

STATE OF SOUTH CAROLINA  
IN THE Supreme Court

Certiorari to Spartanburg County  
Honorable R. Ferrell Cothran, Circuit Court Judge

RECEIVED

MAR 06 2017

S.C. SUPREME COURT

CHUCK EDWARD McCULLOUGH

Petitioner

v.

STATE OF SOUTH CAROLINA,

Respondent.

Appellate Case No. 2016-001416

MEMORANDUM in support of JOHNSON  
PETITION FOR WRIT OF CERTIORARI  
(Pro SE)

March 1, 2017

S) Chuck Edward McCullough

Chuck Edward McCullough #311608  
McCormick Correctional Inst. F-1-236

386 Redemption way

McCormick, S.C. 29899

Petitioner, (Pro SE)

This memorandum has been prepared by the undersigned. By request of the South Carolina Supreme Court to address any issues preserved for review. Petitioner request to amend the section ISSUE PRESENTED of the Johnson petition to add the following:

- I. Did the PCR Court err in holding that petitioner's guilty plea was intelligently, voluntarily, and knowingly entered pursuant to Boykin v. Alabama 395 U.S. 238, 243-244 (1969)?
- II. Did the PCR Court err in holding that Petitioner's prior Drug offense for Possession Meth 1<sup>st</sup> in 2003 valid to use for enhancement purposes? Rendering Ineffective Assistance of Counsel?
- III. Did the PCR court comply with S.C. Code Ann. 17-27-80 setting forth findings of fact and conclusions of law on each ISSUE raised at the PCR hearing?
- III. Did PCR Counsel for Petitioner, prejudice Petitioner by failing to comply with request for 59E motion to preserve all issues raised at PCR hearing?

## ARGUMENTS

I. The PCR Court erred in holding that Petitioner's guilty plea was intelligently, voluntarily, and knowingly entered pursuant to Boykin v. Alabama 395 U.S. 238, 243-244 (1969).

### I.

It is long standing in South Carolina, to find a guilty plea voluntarily, intelligently, 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). Petitioner did not understand the consequences of the plea.

On the records face, during Petitioner's guilty plea, Judge Hayes remarked that "no probation can be given and that no parts of the sentence can be suspended." (App. 17. 6-8) and "do you also understand that, that particular charge is classified as both a violent and also a serious offense under the law?" (App. 17. 10-12) Petitioner's answered YES, sir.

With respect that information is direct consequences of Petitioner's plea. That information from Judge Hayes was a mis-statement of (App. 81. 4) the law under S.C. Ann. Code 44-53-375. There fore petitioner's guilty plea was not knowingly or intelligently made, Invalidating the plea under Boykin v. Alabama 395 U.S. 238 (App. 80. 11-20)

at the time of sentencing the law under 44-53-375 B.3. read in part, "For a third offense where all prior convictions are for possession, a defendant may have the sentence suspended, probation granted, and parole eligibility." All petitioners' priors are possessions. (App. 76. 20-23). Therefore entitling petitioner to a non-violent sentence and Parole eligibility. (see also Johnson Petition), Bolin v. SENCE Opinion No. 5361, Appellate Case no. 2014-000461, Johnson Petition p.7

("In the sentencing context, an error affects substantial rights if, "absent the error, a different sentence might have been imposed.") United States v. Hernandez 603 F.3d 267, 273; U.S. v. Slade 631 F.3d 185, 191 (4<sup>th</sup> Cir. 2011) Petitioner sentence had a prejudicial effect, as a result, Petitioner's sentence has been treated as a violent 85% sentence and has had his parole taken. (see sentence sheet in Attachments)<sup>#1</sup>. See also 59E that was timely submitted to PCR Council.

Under the Fourteenth amendment, Due Process requires that Petitioner's case on the Manufacture Meth Charge be vacated, and remand to trial court for resentencing, giving equal protection of law, and the fundamental right to be sentenced with the consideration of the Court for a suspended sentence, probation, and correcting Parole eligibility.

II. The PCR Court erred in holding that Petitioner's prior Drug offense for possession Meth 1<sup>st</sup> in 2003 valid to use for enhancement purposes. Rendering Ineffective Assistance of Counsel, failing to investigate.

## II.

In the order of Dismissal, 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. That is contrary to what was raised at the PCR hearing. (App. 71, -79)

Exhibits were presented at the PCR hearing (App. 72. 3-16) the appendix does not have them but they are part of the record. Exhibit 1 (App. 72 14-16) is the sentence sheet for the Poss. Meth 1<sup>st</sup>. The Exhibit was evidence that Petitioner at the time had Counsel because he paid \$500 restitution to the PD office and signed pro se. Petitioner also presented the letters from the Greenville County Clerk of Court showing Petitioner sought due diligence in trying to recover the transcripts from that proceeding to prove he never waived representation. (App. 74. 22-25, (App. 75. 1-7) Petitioner was informed that the record had been destroyed. Petitioner's Exhibit 1 should have been sufficient to prove he unknowingly proceeded (Pro SE) without being warned of the dangers of self-representation required by Faretta v. California 422 U.S. 806

("where record of a prior conviction is silent as to presence of Counsel, it is presumed that Sixth Amendments rights of the defendant have been violated and conviction of such defendant under recidivist statute is invalid unless the State can show affirmatively waiver of counsel.") Brown v. State 483 F.2d 116

Therefore at the PCR hearing the State did not prove Petitioner waived his right to counsel. Petitioner did prove that the conviction was invalid because the sentence sheet showed "hybrid representation" in light of Miller v. State 388 S.C. 347, 697 S.E.2d 527, State v. Stuckey 333 S.C. 56, 508 S.E.2d 564 (1998). Had Counsel made a proper investigation he would have seen that. (App. 72.14-25) rendering ineffective Assistance.

Prejudice adheres because Petitioner could have had a possible leanier sentence, but the State used the uncounseled conviction to enhance. Counsel could have prevented that. Petitioner ask the Court to remand for resentencing;

III. The PCR Court failed to comply with S.C. Code Ann. 17-27-80 in the Order of Dismissal setting forth findings of fact and conclusions of law on each issue raised at the PCR hearing?

### III.

As seen through out the PCR Transcript. Petitioner raised several meritorious issues despite the fact PCR Counsel failed to properly amend petitioners PCR application (App 62, 63). Petitioner raised Ineffective Assistance Claims, "failing to object", error of law, Prosecutorial Misconduct, Due Process Claims. Petitioner at this time is barred from addressing those merits, because of PCR Counsel also.

The records does in fact demonstrate that these issues where raised and the PCR failed to rule on them. (App. 64-148) This is prejudicial by the court, because there is language in the "Order of dismissal" that is insufficient. (App. 160) Section 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."

"This paragraph does not constitute a sufficient ruling on any issues since it does not set forth specific findings of fact and conclusions of law. This language should not be included. Petitioner did present evidence at the PCR hearing in regards to S.C. code 44-53-375. The Court is obligated to comply with 17-27-80 and Petitioner's order of dismissal does not.

