, and James Cheek, Esquire. On August 2, 2012, the Applicant pled guilty as indicted pursuant to NC v. Alford. The Honorable J. Mark Hayes II sentenced Applicant to concurrent sentences of thirty years for manufacturing methamphetamine, ten years each on possession of methamphetamine and unlawful

conduct toward a child, five years for exposing child to methamphetamine, and sixty days for unauthorized removal of a dead body.

A timely Notice of was filed on Applicant's behalf. The South Carolina Court of Appeals dismissed the Applicant's appeal for failure to provide an explanation of any issues to be addressed on appeal on November 25, 2013. The Remittitur was returned on December 12, 2013.

Attached herewith and incorporated herein are the records of the Spartanburg County Clerk of Court regarding the subject conviction, the Applicant's records from the South Carolina Department of Corrections, the plea transcript, and Applicant's appellate records. 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 reason:

1. Ineffective assistance of counsel, in that;
 - a. Counsel failed to investigate,
 - b. Counsel failed to file a motion to suppress illegally seized evidence,
 - c. Counsel induced Applicant's guilty plea as a result of erroneous legal advice,
 - d. Counsel allowed his arguments to be influenced by law enforcement on the day of Applicant's plea,
 - e. Applicant did not have adequate time to prepare a response on day of plea.

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, (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. With respect to guilty plea counsel, the Applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed. 2d 203 (1985).

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.

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

V.

WHEREFORE, having made its Return, the State requests that an evidentiary hearing be held solely on the claim of ineffective assistance of counsel.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

KAREN C. RATIGAN
Senior Assistant Deputy Attorney General

SUZANNE H. WHITE
Assistant Deputy Attorney General

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

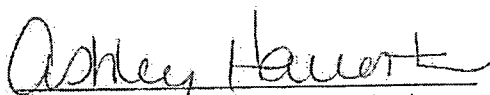
August 18, 2014.

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF SPARTANBURG	)	
	)	
CHUCK EDWARD MCCULLOUGH	)	2013-CP-42-4979
	)	
Applicant,	)	
	)	
vs	)	AFFIDAVIT OF SERVICE BY MAIL
	)	
STATE OF SOUTH CAROLINA,	)	
	)	
Respondent.	)	

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the **Return** on the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Ms. Leah B. Moody
 Law Office of Leah B. Moody, LLC
 PO Box 1015
 Rock Hill, SC 29730

DATED this 18TH day of August, 2014.


 Ashley Haworth, Legal Assistant
 For Respondent

Law Office of Leah B. Moody, LLC

235 East Main Street
Post Office Box 1015
Rock Hill, South Carolina 29731
lbmatty@comporium.net

Phone: (803) 327-4192

Fax: (803) 329-1344

January 5, 2015

Suzanne White, Esquire
Office of the Attorney General
P. O. Box 11549
Columbia, SC 29211

RE: Chuck Edward McCullough v. State of South Carolina
C.A. No.: 2013-CP-42-4979

Dear Ms. White:

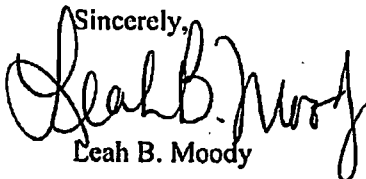
Please be informed that the following amendments need to be made to Mr. Chuck Edward McCullough's PCR Application in the above-referenced matter.

The amendments to Mr. McCullough's PCR Application would be amended under Question 10 and may be generally described as:

- (1) Prosecutorial Misconduct;
- (2) Unconstitutional Sentence Enhancement;
- (3) Subject Matter Jurisdiction; and
- (4) Judicial Misconduct.

If you have any questions or concerns, please feel free to contact my office.

Sincerely,



Leah B. Moody

LBM/scm

Cc: Chuck Edward McCullough
The Honorable M. Hope Blackley

Law Office of Leah B. Moody, LLC

235 East Main Street
Post Office Box 1015
Rock Hill, South Carolina 29731
lbmatty@comporium.net

Phone: (803) 327-4192

Fax: (803) 329-1344

March 6, 2015

Suzanne White, Esquire
Office of the Attorney General
P. O. Box 11549
Columbia, SC 29211

RE: Chuck Edward McCullough v. State of South Carolina
C.A. No.: 2013-CP-42-4979

Dear Ms. White:

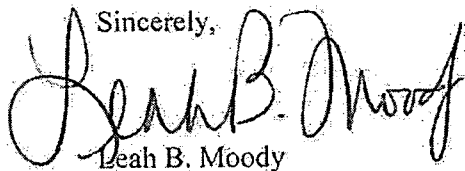
Please be informed that the following amendments need to be made to Mr. Chuck Edward McCullough's PCR Application in the above-referenced matter.

The amendments to Mr. McCullough's PCR Application would be amended under Question 10 and may be generally described as:

- (1) Prosecutorial Misconduct in that the prosecutor abused his discretion by knowingly admitting evidence of the photo of the container that the child was transported in which, was irrelevant to the drug charges.
- (2) Ineffective Assistance of Counsel in that counsel failed to object to the admissibility of the photo of the child in the container, and counsel failed to get a ruling on said photo.

If you have any questions or concerns, please feel free to contact my office.

Sincerely,



Leah B. Moody

LBM/scm

Cc: Chuck Edward McCullough
The Honorable M. Hope Blackley

State of South Carolina)
)
 County of Spartanburg)

In the Court of Common Pleas
 Seventh Judicial Circuit
 2013-CP-42-4979

Chuck Edward McCullough,)
)
 Applicant,)
)
 vs.)
)
 State of South Carolina,)
)
 Respondent.)

Transcript of Record

January 13, 2016
 Spartanburg, South Carolina

B E F O R E:

The Honorable R. Ferrell Cothran, Jr., Judge

A P P E A R A N C E S:

Leah B. Moody, Esquire
 Attorney for the Applicant

Alicia A. Olive, Esquire, Assistant Attorney General
 Attorney for the Respondent

Reported By:
 Maryann S. Nevers, CVR-M-CM

Transcribed By:
 Elizabeth B. Harris, CVR-M-CM
 Circuit Court Reporter

I N D E X

<u>Witness/Description</u>	<u>Page No.</u>
Chuck Edward McCullough	
Direct Examination by Ms. Moody.	4
Cross-examination by Ms. Olive.. . . .	42
Redirect Examination by Ms. Moody.	49
Recross-examination by Ms. Olive.. . . .	52
Further Direct Examination by Ms. Moody.	53
Richard H. Whelchel	
Direct Examination by Ms. Olive.	55
Cross-examination by Ms. Moody.. . . .	63
Redirect Examination by Ms. Olive.	76
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E X H I B I T S

<u>No.</u>	<u>Description</u>	<u>ID.</u>	<u>Ev.</u>
P-1	Sentencing Sheets	9	--
P-2	Tracking Sheet	--	13
P-3	Motion/Order to Reconsider	27	--

1 MS. OLIVE: May it please the court, Your Honor?

2 THE COURT: Yes.

3 MS. OLIVE: This is *Chuck Edward McCullough vs. The*
4 *State*, 2013-CP-42-4979. Mr. McMullough was indicted in May
5 of 2011 for possession with intent to distribute
6 methamphetamine third offense, manufacturing
7 methamphetamine third offense. He was subsequently
8 indicted in May 2012 for unauthorized removal of a dead
9 body, exposing child to methamphetamine, and unlawful
10 conduct towards child. He was represented by Richard
11 Whelchel on those charges and James Cheeks.

12 On August 2, 2012, he pleaded guilty as indicted
13 pursuant to *North Carolina vs. Alford*, and that was before
14 Judge J. Mark Hayes. Judge Hayes sentenced him to
15 concurrent sentences of thirty years for manufacturing
16 methamphetamine, ten years on possession of methamphetamine
17 and unlawful conduct towards a child, five years for
18 exposing a child to methamphetamine, and sixty days for
19 unauthorized removal of a dead body.

20 Following, following his sentencing there was a motion
21 to reconsider and a hearing on that motion to reconsider,
22 to reconsider the sentencing and that motion, the judge did
23 not alter his sentence. The sentence stayed the same. A
24 timely notice of appeal was filed on his behalf. The South
25 Carolina Court of Appeals dismissed the appeal for failure

C. McCULLOUGH - DIRECT EXAMINATION BY MS. MOODY

4

1 to provide any explanation -- or to provide an explanation
2 of any issues to be addressed on appeal, and that was
3 November 25, 2013.

4 Mr. McCullough filed the PCR alleging ineffective
5 assistance of counsel. He is present in the courtroom
6 today and represented by Leah Moody. I will turn it over
7 to her at this time.

8 THE COURT: Okay.

9 MS. MOODY: Thank you, Your Honor. At this time I
10 would call Chuck McCullough to the stand.

11 THE COURT: Okay.

12 CHUCK EDWARD McCULLOUGH, BEING

13 DULY SWORN, TESTIFIES AS FOLLOWS:

14 DIRECT EXAMINATION BY MS. MOODY:

15 Q. Mr. McCullough.

16 A. Yes, ma'am.

17 Q. Could you please state your full name for the record?

18 A. Chuck Edward McCullough.

19 Q. Okay, and where are you currently incarcerated?

20 A. I'm incarcerated at McCormick Correctional
21 Institution.

22 Q. And how long have you been there?

23 A. I have been there since I left here in August the 3rd
24 of 2012.

25 Q. And what is your current sentence that you're serving?

C. McCULLOUGH - DIRECT EXAMINATION BY MS. MOODY

5

1 A. My current sentence is a -- my current sentences are
2 for manufacturing methamphetamines third offense.

3 Q. Well, well, I'm just asking you what's the total
4 number of years you're serving.

5 A. Oh. Thirty years.

6 Q. Thank you.

7 A. Sorry.

8 Q. All right. So, you're there at McCormick for thirty
9 years, and the charges that you are there for, your
10 attorney was -- is your attorney present in the courtroom?

11 A. Yes, ma'am.

12 Q. And could you please state his name for the record?

13 A. Richard Whelchel.

14 Q. Okay, and was he your only attorney throughout these
15 proceedings?

16 A. James Cheeks came to talk to me a couple of times on
17 behalf of my bossman. My boss had him to come talk to me,
18 but other than that, yeah, Mr. Whelchel.

19 Q. Okay, and so when you were first appointed an
20 attorney, it was not James Cheeks? It was Mr. Whelchel?

21 A. Mr. Whelchel, yes. Yes, ma'am.

22 Q. And so in your application, you allege ineffective
23 assistance of counsel?

24 A. Yes, ma'am.

25 Q. Okay. Can you specifically tell the court what you

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1 feel was ineffective in your counsel?

2 A. What was ineffective in my counsel was the, the
3 failure to object mostly to the improper comments that were
4 made on the day of the plea. The -- also failing to object
5 to the, the withdrew evidence, the phone calls because all
6 of that, all that was extra things that the state used to
7 influence the judge. It was -- they -- it was
8 inflammatory, which rendered a due process violation
9 because it -- I feel that it made -- it was unfair that
10 those were used in the way it was used.

11 Then the prosecutor, they had made a -- they didn't
12 make no recommendation on the sentencing sheet or before
13 the plea. Then in the courtroom, they made a
14 recommendation of thirty years after he said he wasn't
15 going to make one, and my counsel failed to object to that.

16 And then prior to the plea, leading up to it, I sat in
17 jail for fifteen months trying to get somebody come and
18 talk to me. I wrote letters to the prosecutor's office. I
19 wrote letters to my attorney. I wrote letters to James
20 Cheeks. I signed sheets on the wall. I did everything I
21 could do to try to get someone to come and discuss my case
22 with me before I made a decision on what I wanted to do.

23 But -- and nobody would come and do that until there
24 at the last, last, last few minutes -- last few days up til
25 the plea, Mr. Cheeks came and talked to me. And he had

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1 told me some information regarding the case, and then when
2 I went over to take the plea, my wife wasn't even in the
3 courtroom. So, I backed out of the plea that day; I didn't
4 want to plea. And two days later, Mr. Whelchel brings me
5 my discovery. Gives it to me. Tells me to read it and
6 he'd get with me.

7 That next morning, they brought me to court for the
8 plea. We was in that little room that, that's back here
9 discussing it, and I kept asking him, you know, you know,
10 what -- my chances at trial, you know, and we can't talk
11 about that right now. We can't talk about that right now.
12 I need to know are you going to plead guilty. And I said,
13 well, I don't, I don't know what I'm going to do. He said,
14 well, your wife pled guilty. So, you need to plead guilty,
15 and it's only fair because you -- she, she owned up to her
16 side. She pled guilty. You need to plead guilty, too.
17 You don't want to put her back on the stand.

18 So, I'm scared to death. Don't know what to do, and I
19 went ahead and took the plea because he said that he --
20 being that I didn't have no record, I would get no less --
21 he don't see me getting no more than ten years because I
22 didn't have nothing but two prior drug offenses.

23 Q. Now, Mr. McCullough, when you filled out your
24 application, you indicated that your counsel failed to
25 investigate?

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1 A. Correct.

2 Q. Okay, and what did he not investigate?

3 A. You know, what? I, I, I will drop that one because I
4 won't get into -- I can't even really get into my paperwork
5 here with all this.

6 Q. Well, I ---

7 A. With these chains on. My prior record, for one.

8 Q. Well, wait a minute. So, you're, you're going forward
9 on failure to investigate?

10 A. Yeah.

11 Q. Okay.

12 A. I'll go ahead. I've got it out here. On the failure
13 to investigate, that would be solely on the ground that he
14 failed to investigate my prior record because I had two
15 possession of meth charges, one of them being invalid
16 conviction that could have allowed me a little bit leanier
17 [sic] sentence far as them enhancing.

18 Q. So, so hold for a second for a second. When you're --
19 can -- the judge doesn't know anything about your case, so
20 let's slow it down here. You're saying that your two prior
21 drug offenses, one of them, did you have -- you did not
22 have counsel?

23 A. Correct. I'm getting to it so I can, I show it
24 because I'd like to enter it into, into evidence. My prior
25 sentencing sheet from that first conviction that I'm -- I

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1 have concern with is -- like that one, that one, this one,
2 and this one. Those are ---

3 Q. Hold on one second.

4 MS. MOODY: Your Honor, at this time I would ask to
5 have these documents marked as Plaintiff's Exhibit 1.

6 THE COURT: Okay.

7 MS. MOODY: For identification.

8 MS. OLIVE: No objection.

9 (SENTENCING SHEETS MARKED AS PLAINTIFF'S EXHIBIT
10 NUMBER 1 FOR IDENTIFICATION.)

11 BY MS. MOODY:

12 Q. So, I'm, Mr. McCullough, handing you Plaintiff's
13 Exhibit Number 1.

14 APPLICANT: Plaintiff's Exhibit Number 1, Your Honor,
15 is going to be the indictment -- I mean, the sentencing
16 sheet from my first conviction.

17 A. And it shows here where my attorney, my attorney for
18 -- it says here attorney for -- defendant is pro se, but I
19 paid counsel. I, I paid restitution \$500 for counsel.

20 My lawyer, he, he didn't appear for court that day,
21 and they allowed me to go ahead and give me probation and
22 allowed me to go on forward even though my counsel wasn't
23 present. And I, and I have that here, and I have the, the
24 sheet where that one, one is dismissed. I'd like to enter
25 that into the record, too, to show I did have a lawyer.

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1 Q. Hold on.

2 A. I'm sorry.

3 Q. Okay. The documents that have been marked as
4 Plaintiff's Exhibit 1, you pled to a possession of meth
5 first, and that was on February 28, 2005?