Petitioner request that the case be remanded to the PCR court to get a "full bite" of the issues presented and preserve them for review. The failure to specifically rule on the issues preclude appellate review Pruitt v. State 310 S.C. 254, 423 S.E.2d 127 (1992). In the "interest of Justice" remanding matter to PCR Court, despite the fact that no Rule 59(E) SCRCP motion had been filed, and admonishing all those involved to carefully prepare and review PCR orders to ensure they specifically address the issues raised and make conclusions of law" ( McCullough v. State 320 S.C. 270, 272, 464 S.E.2d 340, 341 (1995)

IV. PCR Counsel for Petitioner, prejudiced Petitioner by failing to comply with request for 59(E) SCRCP to preserve all issues raised at the PCR hearing.

#### IV.

Petitioner received the "Order of Dismissal" dismissing his PCR application on June 17, 2016. (App 150-161) Upon receiving the order petitioner put together a Rule 59(E) (SCRCP) and filed it with his PCR attorney Leah B. Moody on June 20, 2016. Petitioner expressed his concern about issues that were not in the "Order of Dismissal". This was done in a timely manner. (see Attachment # 3), There after Petitioner sent a letter to Spartanburg County Clerk of Court providing an affidavit of Service to Leah Moody asking if his attorney filed his 59 E Motion. In return he received the "Notice of Appeal" filed on June 30, 2016. (see Attachment # 2)

Pursuant to Rule 407 (Professional Conduct) 1.2 (a) ("a lawyer shall abide by a client's decisions concerning the objectives of representation, subject to paragraphs (c), (d), and (e) and shall consult with the client as to the means by which they are to be pursued...") and has a duty to uphold the legal process. (see Attachments #4-8). Petitioner understands that the Court can not

add to the record. The Attachment submitted with this memorandum is only to show "due diligence" on Petitioner's behalf. Petitioner does not want that misconstrued.

Standing case law says "[c]ounsel preparing proposed orders should be meticulous in doing so, opposing counsel should call any omissions to the attention of the PCR judge prior to issuance of the order, and the PCR judge should carefully review the order prior to signing it. Even after an order is filed, counsel has an obligation to review the order and file a Rule 59(e), SCRCP, motion to alter or amend if the order fails to set forth the findings and the reasons for those findings as required by 17-27-80 and Rule 52(a), SCRCP" Pruitt v. State 310 S.C. at 256, 423 S.E.2d at 128.

Counsel for Petitioner at the PCR failed to uphold her duty under this case law. As Petitioner has shown he did everything in his power to preserve his issues. Counsel's misconduct undermined the outcome of Petitioner's Appeal. Petitioner has meritorious issues that has a high probability of a chance to have his sentence corrected or a new Trial granted. But due to the negligence

of PCR Counsel, Petitioner is barred from seeking review. As well as losing counsel on his writ of Certiorari. Petitioner request the Court to grant his writ of Certiorari, or remand back to PCR on grounds of Ineffective PCR Counsel, and making PCR Court comply with 17-27-80.

Petitioner should not have to suffer and forever lose his issues on count of PCR Counsel. It seems that the ones fighting there cases that can't afford attorneys are the ones that end up losing and has to do more time than they should. Because of Petitioner's Counsel he is now doing a violent sentence which is 10 years more than the law allows. In the very least this court should grant leave to make the motion to relief from judgement under Rule 60 (a) (b) (3) to the lower court to correct the sentence,

### Conclusion

For the foregoing reasons, Petitioner request that the Court grant his petition for writ of Certiorari to allow full briefing, reverse the charges, and remanding for resentencing or to PCR court.

March 1, 2017

s/ Chuck Edward McCullough  
Chuck Edward McCullough #311608  
Petitioner

STATE OF SOUTH CAROLINA

Computer

IN THE COURT OF GENERAL SESSIONS

COUNTY OF SPARTANBURG
STATE VS.

Chuck Edward Mccullough

AKA:

Race: Sex: M Age: 36

DOB: 07-02-1976 SS#: 251-69-4240

Address: 140 Cherry Dr

City, State, Zip: Spartanburg SC 29376

DL#: 004388850 SID#:

\*CDL Yes No CMV Yes No Hazmat Yes No

In disposition of the said indictment comes now the Defendant who was

TO: Drugs / Manufacture of methamphetamine, 3rd (10-30 years and/or \$0-50,000) (NPNS)

INDICTMENT/CASE#: 2011GS4202413

A/W#: M752939

Date of Offense: 3/17/2011

S.C. Code §: 3200

CDR Code #: 3200

SENTENCE SHEET

Handwritten signature/initials

in violation of § 3200 of the S.C. Code of Laws, bearing CDR Code # 3200

NON-VIOLENT VIOLENT SERIOUS MOST SERIOUS Mandatory GPS(CSC w/minor 1st or Lewd Act) §17-25-45

The charge is: As Indicted, Lesser Included Offense, Defendant Waives Presentment to Grand Jury.

The plea is: Without Negotiations or Recommendation, Negotiated Sentence, Recommendation by the State.

ATTORNEY: SPIVEY, SCOTT DANIEL SC Bar# 79868 Defendant Attorney for Defendant SC Bar# 6057

WHEREFORE, the Defendant is committed to the State Department of Corrections, County Detention Center,

for a determinate term of 30 days/months/years or under the Youthful Offender Act not to exceed years

and/or to pay a fine of \$; provided that upon the service of days/months/years and/or payment

of \$; plus costs and assessments as applicable\*; the balance is suspended with probation for

months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of

probation, which are incorporated by reference.

CONCURRENT or CONSECUTIVE to sentence on:

The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied

by the State Department of Corrections.

The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

Pursuant to 18 U.S.C Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

RESTITUTION: Deferred Def. Waives Hearing Ordered PTUP

Total: \$ plus 20% fee: \$ days/hours Public Service Employment

Payment Terms: Obtain GED

Set by SCDPPPS Attend Voc. Rehab. or Job Corp.

Recipient: May serve W/E beginning

\*Fine: Substance Abuse Counseling

§ 14-1-206 (Assessments 107.5%) Random Drug/Alcohol testing

§ 14-1-211(A)(1) (Conv. Surcharge) \$100 \$ 100.00

§ 14-1-211(A)(2) (DUI Surcharge) \$100 \$

§ 56-5-2995 (DUI Assessment) \$12 \$

§ 56-1-286 (DUI Breath Test) \$25 \$

Proviso 47.9 (Public Def/Prob) \$500 \$

§ 14-1-212 (Law Enforce. Funding) \$25 \$ 25.00

§ 14-1-213 (Drug Court Surcharge) \$150 \$ 150.00

§ 50-21-114(BUI Breath Test Fee) \$50 \$

§ 56-5-2942(J) (Vehicle Assessment) \$40/ea \$

Proviso 90.5 (SCCJA Surcharge) \$5 \$ 5.00

3% to County (if paid in installments) \$ 8.40

TOTAL \$ 288.40

Fine may be pd. in equal, consecutive weekly/monthly

pmts. of \$ beginning

\$ paid to Public Defender Fund

Other: A.T.O. while in DOC

Appointed PD or appointed other counsel.