6 A. Uh-huh.

7 Q. And then you had a grand larceny.

8 A. Yes, ma'am.

9 Q. That has nothing to do with your drug conviction?

10 A. That was all in one, one ---

11 Q. Plea?

12 A. --- thing, right.

13 Q. Okay.

14 A. One plea.

15 Q. But you pled February 28, 2005?

16 A. Correct.

17 Q. And then another possession of meth?

18 A. That's the same one; that's just two copies. I didn't
19 know how to do this ---

20 Q. Oh.

21 A. --- evidence thing.

22 Q. Okay. All right. So, on these -- on that date, on
23 February 28, 2005, you entered a plea without a lawyer even
24 though you had a lawyer?

25 A. Correct.

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1 Q. That did not show up for court?

2 A. Yes, ma'am.

3 Q. And did you explain this to your ---

4 A. No, because ---

5 Q. --- lawyer?

6 A. --- my lawyer never come talk to me to ask me about my
7 prior record. That's the failure to investigate.

8 Q. So, you're saying that your lawyer should have
9 investigated and found out that you had these -- well,
10 these prior possessions where you pled without your lawyer?

11 A. Correct.

12 Q. Before the judge on November 28, 2005?

13 A. Correct.

14 Q. And then you had another charge that was dismissed?

15 A. That's the other -- the grand larceny charge that's on
16 there. That is -- that, that sheet shows that I did have
17 counsel. Right here. See on this? Warrant number, that's
18 the -- that's this one right here.

19 Q. Okay. So, you did have an attorney?

20 A. Yes, ma'am.

21 Q. But that's -- the attorney did, did not show?

22 A. Yes, ma'am. That's correct. I tried to obtain the
23 transcript for that so I could show that, and they told me
24 that that's been, been destroyed. I have the letters from
25 the, from the clerk of court.

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1 THE COURT: What? All the transcripts have been
2 destroyed?

3 APPLICANT: Yes, sir.

4 THE COURT: Okay.

5 APPLICANT: After five years under Rule 607 they've
6 been -- they usually are destroyed, but she investigated
7 and looked, and she said mine already been destroyed.

8 THE COURT: Okay.

9 MS. MOODY: Your Honor, I'd ask to move in this docket
10 sheet, the tracking sheet for the larceny charge, have her
11 mark it.

12 THE COURT: Any objection?

13 MS. OLIVE: Your Honor, I would just object on
14 relevance.

15 MS. MOODY: It goes to his failure -- this his counsel
16 failed to investigate, investigate in terms of his prior
17 record.

18 THE COURT: Okay. I'll allow it in.

19 MS. MOODY: Thank you, Your Honor.

20 THE COURT: So, what's...

21 MS. MOODY: He's stating that in dealing with his
22 counsel, his counsel didn't look at his prior drug history.

23 THE COURT: Right.

24 MS. MOODY: And that he entered his pleas, and he's
25 saying that he entered his pleas without a lawyer. And

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1 he's stating and he's, he's basing it off of the notion
2 that when you have an uncounseled plea and without him --
3 to the court, you know, he has to waive his attorney's
4 presence. Under the case law that I've read is once you
5 waive your attorney's presence and you go forward on your
6 plea, then it is possibly used for enhancement.

7 He's arguing that his attorney was not there and this
8 attorney, Mr. Whelchel, did not look and they allow -- he
9 allowed them to ---

10 APPLICANT: Enhance.

11 THE COURT: Enhance his ---

12 MS. MOODY: --- enhance his meth.

13 THE COURT: Okay. Okay.

14 (TRACKING SHEET MARKED INTO EVIDENCE AS PLAINTIFF'S
15 EXHIBIT NUMBER 2.)

16 THE COURT: Does both sides agree that all his priors
17 were possessions and that he had no distribution? Is he --
18 what I'm trying to get at, what he ultimately pled to,
19 thirty-year sentence, is it ---

20 MS. OLIVE: Your Honor, it's my understanding he had
21 a, a possession meth first 2003, possession of drug
22 paraphernalia, grand larceny 2005, possession meth second.
23 That's, that's what I have written down for the priors.

24 THE COURT: Okay.

25 MS. OLIVE: Of course, that was what was covered in

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1 the transcript.

2 MS. MOODY: His contention is that he got thirty
3 years. That he got more time and ---

4 THE COURT: Right.

5 MS. MOODY: --- I'm not sure they -- it's -- in --
6 that he's arguing that he should not have been pleading to
7 a third.

8 APPLICANT: Yeah, third violent and I never even had a
9 violent offense ever on my charge, and I got convicted as a
10 three-time violent offender.

11 THE COURT: Well, I understand. How -- and he pled.
12 He got basically max on -- in August of 2012, right?

13 MS. MOODY: Yes, sir.

14 MS. OLIVE: Yes.

15 THE COURT: And is it -- I see on the plea sheet that
16 it's showing no probation, no suspension. That was not the
17 law in 2012, was it?

18 MS. MOODY: Yes, it was. They just -- because his
19 possession -- because his prior possessions, he does fall
20 under the code section. I went through that. He does
21 qualify as a nonparole offense. So, he does fall under the
22 nonparoleable offense. So, he will be up for parole and
23 based on the *Bowling* case he will have parole, but he is
24 saying that ---

25 THE COURT: Right. So, if he's paroleable, the

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1 statute says -- but doesn't that same statute say it's
2 suspendable?

3 APPLICANT: Yeah, it does, sir. It's right there.

4 THE COURT: That the thirty years is suspendable?

5 MS. MOODY: It is, but he had other charges. So, this
6 -- these -- the drug charge are not the only charges that
7 he was charged with.

8 APPLICANT: It says where ---

9 THE COURT: I understand that, but ---

10 APPLICANT: --- all, all ---

11 MS. MOODY: Don't.

12 THE COURT: But the question was -- so, the Department
13 of Corrections is not saying he's got to serve eighty-five
14 percent of the thirty?

15 MS. MOODY: That's not the issue, no.

16 THE COURT: Okay, and it's written on the plea sheet,
17 though, that it is not suspendable. I understands this is
18 in August. The law took effect in June. Was the judge
19 aware because it looks like the plea sheet, he was not
20 aware that he could suspend that sentence, and I hadn't
21 read the transcript ---

22 MS. MOODY: Well, Your Honor, well, if I could just
23 clarify because I don't want...

24 MS. OLIVE: Well, Your Honor.

25 MS. MOODY: He's charged with other charges. He's

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1 charged with manufacturing meth third, unlawful neglect of
2 a child, exposing a child to that methamphetamines first,
3 unauthorized removal of a body, and ---

4 THE COURT: I know, but the thirty years is what he's
5 here about. The rest of it is relatively minor time.

6 MS. OLIVE: Well.

7 MS. MOODY: Actually ---

8 APPLICANT: She's trying to ---

9 MS. MOODY: --- no, I'm -- the judge could have given
10 him thirty years. He did have a motion to reconsider. The
11 motion to reconsider was held, and we have a transcript
12 here for the court, too, and I'll hand it up.

13 THE COURT: Okay, okay, and I, and I shouldn't
14 interrupt you. I'll read that transcript. You go ahead.

15 MS. MOODY: Okay.

16 BY MS. MOODY:

17 Q. All right. So, your issue of your counsel failed to
18 investigate, you indicate he didn't review your record to
19 know that you had ---

20 A. To see if they could have had a possible leanier
21 sentence because of my prior convictions.

22 Q. As to whether the meth was a third offense?

23 A. Right. If it could have been enhanced from that --
24 from all, you know, prior convictions.

25 Q. Okay, and so did you discuss -- and I believe your

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1 testimony previously was that you didn't discuss that with
2 your attorney?

3 A. Correct. I did not.

4 Q. Were you able to discuss that with Mr. Cheeks?

5 A. No.

6 Q. On the day of the plea, did you discuss it with your
7 attorney?

8 A. No.

9 Q. So, you also indicate in your case that counsel failed
10 to file a motion to suppress illegally seized evidence.

11 A. I'm going to bypass that, that one there because that
12 deals with what was in the vehicle, and I had done talked
13 to you about that.

14 Q. So, you wish to withdraw?

15 A. On that, on that particular, yes, ma'am.

16 Q. Okay. The next allegation is your counsel induced
17 your guilty plea as a result of erroneous legal advice.
18 Now, you entered into an *Alford* plea on this case?

19 A. Correct.

20 Q. And you understood that an *Alford* plea would be
21 treated as a -- as if you pled guilty? You got to speak
22 up.

23 A. Yes, ma'am. Yes, ma'am, I -- well, to be honest, I
24 didn't really -- still, still don't have a real full
25 understanding on, on the *Alford* plea itself, what it is,

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1 because I hear it's this and it's not. So, no, I really
2 don't know.

3 Q. So, you talked to Mr. Whitchel -- Mr. Whelchel?

4 A. Whelchel.

5 Q. About your plea?

6 A. But, like I said before, when we sat down and talked
7 and when I was wanting to go to trial, he told me I'll
8 plead. I'll plea it under *Alford* because he pled under
9 *Alford* also, that we could do that.

10 Q. Okay.

11 A. Okay, but never gave me a understanding what, what the
12 *Alford* was that -- I, you know, I'm -- from what I've read,
13 I understand that under *Alford*, I have the right to -- what
14 I'm doing under *Alford* is I'm saying I'm still innocent,
15 but I'm pleaing guilty because there's enough evidence to,
16 to -- it -- you know, if I go to trial to get convicted on
17 the charge.

18 Q. Okay. So, when you say your attorney induced you to
19 plead guilty as a result of erroneous legal advice, what
20 did he tell you about your plea?

21 A. That it was ten to thirty and I'll -- he didn't see
22 where I'd get no more than ten years because ---

23 Q. Well, it was ---

24 A. --- of my record.

25 Q. So, you're saying because he didn't tell you exactly

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1 what the judge would give you?

2 A. No. The errorness [sic] that -- it boils down to that
3 I had to plea. That I didn't want to go -- that he tells
4 me he made his decision. I didn't want to go to trial, but
5 yet I wanted to go to trial.

6 Q. So, your attorney ---

7 A. That's the errorness was, was that I, under
8 coercioning [sic], I was pretty much forced to take this
9 plea. I didn't want -- not want to take this plea.

10 Q. Well, what made you take the plea is what I'm trying
11 to get at.

12 A. Because he kept telling me that I was going to have
13 to. That if, if, if I didn't, I could -- didn't want to
14 put my wife on, back on the stand. I didn't want to put
15 her through this again. That I needed to do what she did
16 and own up and take -- and plead guilty.

17 Q. Okay. So that, coupled with the fact that you
18 shouldn't get more than ten years, is what you're saying
19 that induced you to plead?

20 A. Yeah, and then, and then after that, then when he says
21 I don't see you getting no more than ten years, I, you
22 know, I felt like I had no last resort. I mean, I got
23 nobody helping me here. So, I guess I'll go on. I ---

24 Q. So ---

25 A. --- go on and do it.

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1 Q. So, when you say that -- so, you took it as a certain
2 that you would get no more than ten years. Is that what
3 you're saying?

4 A. In a way, yeah.

5 Q. Well, no. Either you're saying that you're ---

6 A. Yeah.

7 Q. Okay. All right. So, your attorney induced you to
8 plea and you did so based off of the fact that you thought
9 you would get ten years?

10 A. Yes, ma'am.

11 Q. All right, but did you know what the possibility of
12 the sentence was, what the penalty range was?

13 A. Well, he said it carried, it carried ten to thirty,
14 but he didn't see me getting no more than ten years. So, I
15 figured ---

16 Q. So, you knew what the range was?

17 A. I knew what the range was, yes, ma'am.

18 Q. All right. All right. Did you -- well, your next
19 allegation is that your counsel allowed his argument to be
20 influenced -- well, your counsel allowed the argument --
21 the judge's -- excuse me. Hold on one second.

22 (A PAUSE.)

23 A. That last one ---

24 Q. You stated that your counsel allowed his, your
25 counsel's argument, to be influenced by law enforcement on

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1 the day of the applicant's plea, of your plea. Can you
2 explain to the court what you mean by that?

3 A. Yeah. Let me get to the transcript page where the,
4 where the statement took place.

5 (A PAUSE.)

6 A. I'm sorry. Give me just a second here. Right here.

7 Q. Can you give us the page?

8 A. Transcript page, beginning on page 19, lines 25
9 through page 20, lines 1 through 13.

10 Q. Can you tell us what -- can you sum up what that says?

11 A. Yeah. I -- what Matt Hutchinson said, he told the
12 court, he, he stepped up and allowed -- well, he told the
13 court that I showed disregard for my own kid's safety and
14 showed disregard for public safety and other kids. That I
15 was a head of a meth-manufacturing snake and that they tend
16 to work up a drug chain, and that I'm a man manufacturing
17 meth and putting it out for other kids and destroying other
18 families, and, and he had no evidence to support that.

19 There's nothing, no record in there. Nowhere says
20 that I was under any investigation, that I was a head of
21 any kind of meth-making or any of that. And my counsel
22 even there at the end even says that in the volume of
23 discovery nothing, nothing -- there was nothing there to
24 prove that I was any kind of kingpin or a meth maker in
25 Spartanburg County. The prosecutor should have corrected

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1 his testimony when it came out.

2 Q. So, you're saying that the prosecutor's statement or
3 the person who made that statement influenced the judge or
4 it influenced ---

5 A. It influenced ---

6 Q. --- your lawyer?

7 A. It influenced the judge.

8 Q. Oh. Okay. So, and you felt that your attorney should
9 have objected to that?

10 A. That's correct.

11 Q. Okay, and did you tell your attorney that, that ---

12 A. No, I didn't tell my attorney nothing. I'm, I'm up
13 here scared to death in, in this plea.

14 Q. But did you and your attorney discuss anything of
15 what ---

16 A. No. We ain't, we ain't discussed nothing. That's
17 what I've been -- that's my whole point of this. We never
18 went over anything in my case file period.

19 Q. Okay, but you ---

20 A. Ever.

21 Q. --- just testified earlier that you talked about your
22 case with your attorney.

23 A. When?

24 Q. Just a few minutes ago.

25 A. No.

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1 Q. You said you talked to him. So, you didn't talk to
2 your attorney about any of your discovery?

3 A. Nothing. No.

4 Q. But you talked to him about whether or not you should
5 plea?

6 A. That's what we talked about.

7 Q. Okay. So, the possibility of the penalty ---

8 A. Right.

9 Q. -- that you would receive on your plea?

10 A. Correct.

11 Q. Did you ever think that you needed to tell him about
12 your prior record when you learned that you were pleading
13 to ---

14 A. No, because ---

15 Q. --- a third?

16 A. --- I didn't know that they was -- what they was
17 enhancing or, or, or that was going to be used or -- I knew
18 nothing about the, about the case. I don't even have -- I
19 don't know.

20 Q. I understand that, but what I'm saying is you -- this
21 was obviously not your first time before the court.

22 A. Well, like ---

23 Q. Well, I ---

24 A. --- only two times I've been before the court on
25 guilty pleas, yes, ma'am, and one without attorney present,

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1 and second without an attorney.

2 Q. Right, but what I'm saying is when you went ---

3 A. So, I don't know. No, I don't know.

4 Q. I understand that. I am saying that you've been
5 before the court before.

6 A. Yes.

7 Q. Okay, and you're telling the court, and we have to ask
8 this. This is something -- you gave these sheets. When
9 you pled before the -- in Greenville County in general
10 sessions, you did not understand fully about enhancements?

11 A. No.

12 Q. Okay, and so you didn't have an opportunity to talk
13 about enhancements with ---

14 A. No.

15 Q. --- your attorney in this particular case?

16 A. No.

17 Q. And so you feel that those enhancements, had your
18 attorney discussed that with you and investigated this
19 information that's been admitted, which is the Plaintiff
20 Exhibit's Number 1, your attorney would have been able to
21 get you a ---

22 A. Lesser sentence.

23 Q. --- lesser charge?

24 A. Correct.

25 Q. Okay, which would give you a lesser sentence?

1 A. Correct.

2 Q. Okay. All right. Now, you also indicated that you
3 didn't have adequate time to prepare a response on the day
4 of the plea. What exactly do you mean by that?

5 A. That, that is -- when I filled that application out, I
6 went off of this -- his motion, Mr. Whelchel's motion that
7 he filed with the court for the motion to reconsider, and
8 that was what he put. That was his terminology. I, I
9 didn't know what to write. So, I just put in what he put
10 on the -- no, the actual motion itself, I got that.

11 Q. Okay, but can you tell the court what the motion was
12 for reconsideration?

13 A. Exactly that. Well, I'd, I'd rather get it and show
14 it because I can't tell you right off.

15 Q. Here.

16 A. But that ain't what he -- that ain't really what was
17 in the, in the thing.

18 Q. So, what did you understand the court was going to
19 reconsider? Your sentence or the actual charges?

20 A. Ma'am, I didn't even know I was getting a
21 reconsideration up until this -- about ---

22 Q. I understand that, but I'm saying when you learned of
23 it, what did you understand the court was going to
24 consider, your sentence or the charges?

25 A. These improper -- the improper comments that were made

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1 to influence the outcome of the case.

2 Q. So, that would be your sentence?

3 A. I -- if you want to say that.

4 Q. Did you want a lesser sentence from the judge?

5 A. I was hoping he was -- we were going to withdraw the
6 plea is what I was hoping.

7 Q. Oh. You wanted to start over?

8 A. Yeah.

9 Q. Okay, and so are you going to use your documents?

10 A. It's in such a mess now.

11 (A PAUSE.)

12 A. Right here.

13 Q. So, what did you understand the motion to reconsider
14 was?

15 A. Well, he says that, he says that:

16 Defendant understands that and believes that
17 during the plea before the court on August the
18 1st, certain information presented to the court
19 which was not accurate and which affected the
20 outcome of the case. The defendant hereby
21 requests a hearing in order to correct any
22 information presented to the court in which the
23 defendant may not have adequate time to prepare a
24 response on the day of the plea.

25 Q. So, that's what the motion to reconsider was, and

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1 that's what you're saying you did not ask for?

2 A. Correct. I asked for appeal.

3 Q. Okay.

4 A. And I have that also.

5 MS. MOODY: Your Honor, may I have the motion and the
6 order marked as Plaintiff Exhibit 2?

7 THE COURT: Yes.

8 COURT REPORTER: This will be Exhibit 3. The tracking
9 sheet was marked as Exhibit 2.

10 (MOTION AND ORDER TO RECONSIDER MARKED AS PLAINTIFF
11 EXHIBIT'S NUMBER 3 FOR IDENTIFICATION.)

12 BY MS. MOODY:

13 A. And that's where I ---

14 Q. Okay. Hold on. I'm going to hand to you what's been
15 marked as Plaintiff's Exhibit Number 3. That's the motion
16 to reconsider and the order. So, you went to the hearing
17 for the motion to reconsider not knowing exactly that you
18 were going to have a motion to reconsider?

19 A. Correct.

20 Q. Okay, and the judge heard from you, your attorney, and
21 the state on this case?

22 A. Correct.

23 Q. Okay, and when you went in, what, if anything, do you
24 recall taking up with the judge?

25 A. During the, during the motion to reconsider was the

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1 phone calls, was the CD. The CD from the phone calls is,
2 is my concern in this because back in the original -- to
3 the plea transcript, would be pages 13, lines ---

4 Q. That's from the motion to reconsider hearing?

5 A. No. No, ma'am. You have that one. This is my plea
6 transcript.

7 Q. Okay.

8 A. It would be page 13, lines 14 through 25; page 14,
9 lines 1 and 2; also 5, lines 5 through 9.

10 Q. Okay. Specifically about that, please explain to the
11 court what was significant about those lines.

12 A. What was significant about these lines right here is
13 that the prosecutor used these phone calls in an
14 inflammatory manner to, to advise the judge's decision
15 because then he goes into the record and he, he tells the
16 judge. The judge asks him. He's holding the DVD and he
17 asks does he have them transcribed and he said no, sir,
18 Your Honor, I do not. And he goes on again and asks him
19 again does he have them transcribed and he says no, he
20 don't, but he's, he's -- they provide it in discovery to
21 counsel, to defense counsel. But the only thing that I
22 have ever gotten is just a printout of the phone calls,
23 which is all numbers.

24 So, anyway, he's holding the CD and he tells the court
25 -- I mean, the court tells the prosecutor, he says:

1 Well, I mean, if we're making a record here and
2 I'm being presented information, I actually have
3 to read things, take a look at them in order for
4 me to consider it as basis for me having to issue
5 a sentence.

6 Okay, then the prosecutor goes and says: Okay, well,
7 I'll withdraw it; I'll withdraw the CD from being an
8 exhibit. But then he says -- he summarize and actually
9 read part of the -- I don't know what he read from because
10 he said he don't have them transcribed. So, now the motion
11 to reconsider hearing, he says that ---

12 Q. Well, slow up. Let me, let me ask you this. As to
13 the actual plea, the phone calls that you're talking about,
14 you received the list of phone numbers, but the phone logs
15 that the solicitor is talking about that he's trying to
16 submit to the court, those are the recorded conversations
17 from the jail?

18 A. Right. That's something I never -- I didn't get to
19 hear or see or any of that.

20 Q. Right, but he's talking about those phone calls, but
21 after you've been arrested and you're in custody.

22 A. Correct.

23 Q. Okay.

24 A. Correct.

25 Q. Did you have an opportunity to talk with your attorney

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1 about those phone calls that were coming from the jail
2 recordings?

3 A. No. He never came to talk to me about the recording,
4 the phone calls ever.

5 Q. So, when you were going forward on the plea, did you
6 discuss it with your attorney?

7 A. No.

8 Q. Okay. At the time of the plea while you were before
9 the court and the state is taking up that issue with the
10 judge, did you have an opportunity to discuss it with your
11 attorney then?

12 A. No.

13 Q. All right. So, y'all -- you just stood silently as
14 the state presented?

15 A. Correct.

16 Q. Okay, and so ---

17 A. Correct.

18 Q. --- you're contending that that -- that information
19 that's in the plea caused the judge to give you your
20 sentence?

21 A. It influenced. It had ---

22 Q. You ---

23 A. --- yeah, it influenced, yes, it did because in the
24 motion to reconsider, he says he was slightly persuaded to
25 modify the sentence, but due to arguments about the

1 recorded phone calls, he denies the motion. So, there
2 again he based -- he denied me relief at my motion to
3 reconsider because ---

4 Q. Who, who denied ---

5 A. --- of the phone calls.

6 Q. --- you relief when you say that? Who denied you
7 relief when you say that?

8 A. The judge.

9 Q. Okay.

10 A. Because he says here in the transcript that he can't
11 base his decision on this, on this information and it got
12 withdrew, but then the state still used it later on in the,
13 later on in the transcript. The state goes into, I mean,
14 explicit detail of what was on these phone calls that --
15 and he never even allowed the judge to even hear the phone
16 calls. He done withdrew it as evidence.

17 Q. But, okay, explain ---

18 A. But then again at the motion to reconsider, he goes
19 again to present it again and tell the judge at -- about
20 it, and the judge denied me relief in regards to them phone
21 calls.

22 Q. Okay. So, I guess what I'm trying to narrow down,
23 you're saying that the comment that came, allegedly came
24 from those recordings from the jail, you feel that that is
25 how and why you got the sentence you got?

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1 A. Correct.

2 Q. Okay.

3 A. Correct.

4 Q. And you're stating that when the solicitor -- explain
5 to me when you're saying that the solicitor withdrew those
6 phone calls. He withdrew those CDs?

7 A. He, he -- correct. Correct. He withdrew them from
8 the ---

9 Q. And you're saying ---

10 A. --- from the ---

11 Q. --- that's a problem how?

12 A. Because once he -- the judge said that he had to hear
13 them or see them in their entirety, to read them or hear
14 them in their entirety if he wants to use that to base his
15 decision. So, if you want to -- so, he's wanting to admit
16 this as evidence, if he's going to admit it as evidence or
17 use it, then he, the judge, is going to have to review it.
18 Now, he don't present no transcription and don't -- now
19 he's done withdrew the CD, and then at the end of the plea
20 he goes into -- to tell all of this off of it, that that,
21 that ---

22 Q. So, you're saying that he couldn't listen to the CDs
23 himself ---

24 A. Yeah, he couldn't take that ---

25 Q. Wait, wait, wait.

1 A. --- into consideration.

2 Q. Let me, let me get my question out. You're saying
3 that the solicitor couldn't listen to the CDs and tell the
4 court what was on the CDs? Even though he gave your
5 attorney a copy of those CDs, it was -- you're alleging
6 that it's improper for him to state what was on the CDs to
7 the court?

8 A. My counsel should have objected to that because it was
9 withdrew. Whenever he started to go forward with what was
10 on it after the judge gave instructions that I got to hear
11 them or read them, he withdrew it. Once -- then at the
12 end, he says:

13 With, with regards to sentencing, I listened to
14 all of Mr. McCullough's phone calls while he's in
15 jail.

16 Right then my counsel should have objected and say
17 Your Honor, that evidence was withdrew. And that might had
18 -- there is a probability that the outcome of this could
19 have been different had this not been brought forward.

20 Q. So, you're saying the charges and the facts of the
21 case themselves were, were not ---

22 A. I think it was ---

23 Q. --- of the nature ---

24 A. --- it took ---

25 Q. --- that would cause the judge ---

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1 A. --- a substantial effect.

2 Q. Only one of us can talk at the time.

3 A. Well, I feel like you're pros -- you're trying to
4 prosecute the case myself.

5 Q. I'm just trying ---

6 A. You're supposed ---

7 Q. --- to answer ---

8 A. --- to be my attorney.

9 Q. Okay. Never mind. As to your attorney not objecting
10 in the motion to reconsider, what, if anything, is there
11 that your attorney should have objected in the motion to
12 can reconsider? Is there anything else?

13 A. The phone calls, and he could at least, you know, got
14 up and, and helped me.

15 Q. Okay. You've seen this transcript?

16 A. I have not read it; you just showed it to me when I
17 got in here.

18 Q. Do you recall what happened at the hearing?

19 A. Pretty well.

20 Q. I'm going to hand to you ---

21 MS. MOODY: I'm to ask to mark this as Plaintiff's
22 Exhibit Number 4.

23 (COUNSELORS CONFER.)

24 BY MS. MOODY:

25 Q. I'm going to hand to you this document. Can you

1 identify it?

2 A. It's my transcript from motion to reconsider.

3 Q. Can you take a second, look at that transcript and see
4 if your attorney made any comments on your behalf?

5 (A PAUSE.)

6 Q. Do you see anywhere where Mr. Wheelchel might have
7 addressed the court verbally?

8 A. Oh, yeah.

9 Q. Okay. So, he did ---

10 A. Yeah, at the ---

11 Q. --- talk in the hearing?

12 A. --- opening of the plea, yeah.

13 Q. Okay. Right before you spoke with the judge and you
14 gave the judge your explanation, and this is in the motion
15 to reconsider that you didn't know anything about, you
16 didn't ask your lawyer to file for. On page 14 where the
17 court asked: Is there any reply.

18 A. Any reply, meaning?

19 Q. The court's question was: Any reply.

20 A. To? You mean reply to ---

21 Q. Do ---

22 A. --- what?

23 Q. Do you see that?

24 A. Yeah.

25 Q. Okay.

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1 A. I see that.

2 Q. And this is where Mr. Whelchel, Whelchel made a
3 response. Was he speaking on your behalf?

4 A. Yeah.

5 Q. Okay, and did you have an opportunity to speak on your
6 own behalf?

7 A. Yeah, I did.

8 Q. Okay, and what page is that?

9 (A PAUSE.)

10 Q. Did you have an opportunity to speak on your own
11 behalf?

12 A. I'm, I'm trying to find it now. I know I did there at
13 the end. Yes, ma'am, I did.

14 Q. So, on page 15?

15 A. Okay, page 15, yeah.

16 Q. So, you spoke on your behalf. So, your attorney spoke
17 on your behalf, and you spoke on your behalf?

18 A. Correct.

19 Q. Okay, and so ---

20 A. And then when the phone calls come up and I wanted to
21 have something I wanted to say about the phone calls,
22 that's when I got cut off by counsel. He didn't say
23 nothing in regards to the phone calls because what should
24 have been said -- again these -- this is evidence that
25 should have been withdrew, but I got scared and didn't know

1 what else to say and...

2 Q. So -- but you were the last person to talk on your own
3 behalf?

4 A. Yeah.

5 Q. Okay. So, you had the last word, and did you tell the
6 court about your -- the phone calls?

7 A. Yeah.

8 Q. So, you told the court about your phone calls?

9 A. Yeah. What, what, what was -- I rebutted what was
10 said in the transcript in regards to the phone calls, yes,
11 ma'am, I did.

12 Q. So, prior to this motion to reconsider, did you have
13 an opportunity to speak with Mr. Whelchel?

14 A. Again, no, ma'am. I, I wrote and wrote, and I've
15 asked and I've tried to get this man to talk to me in
16 regards to this case, and I -- to no avail.

17 Q. Okay. So, you didn't talk to him about this, and
18 that's why you spoke up on the phone calls?

19 A. Correct.

20 Q. On this day of May 23, 2013?

21 A. Yes, ma'am.

22 Q. Okay.

23 A. I got a, I got a jail log from the Spartanburg County
24 Detention Center to show all the letters that I wrote to,
25 to his office. I went ---

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1 Q. How many letters did you write to his office?

2 A. Fourteen addressed to him, one addressed to Andrea
3 Price, and two addressed to Mr. Allen.

4 Q. Okay, and was this beginning in the year that you
5 were ---

6 A. While I ---

7 Q. --- arrested?

8 A. While I was incarcerated. That is correct.

9 Q. Wait a minute. When you were arrested in 2011?

10 A. Yeah.

11 Q. Okay, and then you wrote throughout that time. That's
12 how many letters you wrote until you entered your plea?

13 A. Correct.

14 Q. Okay.

15 A. It's right here; I have it right here. I'll enter
16 them in if you want me to.

17 Q. Now ---

18 A. I got the letters that I mailed out and the letters
19 received, and I received three from the public defender's
20 office.

21 Q. Okay, and so your contention is you didn't have any
22 kind of communication with your attorney?

23 A. Correct.

24 Q. And because of that, you were prejudiced in your, in
25 your case?

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1 A. Correct.

2 Q. Okay. How were you prejudiced?

3 A. I was prejudiced because had, had he would have
4 discussed my case with me, I would have went to trial.

5 Q. You would have gone to trial?

6 A. Yes, ma'am.

7 Q. Okay, and at the trial, would you have had a defense?

8 A. Yes, ma'am.

9 Q. Then can you tell the court what that defense would
10 have been?

11 A. That, that I did not make, manufacture any
12 methamphetamines on March 17, 2011.

13 Q. Okay. Anything else?

14 Now, you're seeking relief from the court here today,
15 correct?

16 A. Correct.

17 Q. Can you tell the court what relief you're seeking?

18 A. I'm not done with issues yet. I still got my
19 involuntary *Alford* plea issue to do.

20 Q. But we talked about that. You said you were induced
21 to enter a plea.

22 A. By counsel on ineffective assistance claim but not on,
23 on the court. The court, the court, the court made nothing
24 in record that made sure that I understood what the *Alford*
25 plea was that I was pleaing.

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1 Q. Okay.