§ 47.12 requires \$700 be paid to Clerk during probation

Presiding Judge

Judge Code: 2132

Sentence Date: 8/12

Clerk of Court/ Deputy Clerk

Court Reporter: Fauatti

SCCA/217 (03/2011)

Date: June 27 2016

The Honorable Hope Blackley  
Spartanburg County Clerk of Court  
P.O. Box 3483  
Spartanburg, S.C. 29304

Chuck Edward McCullough #311608  
MCCI F-1-236  
386 Redemption way  
McCormick, S.C. 29899

IN RE: (S.C.R. Civ. P.) Rule 59 (E) case # 2013-CP-42-4979

Dear Clerk of Court,

I am writing your office to see if my counsel Leah B. Moody filed the Rule 59(E) (S.C.R. Civ. P.) that was sent to her on June 20, 2016? Requesting to preserving the issues raised at PER Mack v. State 375 S.C. 407, 653 S.E.2d 266 (2007)

I have enclosed a copy of "Certificate of Service" to verify the court that timely notice was sent to Leah B. Moody addressing filing of 59(E) (S.C.R. Civ. P.), following the issuance of "order dismissed" on June 16, 2016.

Thank you Sincerely,

Chuck E. McCullough

6-27-16

2016 JUN 30 AM 9:37  
H. HOPE BLACKLEY

State of South Carolina )  
 County of Spartanburg ) In The Court of Common Pleas for the  
 Chuck Edward McCullough ) Seventh Judicial Circuit  
 #2008 ) Case no. 2013-CP-42-4979

v. )

State of South Carolina ) AFFIDAVIT of CERTIFICATE of SERVICE

I, Chuck Edward McCullough, hereby certifies that a letter  
 (MOTION to Alter or Amend Judgement) pursuant to (SCR Civ.P.)  
Rule 59(e) has been served to Attorney for Mr. McCullough  
Leah B. Moody, ON June 20 2016 by placing in the  
 United States Mail, Postage Prepaid card addressed as follows:

Law Office of Leah B. Moody, LLC  
 235 E. Main St. Suite 115  
 P.O. Box 1015 (29731)  
 Rock Hill, South Carolina, 29730

Chuck E. McCullough 6-20-16  
 Applicant 2013-CP-42-4979

Sworn and Subscribed before me on this 20th day of  
June

Michael Carwne 2016.  
 Notary Public for South Carolina

My Commission Expires  
July 09, 2026

2016 JUN 30 AM 9:37  
 11 HOPES VALLEY

State of South Carolina )  
 County of Spartanburg )  
 Chuck Edward McCullough )  
 #20608 )  
 v. )  
 State of South Carolina )

In The Court of Common Pleas for the  
 Seventh Judicial Circuit  
 Case no. 2013-CP-42-4979

State of South Carolina ) AFFIDAVIT of CERTIFICATE of SERVICE

I, Chuck Edward McCullough, hereby certifies that a letter  
 (MOTION to Alter or Amend Judgement) pursuant to (SCR Civ.P.)  
Rule 59(c) has been served to Attorney for Mr. McCullough  
 Leah B. Moody, ON June 20 2016 by placing in the  
 United States Mail, Postage Prepaid and addressed as follows:

Law Office of Leah B. Moody, LLC  
 235 E. Main St. Suite 115  
 P.O. Box 1015 (29731)  
 Rock Hill, South Carolina, 29730

Chuck E. McCullough 6-20-16  
 Applicant 2013-CP-42-4979

Sworn and Subscribed before me on this 20th day of  
June 2016.

Michael Caruane Michael Caruane  
 Notary Public for South Carolina

My Commission Expires  
July 09, 2026



"Judge not according to  
the appearance, but judge righteous  
Judgement."

John 7:24

Received order on June 17, 2016

Dear Mrs. Moody, Page 6 of the order is missing:

PLEASE! file this Rule 59(e) motion for me.

It is within the 10 days allowed. PLEASE! Help me  
with my only opportunity for preserving my ISSUES  
and a fair chance for reconsideration. MS. OLIVE  
only chose what she wanted in the order. It is  
obvious. PLEASE! I need you to file this!  
Then, file my appeal.

Your Client,

Chuck E. McCallough  
6-20-16

C.C. Leah Moody  
C.C. P. Ale



it violates the defendant's right of Due Process. Ultimately, it violates the fundamental fairness of the State, and lawmakers intent of the State as well the fairness and integrity of the plea process. Pursuant to Boykin v. Alabama

There was not a ruling for this issue. This issue needs to be preserved for appellate review.

2. There was testimony that certain recorded phone calls were used and inadmissible after withdrawn from evidence. It affected the fundamental fairness of the plea and affected the outcome of the plea, motion to reconsider. There was not a ruling for this issue. This issue needs to be preserved for appellate review.

## II.

The following issues were ruled on. Applicant's reason for this (59E) motion is because Applicant has stated his objections to the ruling and ask to Alter, Amend and Reconsider the following:

A. Counsel failed to investigate prior Record.

Page 6 is missing from the order. The order on Page 7 says that applicant failed to present evidence in support of his contention that his prior conviction was acquired in violation of Faretta v. California 442 U.S. 806

Page 2 of 7

Page 11 of 20

Attachment # 2

## "OBJECTION"

Exhibits were presented at the PCR hearing that showed that Applicant on his First Drug charge, he had appointed counsel and was not represented by counsel on the day of the plea. Applicant signed (pro se) and still had Counsel. He did not waive counsel, as testimony and evidence showed, He paid restitution of \$500.00 to the PD office. There is no hybrid representation in S.C.

Applicant also presented a letter after Due Diligence of trying to obtain the transcript, the Clerk of Court said that those records had been destroyed. Applicant's reason for the transcript was to prove he unknowingly proceeded (pro se) without being warned of the dangers of Self-representation as required by Facetta v. California 422 U.S. 806 and can not be used for enhancement.

(where record of a prior conviction is silent as to presence of counsel, it is presumed that Sixth Amendment rights of the defendant have been violated and conviction of such defendant under recidivist statute is invalid unless state can show affirmatively waiver of counsel.) Brown v. State, 483 F.2d 116.

Applicant ask the court to reconsider ruling with consideration to grant PCR Relief, remand for resentencing as Second offense, or NEW TRIAL.

## B. INVOLUNTARY Guilty Plea

Page 9 in the order of dismissal says that, "This court finds Applicant's guilty plea was entered Freely and voluntarily."

### "OBJECTION"

The order of dismissal has completely disregarded testimony from the PCR Judge, and PCR Counsel for the applicant. Testimony and evidence showed that the Plea judge "MISINFORMED" applicant of the direct consequences of the plea for (S.C. code) 44-53-375 (B)(3). The Plea judge stated on (T.S.p.17 Line 6-9)

Line 6. The Court: And do you understand that what ever sentence

7. I impose that particular charge, that it cannot  
8. be -- that no probation can be given and that  
no parts of the sentence can be suspended?

9. Mr. McCullagh: Yes, sir.

at the time of sentencing the statute's language allowed a third offense under (S.C. code 44-53-375 B.3.) that where all prior convictions are for possession pursuant to subsection (A) may have the sentence suspended or probation granted... This Misinformation violated Due Process, the right to a fundamental fair trial, undermined the fairness of the Statute and is in violation of Boykin v. Alabama 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969).

("A guilty plea is considered INVOLUNTARY and thereby invalid if the defendant is in total ignorance of the range of

page 4 of 7

Page 13 of 20

Attachment # 3

punishment the plea carries.") 21 Am. Jur Criminal Law § 601

"A statute as a whole must receive a practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of the law makers." State v. Sweat 386 S.C. at 350, 688 S.E.2d at 575. Therefore the Misinformation is "AN abuse of discretion." the sentence is Procedurally unreasonable.

Applicant ask the Court to reconsider the ruling with consideration to Grant PCR Relief, remanding for resentencing with consideration for Suspended sentence, Probation, or NEW TRIAL.

### C. Ineffective Assistance of Counsel

Page 10 and 11 in the "order of Dismissal" says that "the Court finds Applicant has failed to show that Counsel's performance was deficient or that any alleged deficient performance prejudiced him.

### "OBJECTION"

Applicant did at (PCR) prove counsel was ineffective pursuant to Hill v. Lockhart 474 U.S. 52 (1985). Plea counsel testified at (PCR) that he understood the language in (S.C. code 44-53-375 B.3.). He also testified that he could not recall discussing the statute with Mr. McCullough. Ultimately, however, failing to object to the "MISINFORMATION" from the Judge, that he could not

page 5 of 7

Page 14 of 26

Attachment # 3

suspend the sentence nor grant probation, correcting that information, and protecting his clients right to Due Process rendered the plea involuntary and a violation of the Sixth, and Fourteenth Amendments of the Constitution, Boykin v. Alabama.

"His performance fell below the professional norms that is an objective standard of reasonableness demanded by the Sixth amendment." McMann v. Richardson 397 U.S. 759, 771 (1970)

Plea Counsel also testified that Applicant was scared on the day of the plea, that on minute Applicant wanted to go to trial, then wanted to plea. Counsel testified he didn't know what his client wanted to do, but yet allowed Applicant to plea guilty. This is evidence the plea was induced. Applicant plea believing that he wouldn't get more than 10 years. He (counsel) never testified that he directly discussed the case with his client, He Generalized.

PREJUDICE was proven at PCR when Plea Counsel failed to correct the Misinformation from the Judge, and ask the court to consider that Mr. McCullough's prior record reflects only possession charges pursuant to Subsection (A) of 44-53-375 and ask for a suspended sentence or probation or both. Prejudice is injected at that point, because of that failure it undermined the confidence in the outcome of the plea. Had counsel done his job, there exist a probability that the outcome could have been more favorable to the defendant.

page 6 of 7

Page 15 of 20

Attachment #3

("petitioner prejudiced to the extent that there exists a probability that counsel's deficient performance affected the outcome of petitioner's trial")

Simmons v. State 308 S.C. 481, 419 S.E.2d 225 (1992)

Applicant ask the Court to reconsider the ruling. Due Process would require that Applicant be resentenced, or a NEW TRIAL granted with the help of effective Counsel. Also give a ruling on the issue of failing to object to misinformation from the plea Judge, regarding consequences of (44-53-375 B.3).

Applicant ask respectfully, that this Rule 59(e) (SCR Cr.P.) be filed and granted with respect to the matters addressed therein. Therefore, preserving issues for Appellate review if the PCR is not granted after Reconsideration.

I so move,

Chuck E. McCullough 311608 6-20-16

Chuck E. McCullough Applicant

c.c. : Leah Moody

c.c. Copy : personal file page 7 of 7

Page 16 of 20

Attachment # 3

# Law Office of Leah B. Moody, LLC

Leah B. Moody  
Lbmatty@comporium.net

235 East Main Street, Suite 115  
Post Office Box 1015 (29731)  
Rock Hill, South Carolina 29730  
Telephone (803) 327-4192  
Facsimile (803) 329-1344

June 30, 2016

Chuck Edward McCullough, #311608  
McCormick Correctional Institution  
386 Redemption Way  
McCormick, SC 29899

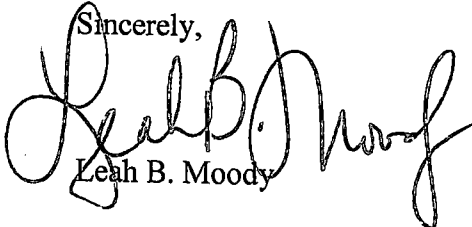
RE: Chuck Edward McCullough, #311608 v. State of South Carolina  
Case No.: 2013-CP- 42-4979

Dear Mr. McCullough:

Please find enclosed a filed copy of the Order Denying Relief, Notice of Appeal, and Proof of Service regarding your case with my office. I contacted the SC Attorney General's Office regarding the page 6. It appears the Spartanburg Clerk of Court left the page out and they sent it to me.

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

Sincerely,



Leah B. Moody

Enclosures

In The State of South Carolina

County Spartanburg

Chuck Edward McElwain #311608  
applicant

v.

State of South Carolina  
Respondent

In The Court of Common Pleas

Affidavit of Service

CA. NO: 2013-CP-42-4979

I, Chuck Edward McElwain, hereby certify that I have served one letter, original, with concerns for Filing 59 E Motion, and Transcript from Motion to Reconsider, by depositing Letter in United States Mail, Postage Recpaid, on Jan. 19 2016 addressed to attorney for applicant Leah B. Moody as follows:

Law Office of Leah B. Moody, LLC  
235 East Main St.  
P.O. Box 1015  
Rock Hill, S.C. 29731

s/ Chuck E. McElwain  
Chuck Edward McElwain #311608

Sworn to and Subscribed before me  
this 19<sup>th</sup> day of January, 2016  
Jenny G. Merton

Notary Public for South Carolina  
My Commission Expires on  
Feb 28, 2018

Date: Jan. 19, 2016

Chuck Edward McLaughlin 311008

APCI F-1-236

386 Redemption Way

McBarnick, S.C. 29099

Law Office of Leah B. Moody, LLC

235 East Main Street

P.O. Box 1015

Rock Hill, S.C. 29731

In RE. Transcript of Motion to Reconsider; Filing Rule 59(e) SCR Civ.P.

Dear Mrs. Moody:

First, I want to remind you to send me a copy of the Reconsideration transcript, as you said you would. Please also send me a copy of Mr. Whitchel's case file.