2 A. Because the court starts out on page 3 and, and the,
3 the prosecutor tells the judge that I'm pleaing to this
4 manufacturing charge straight up, and then my lawyer tells
5 him that this is going to be an *Alford* plea. At that time,
6 from that time until he says that he's correct in
7 concluding that his -- my decisions to enter the plea is
8 free and voluntary, he made nothing in the record that I
9 understood that I was pleaing two types of pleas or did I
10 understand what the *Alford* plea was. None of that took
11 place.

12 Q. So, let's be ---

13 A. So, I didn't ---

14 Q. --- clear on this.

15 A. --- intelligently, knowingly enter into, into this
16 plea.

17 Q. So, when you say two type of pleas.

18 A. Correct.

19 Q. Can you tell me the first type of plea you're talking
20 about?

21 A. Well, he says I'm pleaing to it, pleaing to this
22 charge straight up.

23 Q. So, you're saying that ---

24 A. That's pleaing, saying that ---

25 Q. --- that is a type of plea?

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1 A. Yeah.

2 Q. Okay, and you're saying that when you're pleading
3 straight up, it can't be an *Alford* plea?

4 A. Correct.

5 Q. And then what's the second type of plea?

6 A. The *Alford* plea.

7 Q. Okay, and the *Alford* plea is what?

8 A. That you're not taking, you're not taking
9 responsibility of the charges. That you're remaining
10 innocent because ---

11 Q. No, you're ---

12 A. --- you're pleading guilty because there's enough
13 evidence to present at trial that you -- might convict you
14 of the charge.

15 Q. So, now do you realize one of those -- as to whether
16 or not you have a, a range of sentences that you're exposed
17 to?

18 A. Right.

19 Q. When you're pleading straight up, your -- the range is
20 whatever the penalty is for those charges, correct?

21 A. Right, but the, the, the thing is that the significant
22 of the *Alford* plea is that you're going to get sentenced to
23 the same thing as if you plea straight up, and I was never
24 -- the court never made me aware of this period throughout
25 this. My whole time I'm thinking it's a *Alford* plea, and

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1 that I'm going to get the leniency. Then but yet it wasn't
2 an *Alford* plea. It was a straight-up guilty plea. I
3 didn't intelligently enter this by no means. I had no
4 understanding of, of, of the *Alford* or whatever. I had, I
5 had no, no comprehension in what type of plea this was I
6 was pleading to.

7 Q. What else?

8 A. That's it.

9 Q. That's all your issues?

10 A. Yeah.

11 Q. Okay, and so what kind of relief are you asking from
12 the court here today?

13 A. To vacate or grant a new trial.

14 Q. Is there anything else ---

15 A. No.

16 Q. --- that you'd like to tell the court here today?

17 A. No.

18 Q. I'm sorry?

19 A. No, I don't guess so.

20 Q. Okay.

21 MS. MOODY: No further questions for this witness,
22 Your Honor.

23 THE COURT: Okay.

24 CROSS-EXAMINATION BY MS. OLIVE:

25 Q. Good afternoon, Mr. McCullough.

1 A. Good afternoon.

2 Q. Isn't it true that your attorney did go over discovery
3 with you?

4 A. No.

5 Q. Did you discuss your version of what happened with
6 your attorney?

7 A. No, sir -- I mean, no, ma'am.

8 Q. Isn't it true that he discussed all of the elements of
9 these crimes with you?

10 A. The day of the plea when he told me it was ten to
11 thirty and that they was enhancing it to a third.

12 Q. Weren't you, weren't you scheduled to go to trial that
13 day?

14 A. Yes, ma'am -- no. My trial schedule was for the 13th,
15 and I was wanting to go to that trial.

16 Q. Did you ever tell the judge during your guilty plea
17 that you wanted to withdraw?

18 A. Say that again?

19 Q. During your guilty plea, did you ever tell the judge
20 that you wanted to withdraw your ---

21 A. No, ma'am.

22 Q. --- guilty plea?

23 A. No, ma'am.

24 Q. And the judge did go over all of the charges against
25 you, correct?

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1 A. Correct.

2 Q. And he went over all of the sentencing, sentencing
3 ranges with you, including the maximum he could charge you
4 -- I'm sorry, sentence you for each charge?

5 A. He went over the sentencing range but not the
6 consequences.

7 Q. But he told you what the maximum was that he could
8 charge, charge -- excuse me.

9 A. On each, each one?

10 Q. Sentence.

11 A. Yes, ma'am.

12 Q. Okay, and isn't it true that your attorney never
13 promised you you were going to get ten years?

14 A. It wasn't a promise but that's -- the way he said it
15 persuaded me that that's -- was what it was, yes, ma'am.

16 Q. So, he thought there was a decent chance that you
17 might get only ten years?

18 A. Correct.

19 Q. Okay, but he never promised you that was what you were
20 going to get?

21 A. Correct.

22 Q. Okay, and didn't the judge ask you if you needed any
23 more time, or didn't he ask you if you had had enough time
24 to speak with your attorney?

25 A. I suppose he did.

1 Q. He asked you:

2 Do you feel like you've had enough time to talk
3 to your attorneys about the facts behind these
4 cases, the legal elements of the offenses that
5 you were charged with, and any possible defenses
6 you might have?

7 And you said: Yes, sir.

8 A. Yeah.

9 Q. Okay, and he also asked you if anybody had threatened
10 you or promised you anything in exchange for your plea that
11 day?

12 A. Yes.

13 Q. And you said no?

14 A. Correct. No, I say -- I said yes. Oh, I said no.

15 Q. So, you said no, okay, and you even said that your
16 decision to enter your plea was free and voluntary,
17 correct?

18 A. No. I never said that, not before he, not before he
19 concluded that my decision to enter these pleas was free
20 and voluntarily. That's on page 6. I'd like to enter ---

21 Q. So, he did ---

22 A. --- that in the record.

23 Q. --- ask you if he was correct in concluding your
24 decision to enter your plea was free and voluntary?

25 A. He did not, not until the, the end of plea, but he

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1 already made, he already made his conclusion on page 6 that
2 I entered it voluntarily.

3 Q. Well, wasn't page 6 before any facts were ever read
4 into the record?

5 A. That's correct.

6 Q. Okay, and at that time he asked you if ---

7 A. He already ---

8 Q. --- you were freely ---

9 A. --- he's already made his conclusion that I, I done
10 this voluntarily and of my own free will, which is -- that
11 ain't -- wasn't the case.

12 Q. But you agreed with him, right?

13 A. Well, I mean, I was so gripped by fear at this time,
14 yeah, I agree. I said everything I had to say because I
15 been through guilty pleas before.

16 Q. So, you said everything you had to say?

17 A. That -- if, if you don't -- if you say no, he asks you
18 a question and you say no, then he's going to take the plea
19 away.

20 Q. Okay, but you did, you did speak to the judge ---

21 A. Yes, but ---

22 Q. --- correct?

23 A. Yes, ma'am.

24 Q. And you actually told him that you were ashamed?

25 A. At the end, yes, ma'am, I was and I still, I still am.

1 Q. Okay.

2 A. I don't think -- I wish I'd'a never done drugs in my
3 life, be honest.

4 Q. So -- but at that time, you did not tell him that you
5 wished to withdraw your plea?

6 A. No, ma'am. At the time, I didn't know I could.

7 Q. You didn't think it would have been important to tell
8 him, knowing how much time you were facing, if you had
9 misgivings about pleading guilty that day? You don't think
10 it would have been important to tell him then that you had
11 changed your mind?

12 A. I don't know, ma'am; I can't remember back to recall
13 that moment.

14 Q. Your attorney did go over the, the -- he tried to go
15 over these jail calls with you, did he not?

16 A. No, ma'am.

17 Q. Wasn't it your decision to plead guilty?

18 A. No, ma'am. I, like I said, I wrote Mr. Cheeks a
19 couple times. I wrote Mr. Whelchel a couple times, you
20 know, trying to get somebody to come talk to me. I signed
21 the guilty plea thing hanging on the wall hoping that that
22 that would speed the process up. But no, I had no
23 intentions of pleaing guilty. I was trying to get somebody
24 to come and discuss this case with me.

25 Q. And isn't it true that both your attorneys, Mr., Mr.

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1 Whelchel and Mr. Cheeks, spoke to the judge that day of
2 your plea?

3 A. Yes, ma'am.

4 Q. At length, right?

5 A. Yes, ma'am.

6 Q. Okay.

7 A. But the ---

8 Q. And Mr. Cheeks actually asked for a cooling off period
9 for the judge to consider before he sentenced you, correct?

10 A. Because of all the inflammatory comments, yes, ma'am.

11 Q. And the judge declined that?

12 A. Yes, ma'am, but what they rebutted in their closing
13 was things that should have been objected to in the
14 beginning and prevented that harm forever -- from never
15 even happening.

16 Q. And in these...

17 MS. OLIVE: Beg the court's indulgence a moment, Your
18 Honor.

19 (A PAUSE.)

20 BY MS. OLIVE:

21 Q. Okay, and the judge did inform you at your plea,
22 correct, that -- he asked:

23 Do you understand that whatever sentence I impose
24 on that particular charge, that it cannot -- that
25 no probation can be given and no parts of the

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1 sentence can be suspended?

2 A. Which was wrong.

3 Q. He said it was: Classified as a violent and a serious
4 offense under the law. Correct?

5 A. That's what he said.

6 Q. Okay, and that was the manufacturing methamphetamine
7 third offense, I believe, correct?

8 A. Correct.

9 Q. Is that correct?

10 MS. OLIVE: That's all the questions I have.

11 MS. MOODY: Your Honor, if I may?

12 REDIRECT EXAMINATION BY MS. MOODY:

13 Q. Can -- do you have a copy of your transcript before
14 you?

15 A. Yes, ma'am.

16 Q. Can you turn to page 17?

17 A. I got it somewhere over here.

18 (A PAUSE.)

19 Q. Now, the state just asked you about your getting the
20 consequences -- well, the penalties for the charges that
21 you pled to, correct, and particularly the methamphetamine
22 third offense?

23 A. Uh-huh.

24 Q. And on line 6, the court asked you:

25 Do you understand that whatever sentence I impose

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1 on this -- that particular charge, that it cannot
2 be -- that no probation can be given and that no
3 parts of the sentence can be suspended?

4 A. Uh-huh.

5 Q. Okay. When you talked about your prior sentences that
6 you had as to possession of methamphetamine, the first
7 offenses that you pled to on November 28, 2005, and we've
8 marked it as Plaintiff Exhibit Number 1?

9 A. Uh-huh.

10 Q. What -- you, you indicate that you could have gotten
11 probation in your, your case or a suspended sentence?

12 A. Under the statute, being that these two priors were
13 for possession, it could have been suspended and probation
14 could have been granted.

15 Q. And so you indicated that -- earlier that your
16 attorney did not investigate your prior offenses?

17 A. Correct.

18 Q. Okay, and is that what you were speaking of?

19 A. Well, that would coincide with that, yes, ma'am.

20 Q. Do you recall going over the statute that deals with
21 whether or not it's a paroleable or nonparoleable offense
22 under methamphetamines?

23 A. With you?

24 Q. Yes, sir.

25 A. Yes, ma'am.

1 Q. And what, if anything, do you understand about that
2 section on a third offense?

3 A. On a third offense where all prior, prior possessions
4 are -- matter of fact I got it, but it says where all prior
5 -- hold on a minute. Let me find it because I don't want
6 to miss say it.

7 Q. Would you agree with me that all prior ---

8 A. I got it.

9 Q. --- offenses that were possessions, that they make
10 your offense that you are pleading to, that is ---

11 A. It says here:

12 For a third or subsequent offense in which all
13 prior offenses were for possession of a
14 controlled substance pursuant to subsection (a)
15 may have the sentence suspended and probation
16 granted and is eligible for parole.

17 And I do have a parole date. So, that's how I know I
18 do fall under that statute.

19 Q. And that's as to a third offense, first, and a second
20 offense?

21 A. Correct.

22 Q. And your argument here today is that you should
23 actually not be a third? Well, I think you were arguing
24 that it shouldn't be a third offense?

25 A. It could, it could be a second offense, could have

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1 been a second offense, yes, ma'am.

2 Q. And did you discuss this with your attorney at all?

3 A. No, ma'am.

4 Q. Okay. In fact, when the court informed you of your
5 -- in your plea that, they didn't tell you that?

6 A. Correct.

7 MS. MOODY: No further questions from this witness.

8 THE COURT: Okay.

9 MS. OLIVE: Just briefly.

10 RECROSS-EXAMINATION BY MS. OLIVE:

11 Q. So, is it your position that if you -- now that you
12 know that it, that it is parole eligible, that you would
13 not have pled guilty?

14 A. That is, that is correct. Had I'd'a known that to
15 begin with, I know I'd have went to trial because I, I
16 still got the max. I would have got the max supposedly if
17 I had went to trial on, on it, right? So ---

18 Q. But you know you could ---

19 A. --- I still would have got probation -- I mean,
20 parole.

21 Q. Okay, but you understand that the judge can sentence
22 you to consecutive sentences, correct?

23 A. When?

24 Q. On any of these charges. He can sentence you
25 consecutively. They don't have to be concurrent sentences.

C. McCULLOUGH - FURTHER DIRECT EXAMINATION BY MS. MOODY 53

1 A. Yeah, I understand that.

2 Q. Okay. So, you could have faced a lot more time than
3 thirty years.

4 A. Yeah.

5 Q. Okay.

6 MS. OLIVE: Thank you.

7 FURTHER DIRECT EXAMINATION BY MS. MOODY:

8 Q. But just so we're clear, you were not told that you
9 could get a suspended sentence for probation?

10 A. Correct.

11 Q. And there was never a discussion about probation with
12 your attorney?

13 A. No. Mr. Cheeks tried one time when we first talked
14 early in, early in the, early in the case.

15 Q. And then this plea was a straight-up plea? There was
16 no recommendation coming from the state?

17 A. Correct.

18 Q. And so going into this, you thought you were going to
19 get no more than ten years?

20 A. Correct.

21 MS. MOODY: No further questions, Your Honor.

22 APPLICANT: But then I also would like to say on that,
23 about the recommendation, while we're here in court.

24 MS. OLIVE: Your Honor, I'm just going to object
25 because this isn't responsive to anything.

1 APPLICANT: Yeah, because he makes a comment, he --
2 the state recommends thirty years when the -- it was for no
3 recommendations. The plea was for no recommendations, but
4 yet the state ---

5 THE COURT: I understand that. Thank you, sir. You
6 can step down.

7 MS. MOODY: No further witnesses.

8 COURT REPORTER: Your Honor, we are missing one of the
9 exhibits, Plaintiff's Exhibit 2.

10 THE COURT: You got it?

11 MS. MOODY: I don't think it's in there. I think I
12 placed it in my ---

13 THE COURT: Okay.

14 (THE WITNESS EXITS THE STAND.)

15 THE COURT: Any of y'all need a break, just holler.

16 (A PAUSE.)

17 MS. MOODY: I can take a minute so I can go through
18 the rest of this file.

19 THE COURT: Sure.

20 (OFF THE RECORD.)

21 THE COURT: Were any charges dropped as a result of
22 the plea?

23 MS. OLIVE: Not to my knowledge, Your Honor. I, I am
24 going to have Mr. Whelchel discuss ---

25 THE COURT: Okay.

R. WHELCHER - DIRECT EXAMINATION BY MS. OLIVE

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1 MS. OLIVE: --- a little more about those.

2 MS. MOODY: It was, Your Honor. The disposal of meth.

3 MS. OLIVE: Oh. I apologize.

4 MS. MOODY: Was improper disposal, it says indictment
5 2012-24-67 -- no, I'm sorry. Wrong indictment. On page 3
6 of the transcript, the state indicated that they were
7 dismissing a disposal of methamphetamine waste charged as a
8 condition of the plea.