Secondly: In the event (PCR) was unsuccessful, I ask you at court to file a 59 E (SCR Civ.P.) on my behalf. I want you to make sure the court gives findings of fact with supporting law on each issue raised. Giving that each issue is properly preserve for review. Pursuant to S.C. code § 17-27-80 and Rule 52(a) (SCR Civ.P.).

(SCR Civ.P.) Rule 71.1: instructs parties to follow rules of Civil Procedure

(SCR Civ.P.) Rule 59(e): Motion to alter or amend if the order fails to set forth the findings and the reason for those findings as required by section 17-27-80 (S.C. code of law) and Rule 52(a) (SCR Civ.P.)

page 1 of 2

cc. p. file  
original copy

Page 19 of 20

Attachment #5

S.C. Code § 17-27-80 (2003): PCR Court must make specific findings of fact and state expressly its conclusions of law relating to each issue presented.

Supreme Court Held: Counsel preparing a proposed order should be meticulous in doing so, opposing counsel should call any omissions to the attention of the (PCR) Judge prior to issuance of the order and the (PCR) Judge should carefully review the order prior to signing it. Even after an order is filed a Rule 59(E) (S.C.R.Civ.P.) (motion to alter or amend) if the order fails to set forth the findings and the reason for those findings as required by section S.C. Code 17-27-80, Rule 52(a) S.C.R.Civ.P.

Marlar v. State 375 S.C. 407, 653 S.E.2d 266 (2007)  
 ("preserving the issues by Rule 59(E) S.C.R.Civ.P.")

McCullough v. State 320 S.C. 270, 272; 464 S.E.2d 340, 341 (1995)  
 ("Remanding matter to PCR court despite the fact that no Rule 59(E) motion had been filed, and admonishing all parties to carefully prepare and review PCR orders to ensure that they specifically address the issues raised and made conclusions of law.")

Being I'm represented by counsel. I can not file a motion to the court, or read the order before the 10 days is up. Therefore, I renew my request and ask you to file this 59E motion if the issues were not preserved.  
 Thank you for patients.

God Bless.

Chuck C. McCullough

1-19-16

c.c.p. file  
 original copy

Page 2 of 2

Page 20 of 20

Attachment # 5

## Law Office of Leah B. Moody, LLC

235 East Main Street  
Post Office Box 1015  
Rock Hill, South Carolina 29731  
[LBMatty@comporium.net](mailto:LBMatty@comporium.net)

Phone: (803) 327-4192

Fax: (803) 329-1344

September 17, 2014

Chuck Edward McCullough, #311608  
McCormick Correctional Institution  
386 Redemption Way  
McCormick, SC 29899

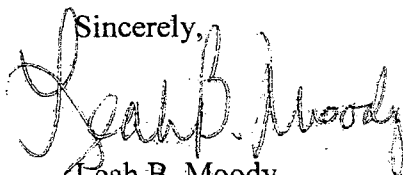
RE: Chuck Edward McCullough v. State of South Carolina  
C.A. No.: 2013-CP-42-04979

Dear Mr. McCullough:

I am in receipt of your letters dated July 29, 2014, August 25, 2014, and September 8, 2014. I have not received all of the documents pertaining to your case your former attorney. Once I receive all of the necessary documents, I will review your entire file. After I review your file in its entirety, I will provide you with a response to your letters addressing your concerns and/or schedule a conference call.

Thank you for your attention.

Sincerely,



Leah B. Moody

LBM/scm

(10) State of South Carolina )  
 )  
 County of Spartanburg )  
 )  
 Chuck Edward McCullough )  
 )  
 #11608 Applicant )  
 )  
 vs. )  
 )  
 State of South Carolina )  
 )  
 Respondant )

In the Court of Common Pleas

COPY

CA. NO. : 2013-CP-42-04979

Certificate of Service

I, Chuck Edward McCullough #311608, hereby certify that I have served upon the attorney for the Applicant one (1) copy original of a letter requesting she file a Motion for Leave to conduct Discovery listing documents to obtain, but not limited to, and list of PCR Amendments to Amend PCR application, but not limited to, and notice to Appeal PCR in the event it is unsuccessful, in the above captioned case by depositing a a copy of same in the United States Mail, First Class, Postage Prepaid (on Sept 8 2014) addressed as follows:

Law Office of Leah B. Moody, LLC  
 235 East Main St.  
 Post Office Box 1015  
 Rock Hill, S.C. 29731

This the 8<sup>th</sup> day of Sept 2014, in McCormick, S.C

Chuck McCullough  
 Applicant

Sworn and Subscribed Before me  
 on this 08 day of Sept 2014

J. Frankler  
 Notary Public for South Carolina  
 My Commission Expires on  
12-16-2019

Attachment #6 COPY (ccp file)

Date: Sept 8 2014

Att. 6

19 of 23

Chuck Edward McLaughlin 311608

MeCI F-1-236

386 Redemption Way

McCormick, S.C. 29599

Law Office of Leah D. Moody

235 East Main St.

P.O. Box 1015

Rock Hill, S.C. 29731

IN RE: Update on PCR ( ~~Filing Motion for leave to conduct~~  
Discovery )

Dear Miss Moody:

Thank you for providing me with the States return and plea transcript. It is important that we go over the material and get some clarification. To let you know that the Judge misinformed me on the sentence he said in the transcript that my sentence could not be suspended or probation granted. 44-53-375 (B)(3) does say further that for a third where all priors are for pass. the sentence can be suspended, probation granted, that is why I have a parole date. I want that raised at the PCR. That was highly prejudice.

At this time, I ask you to file a Motion for leave to conduct Discovery. (Section 17-27-150 S.C. Code specifically authorizes discovery in non-capital post-conviction relief proceedings upon a showing of good cause.) I must show that the plea was unfair and prejudice so I will need: (1) Public Defenders complete case file (2) Solicitors complete case file (3) get the Phone Calls transcribed from County Jail (4) Transcript of Reconsideration proceeding on May 25 2013. With this information I can prove my allegations without a shadow of doubt.

1) Solicitor (Scott Spivey's) case file

2) Public defender (Richard Whitech) case file

3) Phone calls transcribed from County Jail

(FOIA) S.C. Code 30-4-10 to 110

4) Transcript of Motion to Reconsider sentence on May 25, 2013.

Page 1

Attachment #6

(10)

This will substantially reduce the likelihood that a last minute continuance of the post-conviction relief proceeding will be necessary; Discovery will permit me to obtain necessary information through means other than in-court proceedings, such as dispositions, interrogatories, affidavits, and documents produced by the prosecuting agencies, On the other hand, allowing pre-hearing discovery will facilitate full preparation by us and clear the way for a presentation of all facts supporting my claims for relief to be presented at a single evidentiary hearing. If not we will need to subpoena the files and transcript requested. Also please send me a copy of the memorandum you prepare.

In the event that we are unsuccessful with my PCR and the final order of my PCR comes make sure that the Judge makes specific findings of fact, and state expressly its conclusion of law relating to each issue we raise. If there be any insufficiency in the final order file a Rule 59(E) SCRPC motion requesting the Court to specifically address each issue raised so we will preserve the issues. Maclar v. State 375 S.C. 407, 653 S.E.2d 266 (2007).