9 THE COURT: Okay.

10 MS. OLIVE: Thank you, Your Honor. I apologize. I
11 forgot.

12 Your Honor, the state would call Mr. Whelchel to the
13 stand.

14 THE COURT: Okay, you can come around, please, sir.

15 RICHARD H. WHELCHER, BEING DULY
16 SWORN, TESTIFIES AS FOLLOWS:

17 DIRECT EXAMINATION BY MS. OLIVE:

18 Q. Good afternoon Mr. Whelchel.

19 A. Good afternoon.

20 Q. Mr. Whelchel, how long have you been practicing law?

21 A. About thirty-four years now.

22 Q. And how much -- how many years of that has been in
23 criminal?

24 A. Pretty much all of it.

25 Q. Okay. Do you recall how many times you met with Mr.

R. WHELCHER - DIRECT EXAMINATION BY MS. OLIVE

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1 McCullough in this case?

2 A. Probably a dozen over the time that he was in jail. I
3 can't tell you exactly.

4 Q. Did you file motion of discovery in this case?

5 A. Yes, ma'am.

6 Q. Do you feel you received complete discovery in this
7 case?

8 A. Yes, ma'am.

9 Q. Did you review that discovery with Mr. McCullough?

10 A. Yes, ma'am.

11 Q. Okay. Did you -- these 911 calls that were discussed,
12 did, did he review those calls?

13 A. Did I review those calls? Yes, ma'am.

14 Q. Did he review those, did ---

15 A. No, ma'am.

16 Q. --- Mr. McCullough?

17 A. He didn't want to review those calls.

18 Q. He didn't want to review them? Mr. Whelcher, can you
19 briefly describe -- well, let me first ask you. Did Mr.
20 McCullough share with you his version of what happened?

21 A. Yes, ma'am.

22 Q. Did you discuss with him all of the crimes he was
23 charged with, including the elements that the state would
24 have to prove to prove him guilty at trial, as well as any
25 defenses he might have to those charges?

R. WHELCHER - DIRECT EXAMINATION BY MS. OLIVE

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1 A. I did.

2 Q. Okay. Were you familiar -- were you aware of his
3 prior record?

4 A. Yes. It was in the, it was in the discovery.

5 Q. Okay. Did you discuss that with him?

6 A. I did.

7 Q. Is it typical for you to challenge prior record --
8 excuse me, to challenge prior offenses?

9 A. I go over the, the discovery with the client, which
10 includes his rap sheet, his prior record, and ask him at
11 that time if he has these prior convictions because those
12 are the prior convictions that are being shown by the
13 discovery that's provided to me and they, you know, they
14 confirm those prior convictions. Sometimes they'll deny or
15 they don't remember, but they will confirm those prior
16 convictions normally.

17 Q. So, he understood the nature -- do you feel that he
18 understood these conversations?

19 A. Yes, ma'am.

20 Q. Okay. Do you feel he understood the nature of the
21 charges against him?

22 A. Yes, ma'am.

23 Q. Do you feel he understood that he was facing a third
24 or subsequent charge on the distribution meth?

25 A. Yes, ma'am. He, he didn't understand or tried to tell

R: WHELCHER - DIRECT EXAMINATION BY MS. OLIVE

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1 me that he didn't understand the first time I talked to him
2 about it being a third offense. He said he hadn't
3 possessed with intent to distribute prior to that, and I
4 said it doesn't have to be possession with intent to
5 distribute prior to that. The prior possessions count, are
6 enabled to enhance this to a possession with intent third.
7 He didn't like that, and he didn't -- but, you know, I told
8 him I couldn't do anything about that.

9 Q. Do you feel there was anything improper about that
10 charge?

11 A. No, ma'am.

12 Q. Mr. Whelchel, can you briefly describe the state's
13 evidence in this case against Mr. McCullough?

14 A. Mr. McCullough and Ms. McCullough began or came to the
15 state's attention because someone had called in to the
16 sheriff's office, I believe, and indicated that Mr. and Ms.
17 McCullough were driving around the county and they had a
18 dead baby in the car with them. At some point, Mr.
19 McCullough and his wife went to a relative of his or hers.
20 I can't remember which one it was, and from that home, a
21 phone call was made. And subsequent or ultimately, Mr. and
22 Ms. McCullough were stopped, or the police came to a
23 location where they were and they searched, I believe, Ms.
24 McCullough's truck and ---

25 Q. Did you understand that, that she had given the

1 officers consent to ---

2 A. Yes, ma'am.

3 Q. --- search the truck? And at some point, did they
4 eventually come to search the home as well?

5 A. Yes, ma'am.

6 Q. And do you recall what, what sort of evidence was ---

7 A. That's ---

8 Q. --- discovered in the home?

9 A. That's when the meth lab was found or the, the items
10 that, that can be used to make a meth lab would have been
11 the testimony from the officers from the narcotics unit.

12 Q. Do you recall whether -- do you recall as part of this
13 case an investigation being done regarding the death of
14 the, the infant?

15 A. Of the infant?

16 Q. Yes.

17 A. Yes, ma'am. There was no, there was no evidence in
18 the file that the death of the infant was related at all to
19 the meth lab that was found.

20 Q. And did you bring that to the judge's attention at Mr.
21 McCullough's guilty plea hearing?

22 A. Yes, ma'am, I did and the solicitor confirmed that in
23 the, in the transcript.

24 Q. Was Mr. McCullough's case up for trial?

25 A. Yes.

R. WHELCHER - DIRECT EXAMINATION BY MS. OLIVE

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1 Q. Okay. Was that up for trial the day he pled guilty?

2 A. Yes, ma'am.

3 Q. Were you prepared to go to trial?

4 A. Yes, ma'am.

5 Q. So, that day you were planning to go to trial?

6 A. I arrived at the courthouse ready to go to trial,
7 thinking that we were going to trial. Someone in the lobby
8 told me that your case is going to be a plea. He's telling
9 people it's a plea. That was the first I -- knowledge I
10 had that Mr. McCullough had decided he wanted to plead
11 guilty. And of course after we went in, I think after we
12 did the roll call, I went in and talked to Mr. McCullough,
13 and that's when I found out that he had decided to plea or
14 wanted to plea.

15 Q. Had any offers been made prior to that point?

16 A. I believe one had been. I'm not sure, but it had not
17 been accepted.

18 Q. Okay, but if it had been, you would have ---

19 A. Any, any offers that I receive are communicated to the
20 client.

21 Q. Did you ever promise Mr. McCullough that he would only
22 receive ten years?

23 A. No, ma'am. I never promise clients that they're going
24 to receive a particular sentence. I have clients a lot of
25 times who ask me am I going to get five, you know, what do

R. WHELCHER - DIRECT EXAMINATION BY MS. OLIVE

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1 you think my chances are, or things of that nature and I
2 tell them all. You're asking me to crawl inside the mind
3 of the judge. I can't tell you what the judge is going to
4 do in your case. I can tell you what the range of your
5 sentence is, and I can advise you as to what I think can
6 happen should you go to trial and should you plead guilty
7 what the range is, but I am never and don't plan on
8 starting telling a client that you're not going to get any
9 more than two years.

10 In fact, I have told clients in the past if you talk
11 to a lawyer that tells you I can get you only two years,
12 you need to run away from him because nobody can guarantee
13 what's going to happen at a plea or a trial.

14 Q. Do you ever make any promises regarding the parole
15 eligibility of someone?

16 A. No, ma'am.

17 Q. Who, who actually handles those determinations in
18 terms of ---

19 A. The parole board.

20 Q. You say the parole board?

21 A. Yeah.

22 Q. Did you file a motion to reconsider Mr. McCullough's
23 sentence in this case?

24 A. I did.

25 Q. And were you present at that hearing?

R. WHELCHER - DIRECT EXAMINATION BY MS. OLIVE

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1 A. Yes, ma'am.

2 Q. And did you present mitigation on behalf of Mr.
3 McCullough both at his guilty plea hearing and at that?

4 A. Yes, ma'am. My primary concern at the, at the motion
5 to reconsider was to allow the judge some time to think
6 about the case or some time between that, that particular
7 plea and the motion to reconsider being, being held. Had
8 to ensure that the judge knew and understood that there was
9 no connection whatsoever between the death of this child
10 and the meth lab that was found at the home.

11 They didn't find any evidence that there was any kind
12 of connection between that child's death -- the child was
13 found in the morning by the codefendant wife, and it had
14 vomited and I believe choked on its own vomit. I think I
15 even said in the record it's tragic, but those things
16 happen. It, it scares parents to death, and I remember, I
17 have children of my own. When they were little, you, you
18 worry about these things, but God forbid, I mean, you just
19 can't stop them.

20 Q. And you communicated all that to the judge?

21 A. Yes, ma'am.

22 Q. Did you communicate that you felt Mr. McCullough was
23 remorseful over this?

24 A. Yes.

25 MS. OLIVE: beg the court's indulgence a moment, Your

R. WHELCHER - CROSS-EXAMINATION BY MS. MOODY

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1 Honor.

2 THE COURT: Okay.

3 (A PAUSE.)

4 MS. OLIVE: That's all the questions I have, Mr.
5 Whelchel.

6 MS. MOODY: May it please the court?

7 THE COURT: Yes, ma'am.

8 CROSS-EXAMINATION BY MS. MOODY:

9 Q. Mr. Whelchel, when you discuss the charges with your
10 clients, you discuss with them what the statute says the
11 law is for the penalties?

12 A. Yes, ma'am.

13 Q. Okay, and in this particular case, are you familiar
14 with the statute section for manufacturing, possession with
15 intent to distribute, or distribution of methamphetamines?

16 A. Yes, ma'am.

17 Q. And, in fact, you would agree with me that section
18 44-53-375 controls the sentencing for a conviction of a
19 meth ---

20 A. Yes, ma'am.

21 Q. --- offense, and as it relates to the first, second,
22 or third offense, the court -- well, excuse me. The law is
23 that a person will be convicted if they have:

24 Two or more in the aggregate of violations, that
25 by any violations of the law of the United States

R. WHELCHER - CROSS-EXAMINATION BY MS. MOODY

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1 or of any state, territory, or district relating
2 to narcotic drugs.

3 And if gives the different drugs.

4 That they are to be imprisoned not less than ten
5 years nor more than thirty, thirty years, or
6 fined not more than \$50,000 or both.

7 A. On the third offense?

8 Q. Yes.

9 A. Yes, ma'am.

10 Q. And then below in our code books, it also gives us
11 some other language as to whether a person is parole
12 eligible, whether they can receive work furlough,
13 educational credit, all that while they're incarcerated?

14 A. Yes, ma'am.

15 Q. Okay, and particularly if it is a third -- well, if
16 it's a first or second offense, the person is entitled to
17 -- they may have -- if they have prior possessions, they
18 may have their:

19 Sentence suspended and probation granted and is
20 eligible for parole, supervised furlough,
21 community supervision, work release, work credit,
22 education credit, and good conduct credit.

23 You would agree that's the first and second?

24 A. Yes, ma'am.

25 Q. And then after that:

1 Notwithstanding any provision of the law, a
2 person convicted or sentenced pursuant to this
3 subsection for a third or subsequent offense in
4 which all prior offenses were for possession of
5 the controlled substance pursuant to subsection
6 (a) may have this sentence suspended and
7 probation granted and is eligible for parole,
8 supervision, supervised furlough, community
9 supervision, work release, work credit, education
10 credit, or good conduct credits.

11 A. Yes, ma'am.

12 Q. Now, you indicated earlier that you spoke with Mr.
13 McCullough about his prior record?

14 A. I did.

15 Q. Okay, and, in fact, in his prior record he has a
16 possession of methamphetamines February, February 28, 2005,
17 which we've talked about here earlier?

18 A. Yes, ma'am.

19 Q. And then he has a possession of coke for October 3,
20 2005. He has that conviction?

21 A. Yes, ma'am.

22 Q. And then he has a possession of methamphetamines
23 November 17, 2005?

24 A. Yes, ma'am.

25 Q. All of these are possessions?

R. WHELCHER - CROSS-EXAMINATION BY MS. MOODY

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1 A. Yes, ma'am.

2 Q. Therefore, under the statute as it is written, he
3 would be eligible for parole?

4 A. I believe so, yes.

5 Q. And he would be eligible to a suspended sentence as
6 well?

7 A. Yes, ma'am.

8 Q. On probation, furlough, work credit, educational
9 credit, all those things as -- whether it was a first or
10 second?

11 A. If -- yeah, for a first or second.

12 Q. And did you all discuss that, along with his prior
13 record, prior to him entering a plea?

14 A. We discussed the fact that he had those prior
15 convictions. He couldn't understand why they could charge
16 him with possession with intent third. He thought that he
17 had to be charged with possession with intent first and
18 possession with intent second in order to be charged with
19 possession with intent third, and I told him that's not the
20 way it works. Excuse me. The prior possessions -- and
21 this is what I told him. The prior possessions are
22 sufficient to allow them to enhance this and make it a
23 possession with intent third.

24 Q. So based on enhancement, it could be a third. We can
25 all agree on that. As far as the instruction that he

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1 received in terms of what he was entering his plea of guilt
2 to and what the judge could give him, did you discuss with
3 him that the judge could give him probation? Even though
4 it might have been a long shot, did you discuss with him
5 that the judge could suspend a sentence and give him
6 probation?

7 A. Yes, ma'am, I believe so.

8 Q. Okay. So, when the court indicated that they could
9 not give him a suspended sentence or probation, why, then,
10 did you not object?

11 A. I can't tell you.

12 Q. But you're certain that you talked to him about his
13 offense being -- all his prior offenses being possessions
14 and that he would be eligible for parole, he would be
15 eligible for a suspended sentence to probation. You're
16 certain of that?

17 A. When I talk to a client ---

18 Q. I, I understand when you talk to a client. I get
19 that. I'm saying in this particular instance, did you
20 specifically tell him that he could get a suspended
21 sentence for probation?

22 A. I don't know. If you're talking about that day, I
23 don't know. I can't tell you that, but whenever I go and
24 talk to a client that has this level of charges, I take the
25 statute book with me so that they can see and we go over

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1 the entire statute. So, he would have known what was
2 eligible to him.

3 Q. So in that case, then if he would have known, he would
4 also know what the judge instructed him was incorrect, too,
5 as, as it relates to ---

6 A. I ---

7 Q. --- possession of methamphetamines third?

8 A. I assume so.

9 Q. Or the manufacture or distribution, I should say, of
10 methamphetamines. He would have known that that was wrong?

11 A. I assume so.

12 Q. But yet still in the transcript, nobody objected to
13 it?

14 A. That's correct.

15 Q. Okay. Now, you indicated that you sat down and you
16 talked to him a dozen or so times. Do you recall those
17 dates?

18 A. No, ma'am.

19 Q. But the jail logs would reflect whether or not you
20 talked to him?

21 A. No, ma'am.

22 Q. It would not ---

23 A. No.

24 Q. --- reflect whether you went to visit him?

25 A. When you go to the jail, they ask you for a name, and

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1 if you go to visit more than one person, they only put in
2 the name that you put in, the first name that you give
3 them. So ---

4 Q. Well, is there any way for you to document your visits
5 with your clients?

6 A. If I write in the file every time that I go see him,
7 yes, but I didn't do that. I don't do that. Now, there
8 are times that you go to the pod and talk to one client,
9 and then another client wants to talk to you. You don't
10 have your file with you or anything like that, but you
11 still talk to them.

12 Q. Okay. So, when you say a dozen or so times, that's an
13 estimation of times that you talked to him?

14 A. Exactly.

15 Q. Okay, but you do recall whether or not you talked to
16 him specifically about his discovery in his case?

17 A. There's no question about that.

18 Q. And you have notes in your file where you asked him
19 about his prior record, his version of the case, all that
20 would have been -- pertained to the discovery that was
21 presented?

22 A. I don't know if there are notes in my file, but that's
23 what I do. I take the discovery with me if I haven't
24 provided a copy already to them, but even if I have, I take
25 the discovery with me, and we go over the discovery. So,

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1 that ---

2 Q. But how are you certain that you talked to him about
3 his prior record?

4 A. Because it's in the discovery.

5 Q. Okay. So, when you go through the offenses, if
6 something in his record applies that it might make him
7 eligible -- you're saying that you would have talked to him
8 about him being eligible for probation?

9 A. I believe so, yes, ma'am.

10 Q. And this was a straight-up plea?

11 A. Yes, ma'am.

12 Q. Was this the first plea offer or -- well, it wasn't
13 necessarily a plea offer. It was a straight-up plea. They
14 dismissed one charge. Was there any other time that y'all,
15 you and Mr. McCullough, talked about his case and him
16 pleading?

17 A. I can't recall. There may have been; I just do not
18 remember.

19 Q. Did you ask the solicitor to consider giving him any
20 kind of suspended sentence?

21 A. Well, yes.

22 Q. I mean, I understand that this was -- the facts of
23 this case are extreme.

24 A. What ---

25 Q. But still when a client is wanting probation, I ask

1 for probation. So, I'm asking you. Did you ask for
2 anything of that nature?

3 A. Probation?

4 Q. Probation, suspended sentence, anything other than
5 just going straight up to a plea?

6 A. Yes, I did, and that was refused. What happened in
7 this case was I was prepared for trial. I thought we were
8 going to trial. As I said earlier, I think I said earlier,
9 when I got to the courthouse, somebody in the lobby said --
10 one of the other attorneys; I don't remember who --
11 informed me then that your client is saying it's a plea.
12 So, I went and talked to Mr. McCullough, and he said he
13 wanted to plea.

14 The idea for this case to go to from trial to plea was
15 not mine or Mr. Cheeks's idea. It was Mr. McCullough's
16 idea. Mr. McCullough's wife had pled the previous week.
17 She had received a sentence from a judge that was not
18 available to us.

19 Q. Do you recall what her sentence was?

20 A. No. All I recall about her sentence was that Judge
21 Verdin gave her a lot of time suspended to, I believe, home
22 incarceration or something of that nature and gave her
23 credit for the time that she served before she made bond,
24 but she got that sentence. That may have influenced him.
25 I can't remember.

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1 Q. Okay. So, the first time that he went before the
2 judge to do the plea, that was when you learned that he
3 wanted to plead, but you were prepared to go to trial?

4 A. Yes, ma'am.

5 Q. Okay, and then the second time that you went for the
6 plea, which -- where he got this ---

7 A. There was only just one time.

8 (COUNSEL CONFERS WITH APPLICANT.)

9 Q. So, you don't recall him backing out of his first
10 plea?

11 A. On the same day, or are you talking about a date prior
12 to that?

13 (COUNSEL CONFERS WITH APPLICANT.)

14 Q. Every time Mr. -- were you available for Mr.
15 McCullough every time he went before the court or what --
16 is it possible that Mr. Cheeks went before the court with
17 Mr. McCullough for his plea?

18 A. That's possible. I don't, I don't remember.

19 Q. Okay. So, the first time that you ever went before
20 the court was on August 2, 2012, where you all entered into
21 the plea, and that's when the phone records came into play,
22 and then you filed a subsequent motion to reconsider?

23 A. Yes, ma'am.

24 Q. Okay. All right. So, on the day you discussed with
25 him his plea and advised him of his rights, did you have an

1 opportunity or had you by then discussed with him the phone
2 -- taped recordings from the jail?

3 A. No. Those came in later.

4 Q. Okay. So, when later did they come?

5 A. I think it was about a week or two or three before the
6 trial.

7 Q. So, you advised him of his right to plea before the
8 trial. Okay, then you were prepared to go to trial?

9 A. Yes, ma'am.

10 Q. You learned that he wanted to plea. Then you talked
11 about the phone -- the jail ---

12 A. No. No.

13 Q. --- phone log?

14 A. We had already talked about those; I had already been
15 given those by the solicitor.

16 Q. Okay. Did you ever listen to them with Mr.
17 McCullough?

18 A. No. Mr. McCullough didn't want to hear them.

19 Q. And why is that?

20 A. I can't tell you that. I said look. We have these
21 tapes here and we can listen to these tapes, and they're
22 going to use them against you as an impeachment.

23 Q. Did you listen to them?

24 A. Yes.

25 Q. Okay, and the statements that were made in court

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1 regarding their content, you listened to them, and that was
2 basically what they were indicating, that there was other
3 behavior that was not in Mr. McCullough's favor ---

4 A. Exactly.

5 Q. --- on those ---

6 A. Exactly.

7 Q. --- records? Okay. Now, did you file on your own the
8 motion to reconsider?

9 A. Yes, sir -- yes, ma'am.

10 Q. And, and why was that?

11 A. I thought the sentence was a little harsh. I thought,
12 I hoped that with some passage of time that the judge would
13 reconsider the sentence and do exactly what a
14 reconsideration of the sentence is.

15 Q. And it didn't dawn on you to ask for a suspended
16 sentence or go back to the solicitor's office for a
17 suspended sentence?

18 A. Our concern or my concern at the time of the sentence
19 and the reconsideration was reducing the time because I
20 thought that thirty years on this situation was harsh, and
21 that's what I was looking for was to see if we could get
22 him, get him to understand that there was no connection
23 between the death of the child and any of these charges.
24 That's just what -- that was the vehicle that started all
25 of this.

1 Q. Okay, and so subsequently you filed a notice to
2 appeal?

3 A. Yes, ma'am.

4 Q. Okay, and the basis of your notice to appeal was --
5 the reason why you filed the notice to appeal was what?

6 A. Mr. McCullough told me he wanted to appeal.

7 Q. All right. Now as to the *Alford* plea, what, if
8 anything, did you explain to Mr. McCullough? Whose idea --
9 well, obviously you mentioned to him the *Alford* plea?

10 A. Yes, ma'am.

11 Q. And did you go through the meaning of entering an
12 *Alford* plea?

13 A. Yes, ma'am.

14 Q. And do you recall what you told him?

15 A. Mr. McCullough was -- he didn't want to go to trial
16 and he didn't want to plead guilty, and he was upset
17 because the day of reckoning had come. And I think that's
18 why he decided overnight because the last time I had talked
19 to him, this case was going to be a trial. I think he had
20 gotten scared. I mean, it's not usual for a client to
21 decide as his case gets close to trial that it's going to
22 be a plea instead of a trial.

23 And I instructed him that part of the judge's
24 questions to him would be that are you pleading guilty
25 because you are guilty. He said, well, I'm not guilty and

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1 I said, well, then we go to trial and you get a chance to
2 go to trial and make them prove you guilty. He said but I
3 don't want to do that. I don't want to take that chance.
4 I said, well, you know, we have something that is called an
5 *Alford* plea, and I explained how Alfred worked and would
6 work in this situation, and the fact that it's treated just
7 like a guilty plea, but you are not admitting guilt.

8 Q. So, you explained that to him?

9 A. I explained that to Mr. McCullough, yes, ma'am.

10 Q. Okay.

11 MS. MOODY: No further questions for this witness,
12 Your Honor.

13 THE COURT: Okay.

14 MS. OLIVE: I have a brief redirect, Your Honor.

15 REDIRECT EXAMINATION BY MS. OLIVE:

16 Q. Mr. Whelchel, just to reiterate, did you discuss all
17 of these charges and the potential sentences with Mr.
18 McCullough?

19 A. Yes, ma'am.

20 MS. MOODY: That's all the questions I have. Thank
21 you.

22 THE COURT: You can step down.

23 (THE WITNESS EXITS THE STAND.)

24 MS. OLIVE: Your Honor, may I have just a moment to
25 confer with Mr. Cheeks?

1 (A PAUSE.)

2 MS. OLIVE: Your Honor, that's all the witnesses for
3 the state.

4 THE COURT: Okay. Anything else?

5 MS. OLIVE: Your Honor, I -- oh, sorry. I just have a
6 brief -- well, I'll let Ms. Moody speak first.

7 MS. MOODY: Your Honor, I would ask that Mr.
8 McCullough's relief be granted based on the trial
9 transcript -- or, excuse me, the plea transcript wherein
10 he'd been made aware of the charges that he is pleading
11 guilty to.

12 Specifically, the court goes through each charge that
13 he is entering his plea to. He's giving him the maximum
14 sentence that he could possibly receive, the ranges,
15 sentencing ranges on some of them. And he discusses with
16 him whether or not after hearing all of this information
17 and understanding the sentences, the sentence he could
18 impose, as well as the classification of violent and
19 serious and ramification of those classifications, he
20 asks whether Mr. McCullough still wanted to enter his
21 plea.

22 Mr. McCullough's response is yes, sir, and he does not
23 -- he's not necessarily challenging the evidence that the
24 state has in terms of whether he is guilty or not or
25 whether that they would prevail at a trial. But he's

1 entered this plea and thinking that the most he could
2 possibly receive is ten just based on the facts of the
3 case.

4 But specifically on page 17, the judge or the court
5 asks:

6 And do you understand that whatever sentence
7 imposed on a particular charge, it cannot be, it
8 cannot be that no probation can be given, and no
9 parts of the sentence can be suspended?

10 And that's absolutely contrary to what the statute
11 says. The statute at that time in 2012 was that if your
12 prior convictions are all possessions, you are eligible for
13 a suspended sentence or probation -- or a suspended
14 sentence, obviously a probationary sentence, as well as
15 parole, furlough, work furlough, credit for a number of
16 things.

17 It appears that Mr. McCullough from this transcript
18 was not made aware of that, and I understand what counsel
19 says, but he talks in generalities as to what he typically
20 explains and that he took his book in and he talked about
21 this with Mr. McCullough, and Mr. McCullough never
22 mentions this. But he goes in, and he indicates to the
23 judge yes, he wants to plea. That he understood the
24 classification after it was explained to him on that day in
25 court. But I would suggest, Your Honor, that he did not

1 understand.

2 I think that his testimony here today discussing
3 whether or not he pled straight up and whether it was an
4 *Alford* plea demonstrates his lack of understanding. While
5 he can verbally tell me what the *Alford* plea is, he does
6 not understand as to sentencing that straight up means that
7 if you're facing up to thirty years on a charge, that's
8 straight up. The maximum penalty he can receive for an
9 offense is thirty years. If you go in without a number
10 suggested to you what the state would recommend or what
11 your attorney would ask for, that's considered a
12 straight-up plea.

13 But what I consider to be -- in the *Alford* plea, he
14 understands that he is not saying he's guilty. He's
15 maintaining his innocence, but he's going forward with the
16 plea. The consequences are significant for him. His
17 lawyer, even though the state was not making a
18 recommendation, could have asked the court for a suspended
19 sentence just as maybe his wife received a suspended
20 sentence. That could have been asked of the court, at
21 least as to the methamphetamines charge, the third offense.

22 The other charges that he has being the unlawful
23 manufacture of methamphetamine in front of a minor, that
24 carries up to five years. The charge for the removal of a
25 dead body is sixty days and/or a fine between \$500 to

1 \$1,000. The unlawful neglect of a child charge he could
2 get up to ten years. On the possession of methamphetamines
3 third, that carries a sentence of ten years and a fine of
4 \$10,000, and then his manufacturing methamphetamines third
5 offense:

6 Do you understand that your charge requires to be
7 sentenced -- I'm required to sentence you to,
8 sentence you to at least ten years, but could
9 serve -- sentence you to up to thirty years, and
10 I'm required to issue you a fine up to \$50,000?

11 Now, I'm not sure whether Mr. McCullough understood
12 whether he was eligible for probation or a suspended
13 sentence on all the other charges versus this charge. It's
14 unclear on the record, but this is when the judge discusses
15 this with him, but I don't think that Mr. McCullough
16 understood all the ramifications that he was facing, and he
17 went in on a straight-up plea. He got the max on all of
18 them, and I don't think that his attorney gave him enough
19 legal advice for him to make an informed decision on that
20 fact.

21 THE COURT: Okay. Let me ask you. Your only
22 contentions -- and based on this, that the judge was
23 correct when he quoted on the record what each offense
24 carried and what the maximum, minimum sentence was. But
25 on, on the manufacturing third offense, he basically told

1 him what the correct sentence was. He just said that, that
2 he needed to understand that probation couldn't be granted
3 and his sentence couldn't be suspended, and that that was a
4 misstatement of the law as of August of 2012.

5 This offense occurred March the 17th of 2011. On
6 March the 17th of 2011, that law was correct. That law
7 only got changed on June the 2nd of 2012. So, the entire
8 time he was in jail and the conversations he would have had
9 with his lawyer, any, any conversations that occurred prior
10 to June, the law was it was a minimum of thirty -- I mean,
11 a minimum of ten with a maximum of thirty, and it couldn't
12 be suspended.

13 Now, I guess -- and the real issue is whether the
14 lawyer should have objected on page 17 when the judge
15 misquoted the, the law as far as probation and suspension
16 issue.

17 The, I guess the argument could be made if the judge
18 had given him the bottom of that, if the judge had given
19 him ten, ten years, then clearly maybe if the judge had
20 known he could have suspended it, he may have given him
21 less than ten years and given him probation.

22 The problem you have here is the judge maxed him. The
23 judge gave him thirty years. So, the judge was not
24 inclined to think on the bottom range because if the -- say
25 the judge wanted to give him probation, but the judge

1 didn't think he could because the law had changed a couple
2 of months prior to that, and I don't, you know, I don't
3 know how we got to where we were. But the judge wasn't
4 thinking the minimum range anyway, whether he could have
5 suspended it or not. He gave him the maximum.

6 MS. MOODY: Well, I, I understand that, Your Honor,
7 and I'm not arguing that the judge was going to consider
8 giving him probation necessarily. I'm just saying for the
9 client to enter knowingly and intelligently enter into
10 plea, that he needs to understand what exactly that he is
11 entering his plea of guilt to, as well as I don't know --
12 and there was no testimony given here -- whether or not
13 they discussed, you know, whether he could get probation or
14 not. Certainly from my standpoint of just looking at the
15 facts, I don't think the judge would have necessarily given
16 him that, but I think it really more so hinges on the fact
17 that the client needs to be able to knowingly and
18 intelligently enter into that.

19 THE COURT: And I understand your argument. You know,
20 the issue is if, if it had been the other way around, if he
21 was -- thought he was entitled to a suspended sentence or
22 probation against that and then found out he didn't, if
23 he'd have known that, he wouldn't have pled. But in this
24 situation the judge told him that he couldn't suspend it
25 and he -- any part of it. He had to give him a minimum ten

1 years.

2 Now, even though that wasn't correct at the time, you
3 know, if his lawyer told him the correct law and the had
4 judge told him something different, then he's pleading
5 thinking he can get -- once the judge tells him that, he
6 said yeah.

7 MS. MOODY: Well, I guess I'm going off of the -- off
8 my client's statement that his lawyer didn't explain it to
9 him. So, I understand basically the testimony is that Mr.
10 Whelchel said that he did discuss it with him, but I'm
11 arguing from the standpoint of my client saying that he did
12 not discuss it with him, and that goes to his investigation
13 of his prior record that he had possessions but ---

14 THE COURT: Okay.

15 MS. MOODY: Thank you.

16 THE COURT: I understand. I will study this in great
17 detail.

18 MS. MOODY: Thank you.

19 THE COURT: Now I'll be glad to hear from the attorney
20 general.

21 MS. OLIVE: Thank you, Your Honor. Just briefly.
22 Once again, as Your Honor knows, the standard for
23 ineffective assistance of counsel is some failure by
24 counsel and that that failure prejudiced Mr. McCullough.
25 And I think as Your Honor pointed out, the issue here is

1 clearly prejudice.