Remanding matter to PCR court despite the fact that no Rule 59(E) motion had been filed, and admonishing all parties to carefully prepare and review PCR orders to ensure that they specifically address the issues raised and made conclusions of law). McCullough v. State 320 S.C. 270, 272 464 S.E.2d 340, 341 (1995).

In your brief or memorandum please amend the list of Amendments I have provided with this letter and any after we discuss case. Including the issue of being misinformed of sentencing on drug law 44-53-375 by Judge, and uncounseled prior convictions.

(10)

The Supreme Court has repeatedly reminded all involved parties that:

[C]ounsel preparing a proposed order should be meticulous in doing so, opposing counsel should call any omissions to the attention of the PCR Judge prior to issuance of the order, and the PCR judge should carefully review the order prior to signing it. Even after an order is filed, counsel has an obligation to review the order and file a Rule 59(e) SCRPC motion to alter or amend if the order fails to set forth the findings and the reasons for those findings as required by section 17-27-80 and Rule 52 (a) SCRPC.

S.C.R. Civ. P. 59 (b) A Rule 59(e) motion must be served within 10 days of receiving written notice of the entry of the order denying PCR relief.

S.C.R. Civ. P. 59 (f) Filing a Rule 59(e) motion also tolls the time for filing a notice of intent to appeal.

SCACR 227 (A) a final decision is reviewable by the South Carolina Supreme Court upon a petition for a writ of certiorari by either party.

SCACR 203 and 227 (b) Upon the order of denial we have 30 days to file the appeal. I don't want to lose appeal. If not filing 59(e) we will have 10 days to file notice of appeal. 10 days to order transcript

If we are not successful I ask for the listed actions. Miss Moody thank you very much and I hope to hear from you soon.

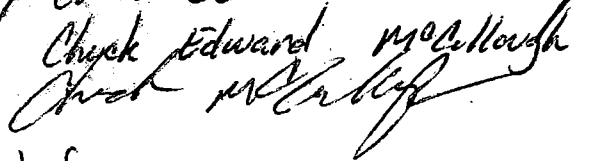
Sincerely Yours,

Jack Edward McAllister

①

## Proof of Service

I, Chuck Edward McCallough, hereby certify that I have sent a letter requesting to file motion to amend my PCR application with the allegations, that my Fifth and Fourteenth amendment rights have been violated. The letter is for issue to be raised, but not limited to, with case facts, Law, case citations with authorities, and conculsion. The letter also ask to preserve PCR issues' by filing a 59(E) motion after PCR case is heard. This allows me to diligently pursue my case for relief, by depositing a copy of it in the United States Mail, Postage pre paid, on (date), addressed to Law Office of Leah B. Moody, LLC P.O. Box 1015, Rock Hill, S.C. 29731

S/ Chuck Edward McCallough  
 Chuck Edward McCallough  


Sworn to and Subscribed before me  
 this 13 day of may 2014

J. Franklin  
 Notary Public for South Carolina

My Commission Expires on  
12-16-2019

STATE OF SOUTH CAROLINA  
 COUNTY OF SPARTANBURG  
 Chuck Edward McCollough # 311608  
 Applicant,  
 v.  
 State of South Carolina  
 Respondant,

IN THE COURT OF Common Pleas  
 Seventh Judicial Circuit  
 CA. No: 2013-CP-42-4979

Certificate of Service

COPY

I, Chuck Edward McCollough # 311608, hereby certify that I have served upon attorney for Applicant, Leah B. Moody, one (1) copy original of Applicant's "Motion to Amend PCR Application", with attachments, and letter addressing the (4) other amendments to Applicant's (PCR application) pursuant to Rule 15(c) SCRPC. By depositing the original copy in the United States Mail, First Class, Postage Prepaid (on Jan 7 2015) addressed as follows:

Law Office of Leah B. Moody, LLC  
 235 East Main Street  
 Post Office Box 1015  
 Rock Hill, S.C. 29731

Sworn and Subscribed before me on this 07 day of Jan. 2015.

Franklin  
 Notary Public for South Carolina  
 My Commission Expires  
12-16-2019

Chuck Edward McCollough  
 PER Applicant C.A. No: 2013-CP-42-4979  
 Attachment # 8

<c.c. p. file >

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

---

**RECEIVED**

MAR 06 2017

Certiorari to 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

---

JOHNSON PETITION FOR WRIT OF CERTIORARI

---

Taylor D Gilliam  
Appellate Defender

South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
PO Box 11589  
Columbia, SC 29211-1589  
(803) 734-1330

ATTORNEY FOR PETITIONER

**INDEX**

INDEX.....i

ISSUE PRESENTED .....1

STATEMENT .....2

ARGUMENT .....6

CONCLUSION .....11

PETITION TO BE RELIEVED AS COUNSEL.....12

**ISSUE PRESENTED**

Did the PCR Court err in holding that Petitioner's guilty plea was intelligently, voluntarily, and knowingly entered in light of the fact that the trial court incorrectly applied S.C. Code Ann. § 44-53-375, thereby preventing him from receiving a suspended sentence, probation, or parole?

## STATEMENT

On August 1, 2012, Petitioner pled guilty to possession of methamphetamine third offense, manufacturing methamphetamine third offense, unauthorized removal of a dead body, exposing a child to methamphetamine, and unlawful neglect of a child in front of the Honorable J. Mark Hayes, II in Spartanburg County. App. 1. James Cheek and Richard Whelchel represented Petitioner, and Scott Spivey served as the Assistant Solicitor.

The facts presented at the guilty plea by Solicitor Spivey were as follows:

On March 17, 2011, deputies were notified that the two-month-old son of Petitioner and his wife had passed away. App. 8 ll. 8 – 11. A subsequent phone call to law enforcement from a family member of Petitioner's wife yielded additional information which allowed officers to locate Petitioner, his wife, and the body of the two-month-old son. App. 8 l. 15 – App. 9 l. 7. There was no sign of physical injury to the child. App. 9 ll. 4 – 8. Petitioner's wife gave a written statement wherein she admitted to putting the baby face down on the bed after a feeding. App. 9 ll. 10 – 18. Upon awakening the next morning, the baby's body was discovered by Petitioner's wife face down with vomit on the bed. App. 9 ll. 16 – 21.

Law enforcement obtained a search warrant for Petitioner's home in order to search for poisons. App. 9 ll. 22 – 23. Upon entering the residence, officers located a methamphetamine lab. App. 9 ll. 23 – 25. Baby diapers were located in the trash can along with methamphetamine waste. App. 10 ll. 12 – 15.

Petitioner was indicted for possession with intent to distribute methamphetamine third offense, manufacturing methamphetamine third offense, unauthorized removal of a dead body,

exposing a child to methamphetamine first offense, unlawful neglect of a child, and disposal of methamphetamine waste. App. 3 ll. 4 – 15; App. 162 – 173.

At Petitioner's guilty plea, the Assistant Solicitor discussed telephone calls made by Petitioner while he was in jail:

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

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

In another phone call on April 7, 2011, ... less than a month after [ ] he was arrested. [Petitioner] also admitted to paying rent for the [ ] address at least partially in methamphetamine.

App. 11 ll. 12 – 22.

The CD/DVD containing those telephone calls was subsequently withdrawn as an exhibit. App. 14 ll. 5 – 12. Following the withdrawal of that evidence, the Assistant Solicitor spoke at length regarding the contents of the telephone calls, even though the trial court was without the original source of those remarks. App. 20 l. 17 – App. 21 l. 22.

During the trial judge's colloquy with Petitioner, the following conversation occurred:

The Court: And on the manufacturing of methamphetamine third, do you understand that on the charge I'm required to sentence you to at least 10 [years], but could sentence you up to 30 years and I am required to issue a fine of \$50,000?

Petitioner: Yes, sir.

The Court: And do you understand that whatever sentence I impose, on that particular charge, that it cannot be - - that no probation can be given and that no parts of the sentence can be suspended?

Petitioner: Yes, sir.

App. 17 ll. 1 – 9.

Following that exchange but before Petitioner's guilty plea was accepted, there was a discussion of his prior record. App. 19 l. 12 – 15. Notably, Petitioner had two convictions for possession of methamphetamine. App. 19 ll. 13 – 15. This fact was reiterated by Counsel Whelchel. App. 22 ll. 17 – 18; App. 23 ll. 12 – 17.

Judge Hayes accepted Petitioner's guilty plea. App. 21 – 24. He pled guilty under North Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (U.S. 1970) to five out of the six charges; the State dismissed the disposal of methamphetamine waste charge as a condition of the plea. App. 3 ll. 4 – 15.

After accepting Petitioner's Alford plea, Judge Hayes sentenced him to sixty days' imprisonment on the unauthorized removal of a dead body charge, thirty years' imprisonment on the manufacturing of methamphetamine third offense charge, ten years' imprisonment on the possession of methamphetamine third offense charge, ten years' imprisonment on the unlawful neglect of a child charge, and five years' imprisonment on the unlawful manufacturing methamphetamine in the presence of a minor child charge. App. 29 ll. 1 – 18. These sentences were to run concurrent. App. 29 ll. 4 – 5.

Counsel Whelchel filed a Motion to Reconsider the Sentence on or about August 13, 2012. A hearing was held on that motion on May 23, 2013 before the Honorable J. Mark Hayes, II with the same attorneys as involved in the guilty plea. App. 32 – 47. Once more, the Assistant Solicitor spoke regarding the jail telephone calls which were not in evidence. App. 42 l. 9 – App. 43 l. 12; App. 43 l. 23 – App. 54 l. 4.

Judge Hayes issued an Order Denying Defendant's Motion to Reconsider the Sentence on May 28, 2013. App. 49. The Order referenced the telephone calls that were not in evidence as a means of coming to the conclusion that the sentence should not be altered. App. 49.

De → Petitioner's appeal was dismissed by the South Carolina Court of Appeals. He filed a timely application for post-conviction relief on December 16, 2013 which was subject to two subsequent amendments. App. 50 - 54; App. 62 - 63. Petitioner's application contained allegations of ineffective assistance of counsel, including claims that Counsel failed to investigate, failed to suppress evidence, induced Petitioner's guilty plea, and allowed arguments to be influenced by law enforcement. App. 52. The amendments were in letter form and included prosecutorial misconduct, unconstitutional sentence enhancements, subject matter jurisdiction, judicial misconduct, and ineffective assistance of counsel regarding admission of a photo as additional grounds for relief. App. 62 - 63.

The State made its Return on or about August 18, 2014. App. 57 - 60. An evidentiary hearing was conducted on January 13, 2016 before the Honorable R. Ferrell Cothran, Jr. App. 64. Leah Moody represented Petitioner, and Alicia Olive represented the State. App. 64. Petitioner and Counsel Whelchel testified during the hearing.

On June 8, 2016, Judge Cothran issued his order denying Petitioner relief. App. 150 - 161. In particular, he found that Petitioner failed to prove any deficiencies regarding Counsel Whelchel's performance or any prejudice resulting from any alleged deficiencies. App. 155. Additionally, Judge Cothran's Order of Dismissal indicated that the record fully supported the knowing and voluntary nature of Petitioner's guilty plea. App. 156.

This Petition follows.

## ARGUMENT

The PCR Court erred in holding that Petitioner's guilty plea was intelligently, voluntarily, and knowingly entered in light of the fact that the trial court incorrectly applied S.C. Code Ann. § 44-53-375, thereby preventing him from receiving a suspended sentence, probation, or parole.

Petitioner was indicted and sentenced to thirty years' imprisonment for manufacturing methamphetamine under S.C. Code Ann. § 44-53-375. The version of S.C. Code Ann. § 44-53-375 which was effective from June 2, 2010 to April 20, 2016 read as follows:

(B) A person who manufactures, distributes, dispenses, delivers, purchases, or otherwise aids, abets, attempts, or conspires to manufacture, distribute, dispense, deliver, or purchase, or possesses with intent to distribute, dispense, or deliver methamphetamine or cocaine base, in violation of the provisions of Section 44-53-370, is guilty of a felony and, upon conviction:

- (1) for a first offense, must be sentenced to a term of imprisonment of not more than fifteen years or fined not more than twenty-five thousand dollars, or both;
- (2) for a second offense or if, in the case of a first conviction of a violation of this section, the offender has been convicted of any of the laws of the United States or of any state, territory, or district relating to narcotic drugs, marijuana, depressant, stimulant, or hallucinogenic drugs, the offender must be imprisoned for not less than five years nor more than thirty years, or fined not more than fifty thousand dollars, or both;
- (3) for a third or subsequent offense or if the offender has been convicted two or more times in the aggregate of any violation of the laws of the United States or of any state, territory, or district relating to narcotic drugs, marijuana, depressant, stimulant, or hallucinogenic drugs, the offender must be imprisoned for not less than ten years nor more than thirty years, or fined not more than fifty thousand dollars, or both.

Possession of one or more grams of methamphetamine or cocaine base is prima facie evidence of a violation of this subsection. Notwithstanding any other provision of law, a person convicted and sentenced pursuant to this subsection for a first offense or second offense may have the sentence suspended and probation granted, and is eligible for parole, supervised furlough, community supervision,

work release, work credits, education credits, and good conduct credits. **Notwithstanding any other provision of law, a person convicted and sentenced pursuant to this subsection for a third or subsequent offense in which all prior offenses were for possession of a controlled substance pursuant to subsection (A)<sup>1</sup>, may have the sentence suspended and probation granted and is eligible for parole, supervised furlough, community supervision, work release, work credits, education credits, and good conduct credits.** In all other cases, the sentence must not be suspended nor probation granted.