2 If, if he's -- it's -- for him to say that he would
3 not have pleaded guilty if he had known that he was --
4 would have been parole eligible on these charges, I don't
5 think that's enough to show prejudice. I mean, Mr.
6 Whelchel testified he was prepared and ready to go to trial
7 that day, and that Mr. McCullough decided that he wanted to
8 plead guilty. He got scared, and unfortunately he was
9 sentenced to the max. He's unhappy with that.

10 Mr. Whelchel file a motion to reconsider. Mr.
11 Whelchel made all of the proper arguments, which is
12 reflected in both of the transcripts as well. Tried to
13 show that Mr. McCullough was remorseful. That he had a
14 drug problem that he just, you know, needed to get
15 straightened out. There was no relationship between the
16 meth lab and the death of the child. He made all the
17 proper arguments.

18 Furthermore, parole eligibility is a collateral
19 consequence. Counsel has no duty to inform his clients
20 about collateral consequences of their, of their guilty
21 plea. So, it would be our position that not only is there
22 no prejudice, but there was no, there was no conduct that
23 fell below an objective standard of reasonableness either.
24 Thank you.

25 THE COURT: Okay. All right. I will let y'all know.

1 Thank y'all.

2 MS. MOODY: Thank you, Your Honor.

3 MS. OLIVE: Thank you.

4 --- END OF TRANSCRIPT OF RECORD ---

CERTIFICATE

I, THE UNDERSIGNED ELIZABETH B. HARRIS, CERTIFIED
VERBATIM OFFICIAL COURT REPORTER FOR THE FIFTH
JUDICIAL CIRCUIT OF THE STATE OF SOUTH CAROLINA, DO
HEREBY CERTIFY THAT THE FOREGOING IS A TRUE, ACCURATE
AND COMPLETE TRANSCRIPT OF RECORD OF ALL THE
PROCEEDINGS HAD AND EVIDENCE PROVIDED TO ME BY MARYANN
S. NEVERS AND INTRODUCED IN THE HEARING OF THE
CAPTIONED CAUSE, RELATIVE TO APPEAL, IN THE CIRCUIT
COURT FOR SPARTANBURG COUNTY, SOUTH CAROLINA, ON THE
13TH DAY OF JANUARY, 2016.

I DO FURTHER CERTIFY THAT I AM NEITHER OF KIN,
COUNSEL, NOR INTEREST IN ANY PARTY HERETO.

/S/ELIZABETH B. HARRIS, CVR-M-CM

COLUMBIA, SOUTH CAROLINA

SEPTEMBER 19TH, 2016

STATE OF SOUTH CAROLINA)

COUNTY OF SPARTANBURG)

Chuck Edward McCullough,)

Applicant,)

v.)

State of South Carolina,)

Respondent.)

IN THE COURT OF COMMON PLEAS
FOR THE SEVENTH JUDICIAL CIRCUIT

Case No. 2013-CP-42-4979

ORDER OF DISMISSAL

This matter comes before the Court by way of an Application for Post-Conviction Relief filed December 16, 2013. Respondent made its Return on August 18, 2014. The Court convened an evidentiary hearing into the matter on January 13, 2016, at the Spartanburg County Courthouse. Applicant was present at the hearing and represented by Leah B. Moody, Esquire. Alicia A. Olive, Esquire, of the South Carolina Attorney General's Office, represented Respondent.

Applicant testified on his own behalf at the evidentiary hearing. Applicant's plea counsel, Richard H. Whelchel, Esquire, also testified. The Court had before it copies of the plea transcript and the transcript of the hearing on the motion to reconsider the sentence, the records of the Spartanburg County Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, and the pleadings. The Court finds as follows:

I. PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Spartanburg County Clerk of Court. He was indicted at the May 2011 term of the Spartanburg County Grand Jury for possession with intent to distribute

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methamphetamine or cocaine base, third offense (2011-GS-42-2412), manufacturing methamphetamine, third offense (2011-GS-42-2413). Applicant was subsequently indicted at the May 2012 term of the Spartanburg County Grand Jury for unauthorized removal of a dead body (2012-GS-42-2465), exposing child to methamphetamine (2012-GS-42-2466), and unlawful conduct toward a child (2012-GS-42-2467). Applicant was represented by Richard Whelchel, Esquire, ("Counsel") and James Cheek, Esquire. On August 2, 2012, the Applicant pleaded guilty as indicted pursuant to North Carolina v. Alford.¹ The Honorable J. Mark Hayes, II, sentenced Applicant to concurrent terms of thirty years for manufacturing methamphetamine, ten years each for possession of methamphetamine and unlawful conduct toward a child, five years for exposing a child to methamphetamine, and sixty days for unauthorized removal of a dead body.

A timely Notice of was filed on Applicant's behalf. The South Carolina Court of Appeals dismissed the Applicant's appeal for failure to provide an explanation of any issues to be addressed on appeal pursuant to Rule 203(d)(1)(B)(iv), SCACR, on November 25, 2013. The Remittitur was returned to the circuit court on December 12, 2013.

II. ALLEGATIONS

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

1. Ineffective assistance of counsel, in that;
 - a. Counsel failed to investigate,
 - b. Counsel failed to file a motion to suppress illegally seized evidence,
 - c. Counsel induced Applicant's guilty plea as a result of erroneous legal advice,
 - d. Counsel allowed his arguments to be influenced by law enforcement on the day of Applicant's plea,
 - e. Applicant did not have adequate time to prepare a response on day of plea.

¹ 400 U.S. 25 (1970).

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III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

A. Summary of Testimony

Applicant testified that Counsel should have objected to improper comments made at the plea hearing. He testified that the State did not make a recommendation regarding sentencing prior to the plea. Applicant testified that he backed out of an earlier plea prior to his August 12, 2012, plea because his wife, Carissa McCullough, was not there. Applicant testified that the next day Counsel brought him discovery and he asked what his chances were at trial. Applicant testified his wife pleaded guilty to the same charges. Applicant testified that Counsel told him he did not see him getting any more than ten years.

Applicant testified that Counsel failed to investigate—specifically, that he failed to investigate his prior record. Applicant testified he had two prior possession cases and did not have counsel on one. Applicant testified that one of those prior convictions was a possession of methamphetamine case that he was allowed to proceed on even though counsel was not present. Applicant testified that Counsel allowed his argument to be influenced. Applicant testified that the solicitor had made a comment at the plea that he was the "head" of the manufacturing operation. Applicant testified that Counsel did not object to this statement, but Applicant later admitted that his attorneys challenged these statements and asked the Court place a cooling aspect on the inflammatory comments made in crafting a sentence. Applicant testified that he did

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not review discovery, and did not discuss his prior record. Applicant testified that there was a motion to reconsider the sentence and a hearing was held on the motion. He testified that phone calls from the jail were introduced and that the print outs of the phone calls influenced the judge to make his decision. Applicant testified that his defense was that he was not manufacturing methamphetamine.

Counsel testified that he has been practicing law for thirty-four years. He testified he met with Applicant about a dozen times prior to the plea, and that he reviewed the discovery with Applicant. Counsel briefly summarized the State's evidence against Applicant, and stated that Applicant's wife, the child's mother, Carissa McCullough, gave consent to search her truck and gave a Mirandized statement and that their home was searched pursuant to a search warrant. Counsel stated his primary concern was that he wanted to give the Court time to think between hearing the facts of the case and sentencing Applicant because although the facts involved a deceased infant, there was no connection between the death of the child and the drugs. He stated he pointed this out to the judge.

Counsel stated that he never promises clients a particular sentence but that he gives them a range and advises them. Counsel testified that he advised Applicant of the elements of the charge and possible defenses. Counsel testified that Applicant had a difficult time understanding how he was facing a manufacturing methamphetamine third offense since he only had possession priors. Counsel testified he advised him about the statutes pertaining to enhancement of drug charges and that he explained that since he had at least two prior convictions, the charge was enhanced to third offense on that basis. Counsel testified he did not object to the 911 calls and that he was trying to get the judge to understand the death was not related to the drugs. Counsel testified that Applicant did not want to go to trial but he did not want to plead guilty. Counsel

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testified that at one point Applicant wanted to go to trial because he told Counsel he was not guilty. Counsel told him he could go to trial or he could enter an Alford plea. Counsel testified he explained to Applicant the nature of an Alford plea. Counsel testified that he was ready to go to trial, but Applicant wanted to plead.

B. Ineffective Assistance of Plea Counsel

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

The proper measure of performance is whether counsel provided representation within the range of competence required in criminal cases. Id. (citing Strickland, 466 U.S. at 687; Turner v. Bass, 753 F.2d 342 (4th Cir. 1985); Marzullo v. Maryland, 561 F.2d 540 (4th Cir. 1977)). The Court presumes counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Id. (citing Strickland, 466 U.S. at 690). Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

The Court uses a two-pronged test in evaluating allegations of ineffective assistance of counsel. Id. at 117, 386 S.E.2d at 625. First, Applicant must prove counsel's performance was deficient. Id. Under this prong, the Court measures counsel's performance by its "reasonableness under prevailing professional norms." Id. (citing Strickland, 466 U.S. at 688).

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Second, any deficient performance must have prejudiced Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 117-18, 386 S.E.2d at 625. With respect to guilty plea counsel, Applicant must show there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 59 (1985).

Based on the bulk of the testimony presented at the evidentiary hearing, this Court finds Applicant has failed to satisfy his burden of proving any deficiency in Counsel's performance or any prejudice resulting from any alleged deficiencies. This Court finds that Counsel is a seasoned professional in the area of criminal law and finds his testimony credible.

Failure to challenge prior conviction

Applicant alleged Counsel failed to investigate his prior convictions and challenge their use for enhancement purposes. Applicant asserts Counsel should have attacked his prior possession charge because it resulted from an uncounseled plea and as a result would have prevented the State from using the conviction as an enhancement. A criminal "defendant bears the burden of proof when collaterally attacking a prior conviction which the State seeks to use under a sentence enhancement statute." State v. Payne, 332 S.C. 266, 269, 504 S.E.2d 335, 336 (Ct. App. 1998) (finding defendant failed to produce any evidence to prove allegation that prior conviction was acquired without counsel in violation of Faretta v. California, 422 U.S. 800 (1975)). Here, Applicant had two prior convictions for possession of methamphetamine — first offense from 2003 and a second offense from 2005. Counsel was familiar with Applicant's prior convictions and testified he explained the enhancement statutes to Applicant and explained that because he had two prior convictions for possession of methamphetamine, the manufacturing

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charge was enhanced to a third offense. Applicant has failed to present evidence in support of his contention that his prior conviction was acquired in violation of the dictates of Faretta v. California, 422 U.S. 806. Therefore, Applicant has failed to show Counsel was deficient for not challenging the use of his prior conviction for enhancement purposes on that basis, or that he was prejudiced by the alleged deficiency. The Court finds counsel conducted a proper investigation, adequately conferred with Applicant, and was thoroughly competent in his representation. Accordingly, this allegation is denied and dismissed.

Failure to move to suppress evidence

Applicant alleged Counsel failed to file a motion to suppress illegally seized evidence. This Court finds this allegation is without merit. Based on the testimony at the PCR hearing and in the plea transcript, Carissa, the registered owner of the truck, gave verbal and written consent to search the vehicle after they were intercepted by investigators while travelling with their infant's body. Carissa also gave a statement after receiving Miranda warnings. Thereafter, ~~investigators obtained a search warrant for the couple's residence to look for poisons. Based on~~ the investigators' immediate observations upon entering the home, they also obtained a narcotics search warrant. The search of the truck produced drug paraphernalia. The search of the residence yielded additional evidence against Applicant. Applicant has made no showing that Counsel had any legal basis to move to suppress the evidence obtained as a result of the search warrants and Carissa's consent, or that such motion would have been successful. See Arnette v. State, 206 So.2d 556, 557, 413 S.E.2d 803, 804 (1992) (finding counsel not ineffective for failing to advise of potential defense where no evidence exists to support the defense).

Regardless, a knowing and voluntary guilty plea waives any non-jurisdictional defects and defenses, including challenges to the sufficiency of the evidence. See Whetsell v. State, 276

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S.C. 295, 297, 277 S.E.2d 891, 892 (1981) (citing Rivers v. Strickland, 264 S.C. 121, 213 S.E.2d 97 (1975); State v. Fuller, 254 S.C. 260, 174 S.E.2d 774 (1970)); See also Palacio v. State, 333 S.C. 506, 514, 511 S.E.2d 62, 67 (1999) (finding no deficiency where "it would have been futile for Attorney to have made such arguments"). Counsel testified he reviewed all discovery with Applicant, explained the charges against him and discussed any possible defenses he might have to those charges. Counsel testified that he was prepare to go to trial but Applicant decided to enter an Alford plea. Therefore, this Court finds Applicant has failed to show either deficiency or prejudice as to this allegation. Accordingly, this allegation is denied and dismissed.

Counsel allowed arguments to be influenced by law enforcement

Applicant alleges Counsel allowed his arguments to be influenced by law enforcement on the day of his plea. Applicant has produced no evidence in support of this allegation. At Applicant's plea, investigator Hutchins asked for the maximum sentence and stated he was "the head of the manufacturing of methamphetamine snake." (Plea Tr. p. 20, lines 4-6). In response, ~~and in mitigation, Counsel argued he did not see anything in the volumes of discovery he~~ received that indicated Applicant was the kingpin of meth producers in Spartanburg County. Counsel stated the real problem was that there was a young child who died. Counsel also argued that the autopsy showed that the child choked on his own vomit, and that there was "nothing to suggest that any meth lab, or any of the items there had anything to do with the child's death" (Plea Tr. p. 23, lines 1-2). Furthermore, James Cheek, who also assisted at the guilty plea, asked the Court to . . . take into consideration that there are some things that are really inflammatory and "ask[ed] the Court to put a cooling aspect on all of that as the Court fashion[ed] a sentence because there's nothing to show that any of [Applicant's] involvement with the drugs extended beyond himself and [Carissa's] use." (Plea Tr. p. 27, line 22-p. 28, line 2). In addition, Counsel

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made a motion to reconsider the sentence and a hearing was held on the motion on May 23, 2013. Ultimately, however, the Court did not change the sentence. This Court finds Applicant has failed to make any showing that Counsel was deficient in this regard or that he was prejudiced by any alleged deficiency. Accordingly, the allegation is denied and dismissed.

Applicant did not have adequate time to prepare a response on day of plea

Applicant alleges he did not have adequate time to prepare a response to the State's comments on the day of his plea. This Court finds Applicant has failed to produce any evidence in support of this allegation. Furthermore, an applicant asserting a constitutional violation must frame the issue as one of ineffective assistance of counsel. Al-Shabazz v. State, 338 S.C. 354, 363-64, 527 S.E.2d 742, 747 (2000) (citing Drayton v. Evatt, 312 S.C. 4, 430 S.E.2d 517 (1993); Hyman v. State, 278 S.C. 501, 299 S.E.2d 330 (1983); Richardson v. State, 310 S.C. 360, 426 S.E.2d 795 (1993)). Accordingly, this allegation is denied and dismissed.

C. Involuntary Guilty Plea

~~Applicant alleges he was induced to plead guilty as a result of erroneous legal advice.~~

This Court finds Applicant's guilty plea was entered freely and voluntarily. To find a guilty plea is voluntarily and knowingly entered into, the record must establish the defendant had a full understanding of the consequences of his plea and the charges against him. Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709, 23 L.Ed.2d 274 (1969). Defendant's knowing and voluntary waiver of statutory or constitutional rights must be established by a complete record, and "may be accomplished by colloquy between court and defendant, between court and defendant's counsel or both." Roddy v. State, 339 S.C. 29, 34, 528 S.E.2d 418, 421 (2000) (citing State v. Ray, 310 S.C. 431, 437, 427 S.E.2d 171, 174 (1993)). Therefore, statements made during a guilty plea should be considered conclusive unless a criminal inmate presents valid reasons why he should

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be allowed to depart from the truth of his statements. Crawford v. United States, 519 F.2d 347 (4th Cir.1975).

An applicant who pleads guilty on the advice of counsel may collaterally attack the plea only by showing (1) counsel was ineffective and (2) there is a reasonable probability that but for counsel's errors, the defendant would not have pled guilty and would have insisted on going to trial. Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001) (citing Hill v. Lockhart, 474 U.S. 52; Jackson v. State, 342 S.C. 95, 535 S.E.2d 926 (2000); Thompson v. State, 340 S.C. 112, 531 S.E.2d 294 (2000); Rayford v. State, 314 S.C. 46, 443 S.E.2d 805 (1994)).

An applicant alleging that his guilty plea was induced by ineffective assistance of counsel must prove that counsel's advice was not "within the competence demanded of attorneys in criminal cases." Hill v. Lockhart, 474 U.S. at 56. Applicant must also prove prejudice. Id. at 52. When determining issues relating to guilty pleas, the court will consider the entire record, including the transcript of the guilty plea, and the evidence presented at the post-conviction relief hearing. Anderson v. State, 342 S.C. 54, 57, 535 S.E.2d 649, 657 (2000) (citing Harres v. Leeke, 282 S.C. 131, 318 S.E.2d 360 (1984)).

This Court finds the record fully supports the knowing and voluntary nature of Applicant's guilty plea. Applicant has presented no reason why he should be allowed to depart from the truth of his statements made at the plea hearing. Counsel informed Applicant of his constitutional rights, and Applicant waived these rights, including the right to a jury trial, right to remain silent, and right to confront witnesses. Counsel was thoroughly competent in his representation and adequately advised Applicant regarding the advantages and disadvantages of pleading no contest, given the substantial evidence against him. Therefore, the Court finds Applicant has failed to show that Counsel's performance was deficient or that any alleged

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CLERK OF COURT
SPARTANBURG, SOUTH CAROLINA
2016 JUN 13 PM 1:12
M. HOPE BLAKLEY

RJG

deficient performance prejudiced him. Accordingly, this Court hereby denies and dismisses Applicant's allegation that his guilty plea was involuntary

D. All Other Allegations

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

IV. CONCLUSION

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

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

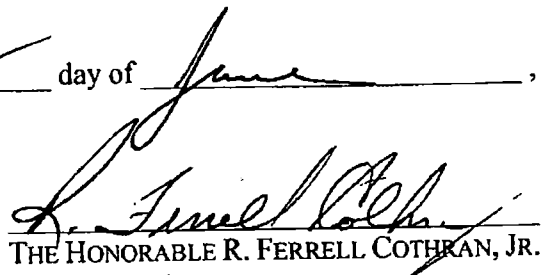
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CLERK OF COURT
SPARTANBURG COUNTY
2016 JUN 13 PM 1:12
M. HOPE BLACKLEY

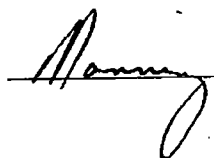
RJC

IT IS THEREFORE ORDERED THAT:

1. The Application for Post-Conviction Relief is denied and dismissed with prejudice; and
2. Applicant must be remanded to the custody of the Department of Corrections to complete service of his sentence.

AND IT IS SO ORDERED this 8 day of June, 2016.


THE HONORABLE R. FERRELL COTHRAN, JR.
Presiding Judge

, South Carolina

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2016 JUN 13 PM 1:12
M. HOPE BLACKLEY

WITNESSES

Spartanburg County Sheriff's Office

Kevin R. [Signature]
SENTENCE REPORT
REPORT END
Computer

3. CARD PULLED

4. INDEXED

5. CHECKED WARRANTS

ARREST WARRANT NUMBER

6. CHECKED SIGNATURE

DIRECT INDICTMENT

7. ASSESSMENT
FINE CARD MADE

8. TRAFFIC VIOLATION COPY

[Signature]
ACTION OF GRAND JURY

True Bill

Foreperson of Grand Jury

Date: MAY 03 2012

VERDICT

Foreperson of Petit Jury

Date:

DOCKET NO.

12-GS-42-2465

The State of South Carolina

County of Spartanburg

Barry J. Barnette, Solicitor

COURT OF GENERAL SESSIONS

MAY 07 2012

TERM

THE STATE

vs.

CHUCK MCCULLOUGH

Indictment for

UNAUTHORIZED REMOVAL OF
DEAD BODY

SC Code: 17-05-580

CDR Code: 1248

Class: Misdemeanor

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2012 MAY -9 PM 2:30
M. HOPE BLACKWELL

STATE OF SOUTH CAROLINA)
COUNTY OF SPARTANBURG)

INDICTMENT

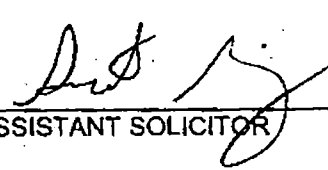
MAY 03 2012

At a Court of General Sessions, convened on _____ the
Grand Jurors of Spartanburg County present upon their oath:

UNAUTHORIZED REMOVAL OF DEAD BODY

That Chuck McCullough did in Spartanburg County on or about March 17, 2011, move and/or authorize the removal of the dead body of [REDACTED] from Louisa Street, Roebuck, South Carolina, before an investigation was completed without authorization by the Spartanburg County Coroner, in violation of §17-5-580 of *THE 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.



ASSISTANT SOLICITOR

WITNESSES

SPTBG CO SHERIFF'S OFFICE

1. SENTENCE MADE

2. REPORT ENTERED

3. CARD PULLED

4. INDEXED

5. CHECKED WARRANTS

ARREST WARRANT NUMBER

6. CHECKED SIGNATURE

7. ASSESSMENT

DIRECT INDIRECT MADE

8. TRAFFIC VIOLATION COPY

ACTION OF GRAND JURY

True Bill

Foreperson of Grand Jury

Date:

MAY 03 2012

VERDICT

Foreperson of Petit Jury

Date:

12-GS-42-2464

The State of South Carolina

County of Spartanburg

Barry Barnette, Solicitor

COURT OF GENERAL SESSIONS

MAY 07 2012

TERM

THE STATE

vs.

CHUCK MCCULLOUGH

Indictment for
EXPOSING CHILD TO
METHAMPHETAMINE

SC Code: 44-53-378

CDR Code:

FILED COURT
CLERK OF COUNTY
SPARTANBURG COUNTY
2012 MAY -9 PM 2:30
M. HOPE BLACKLEY

STATE OF SOUTH CAROLINA)

INDICTMENT

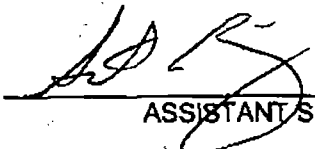
COUNTY OF SPARTANBURG)

At a Court of General Sessions, convened on MAY 03 2012 the Grand Jurors of
Spartanburg County present upon their oath:

EXPOSING CHILD TO METHAMPHETAMINE

That Chuck McCullough did in Spartanburg County, between January 5, 2011 and March 17, 2011, willfully and unlawfully, being a person who is eighteen years of age or older did either directly or by extraction from natural substances, or independently by means of chemical processes, or both unlawfully manufacture amphetamine, its salts, isomers, or salts of isomers, or methamphetamine, its salts, isomers, or salts of its isomers in the presence of a minor child; and/or knowingly permit a child to be in an environment where a person is selling, offering for sale, or having in such person's possession with intent to sell, deliver, distribute, prescribe, administer, dispense, manufacture, or attempt to manufacture, or attempt to manufacture amphetamine or methamphetamine; and/or knowingly permit a child to be in an environment where drug paraphernalia or volatile, toxic, or flammable chemicals are stored for the purpose of manufacturing or attempting to manufacture amphetamine or methamphetamine in violation of Section 44-53-378, *THE 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.


ASSISTANT SOLICITOR

WITNESSES

SPARTANBURG COUNTY SHERIFF'S OFFICE

1. SEARCH MADE ☒

2. REPORT ENDED ☒

3. CARD PULLED ☒

4. INDEXED ☒

5. CHECKED WARRANTS ☒

ARREST WARRANT NUMBER ☒

6. CHECKED SIGNATURE ☒

7. ASSESSMENT FINE CARD MADE ☒

8. TRAFFIC VIOLATION COPY ☒

ACTION OF GRAND JURY

True Bill

Foreperson of Grand Jury

Date: MAY 03 2012

VERDICT

Foreperson of Petit Jury

Date:

DOCUMENT NO.

12-GS-42-2467

The State of South Carolina

County of Spartanburg

Barry J. Barnette, Solicitor

COURT OF GENERAL SESSIONS

MAY 07 2012

TERM

THE STATE

vs.

Chuck McCullough

Indictment for

UNLAWFUL CONDUCT TOWARD A CHILD

SC Code: 63-5-70 and 44-53-375(G)

CDR Code: 2481

Class FEL/E

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2012 MAY -9 PM 2:30
M. HOPE BLACKLEY

STATE OF SOUTH CAROLINA)
COUNTY OF SPARTANBURG)

INDICTMENT

MAY 03 2012

At a Court of General Sessions, convened on _____, the Grand
Jurors of Spartanburg County present upon their oath:

UNLAWFUL CONDUCT TOWARD A CHILD

That Chuck McCullough, did in Spartanburg County, between January 5, 2011 and March 17, 2011, willfully and unlawfully, being the parent and/or lawful guardian of [REDACTED], a minor child, place the child at unreasonable risk of harm affecting the child's life, physical or mental health, or safety, do or cause to be done unlawfully or maliciously any bodily harm to the child so that the life or health of the child is endangered or likely to be endangered, and/or willfully abandon the child, in violation of Sections 63-5-70 and/or 44-53-375(G), *THE 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.



ASSISTANT SOLICITOR

DOCKET NO.

11-GS-42-2412

The State of South Carolina

County of Spartanburg

Barry J. Barnette, Solicitor

2011 MAY 11 AM 9:19

11. HOPE L LACKLEY

SPTBG CO SHERIFF'S OFFICE

T. R. Dutton
1. SENTENCE MADE

2. REPORTED

3. CARD PULLED

4. INDEXED
ARREST WARRANT NUMBER

5. CHECKED WARRANTS

M752953 6. CHECKED SIGNATURE

7. ASSESSMENT
FINE CARD MADE

8. TRAFFIC VIOLATION COPY

ACTION OF GRAND JURY

Ph
Foreperson of Grand Jury

Date:

VERDICT

Foreperson of Petit Jury

Date:

COURT OF GENERAL SESSIONS

MAY 11 2011

TERM

THE STATE

VS.

CHUCK EDWARD MCCULLOUGH

Indictment for

POSSESSION WITH INTENT TO DISTRIBUTE
METHAMPHETAMINE OR COCAINE BASE

SC Code: 44-53-375

CDR Code:

Class MIS/A

STATE OF SOUTH CAROLINA)
COUNTY OF SPARTANBURG)

INDICTMENT

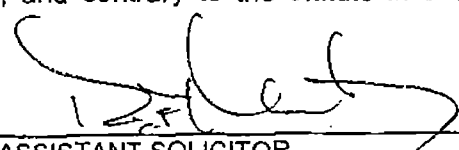
MAY 6th 2011

At a Court of General Sessions, convened on _____ the
Grand Jurors of Spartanburg County present upon their oath:

POSSESSION WITH INTENT TO DISTRIBUTE

That Chuck Edward McCullough did on March 17, 2011 manufacture, distribute, dispense, deliver, purchase, or otherwise aid, abet, attempt or conspire to manufacture, distribute, dispense, deliver or purchase, or possess with intent to manufacture, distribute, dispense, deliver, or purchase a quantity of Methamphetamine or Cocaine Base, a schedule II controlled substance under provisions of § 44-53-375, *THE 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.



ASSISTANT SOLICITOR

WITNESSES

SPTG CO SHERIFF'S OFFICE

1. SENTENCE MADE

2. REPORT ENTERED

3. CARD PULLED

4. INDEXED

5. CHECKED WARRANTS

6. CHECKED SIGNATURE

7. ASSIGNED TO WORKER
FINE CARD MADE

8. TRAFFIC VIOLATION COPY

ACTION OF GRAND JURY

True Bill

Foreperson of Grand Jury

Date:

MAY 03 2012

VERDICT

Foreperson of Petit Jury

Date:

DOCKET NO.

11-GS-42-2413

The State of South Carolina

County of Spartanburg

Barry J. Barnette, Solicitor

COURT OF GENERAL SESSIONS

MAY 11 / 2012

TERM

THE STATE

v.

CHUCK MCCULLOUGH

Indictment for

MANUFACTURING
METHAMPHETAMINE

SC Code: 44-53-375

FILED
CLERK OF COURT
SPARTANBURG COUNTY

2012 MAY -9 PM 2:01

M. HOPE BLACKLEY

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STATE OF SOUTH CAROLINA)
COUNTY OF SPARTANBURG)

INDICTMENT

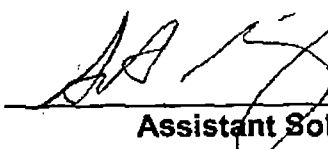
MAY 03 2012

At a Court of General Sessions, convened on _____ the
Grand Jurors of Spartanburg County present upon their oath:

MANUFACTURING METHAMPHETAMINE

That Chuck McCullough in Spartanburg County on or before March
17, 2011, manufacture, distribute, dispense, deliver, purchase, or otherwise
aid, abet, attempt, or conspire to manufacture, distribute, dispense, deliver,
purchase, or possess with intent to distribute, dispense, or deliver
Methamphetamine, in violation of the of S.C. Code § 44-53-375 (Law. Co-
op. 1976).

Against the peace and dignity of the State, and contrary to the statute in such
case made and provided.


Assistant Solicitor

WITNESSES

SPTBG CO SHERIFF'S OFFICE

F. A. Allerton

ARREST WARRANT NUMBER

M752939

ACTION OF GRAND JURY

True Bill

Foreperson of Grand Jury
Date:

MAY 5 2011

VERDICT

Foreperson of Petit Jury
Date:

DOCKET NO. -

11-GS-42-2413

The State of South Carolina

County of Spartanburg

Barry J. Barnette, Solicitor

COURT OF GENERAL SESSIONS

MAY 04 2011

TERM

THE STATE

v.

CHUCK EDWARD MCCULLOUGH

Indictment for

MANUFACTURING
METHAMPHETAMINE

SC Code: 44-53-375

FILED
CLERK OF COURT

2011 MAY 11 AM 9:19

H. HOPE BLACKLEY

STATE OF SOUTH CAROLINA)
COUNTY OF SPARTANBURG)

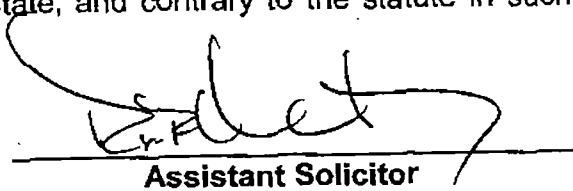
INDICTMENT

At a Court of General Sessions, convened on MAY 05 2011 the
Grand Jurors of Spartanburg County present upon their oath:

MANUFACTURING METHAMPHETAMINE

That Chuck Edward McCullough did in Spartanburg County on or about March 17, 2011, manufacture, distribute, dispense, deliver, purchase, or otherwise aid, abet, attempt, or conspire to manufacture, distribute, dispense, deliver, purchase, or possess with intent to distribute, dispense, or deliver Methamphetamine a schedule II controlled substance, in violation of the provisions of Section 44-53-375, THE 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.


Assistant Solicitor