S.C. Code Ann. § 44-53-375 (emphasis added).

During Petitioner's guilty plea, Judge Hayes remarked that "no probation can be given and that no parts of the sentence can be suspended." App. 17 ll. 6 – 8. Because this statement was in error, Petitioner's guilty plea was not knowingly or intelligently made.<sup>2</sup>

For a third offense where all prior convictions are for possession, a defendant may have the sentence suspended, probation granted, and parole eligibility. S.C. Code Ann. § 44-53-375; App. 114 l. 1 – App. 115 l. 6. However, plea counsel never advised Petitioner that he could have received a suspended sentence or probation. App. 116 ll. 8 – 20. Counsel did not seek to clarify the statute or advocate on Petitioner behalf during the guilty plea; based on Petitioner's record of two prior convictions for possession, his third offense was eligible for suspension, probation,

---

<sup>1</sup> (A) A person possessing less than one gram of methamphetamine or cocaine base, as defined in Section 44-53-110, is guilty of a misdemeanor and, upon conviction for a first offense, must be imprisoned not more than three years or fined not more than five thousand dollars, or both. For a first offense the court, upon approval of the solicitor, may require as part of a sentence, that the offender enter and successfully complete a drug treatment and rehabilitation program. For a second offense, the offender is guilty of a felony and, upon conviction, must be imprisoned not more than five years or fined not more than seven thousand five hundred dollars, or both. For a third or subsequent offense, the offender is guilty of a felony and, upon conviction, must be imprisoned not more than ten years or fined not more than twelve thousand five hundred dollars, or both. Notwithstanding any other provision of law, a person convicted and sentenced pursuant to this subsection may have the sentence suspended and probation granted and is eligible for parole, supervised furlough, community supervision, work release, work credits, education credits, and good conduct credits. S.C. Code Ann. § 44-53-375

<sup>2</sup> Although this issue does not appear in the Order of Dismissal, for the sake of judicial economy it will be discussed herein.

and/or parole. Only at the evidentiary hearing did Counsel Whelchel admit that he believed Petitioner was eligible for parole and/or a suspended sentence. When asked why he did not object when the trial court indicated that it could not give him a suspended sentence or probation, he simply stated "I can't tell you." App. 130 ll. 8 – 11.

As articulated by Leah Moody during the PCR evidentiary hearing, the trial judge misspoke in regards to S.C. Code Ann. § 44-53-375:

[T]hat's absolutely contrary to what the statute says. The statute at that time in 2012 was that if your prior convictions are all possessions, you are eligible for a suspended sentence or probation - - or a suspended sentence, obviously a probationary sentence, as well as parole, furlough, work furlough, credit for a number of things.

It appears that Mr. McCullough ... was not made aware of that, and I understand what counsel says, but he talks in generalities as to what he typically explains and that he took his book in and he talked about this with Mr. McCullough, and Mr. McCullough never mentions this.

App. 141 ll. 10 – 22.

The ensuing prejudice manifested itself in Petitioner's decision to plead guilty. Had Counsel discussed Petitioner's case with him, he would have gone to trial. App. 102 ll. 2 – 12. Petitioner did not wish to plead guilty. App. 81 l. 25 – App. 82 l. 25. Plea counsel induced him to plead guilty, and Petitioner did so based off of the fact that he thought he would be sentenced to ten years' imprisonment. App. 81 ll. 18 – 24; App. 83 ll. 7 – 10. In fact, Counsel and Petitioner never discussed the details of Petitioner's case. App. 85 l. 14 – App. 88 l. 1; App. 92 l. 12 – App. 93 l. 15.

Due process of law requires that before a guilty plea can be entered voluntarily and intelligently, a defendant must be advised of his privilege against compulsory self-incrimination, the right to trial by jury, and the right to confront one's accusers. Boykin v. Alabama, 395 U.S. 238, 243-244 (1969). The record must show with certainty that the plea is "an intentional relinquishment

or abandonment of a known right or privilege.” State v. Patterson, 278 S.C. 319, 322, 295 S.E.2d 264, 265 (1982) overruled on other grounds by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991). Judges are required to give the defendant an explanation of the defendant’s waiver of his constitutional rights and a realistic picture of all sentencing possibilities. State v. Armstrong, 263 S.C. 594, 598, 211 S.E.2d 889, 891 (1975). Entering a guilty plea results in a waiver of several constitutional rights; therefore the Due Process Clause requires that defendants enter into guilty pleas voluntarily, knowingly, and intelligently. Burnett v. State, 352 S.C. 589, 591, 576 S.E.2d 144, 145 (2003).

An individual who pleads guilty on the advice of counsel may collaterally attack the plea 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. Lockart, 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)).

The Sixth Amendment to the United States Constitution guarantees criminal defendants the right to the effective assistance of counsel. Strickland v. Washington, 466 U.S. 668 (1984). The right to the effective assistance of counsel extends to the plea bargaining process. Hill v. Lockart, 474 U.S. 52, 57-59 (1985); Judge v. State, 321 S.C. 554, 471 S.E.2d 146 (1996), overruled on other grounds by Jackson v. State, 342 S.C. 95, 535 S.E.2d 926 (2000). Appellate courts give great deference to the PCR court’s findings of fact and conclusions of law. Dempsey v. State, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005). When reviewing a PCR court’s decision, a reviewing court “is concerned only with whether any evidence of probative value exists to support the decision.” Smith v. State, 369 S.C. 135, 138, 631 S.E.2d 260, 261 (2006).

For Petitioner to knowingly and intelligently enter into a guilty plea, he needs to have understood the charges to which he admitted his guilt as well as the correct accompanying sentences. If Counsel Whelchel had advised Petitioner of the statutory sentence provisions, Petitioner or Counsel could have objected when Judge Hayes stated that no probation could be given and that no part of the sentence could be suspended. Counsel was ineffective for failing to correct the judge regarding the sentence conditions associated with the manufacturing methamphetamine charge. Counsel could have asked the trial court for a suspended sentence, similar to the one Petitioner's wife received. App. 142 ll. 13 - 21.

As a result of Counsel's ineffective assistance, Petitioner elected to plead guilty rather than go to trial. Had Counsel discussed Petitioner's case with him, he would have gone to trial. App. 102 ll. 2 - 12.

**CONCLUSION**

For the foregoing reasons, Petitioner requests that the Court grant his petition for writ of certiorari to allow full briefing on this issue, reverse the charges against him, and remand the case for a new trial.



---

Taylor D Gilliam  
Appellate Defender

ATTORNEY FOR PETITIONER

This 21st day of February, 2017

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

---

Certiorari to Spartanburg County

Honorable R. Ferrell Cothran, Circuit Court Judge

---

CHUCK EDWARD MCCULLOUGH,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

---

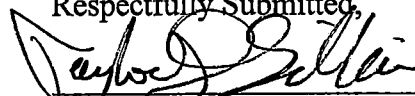
PETITION TO BE RELIEVED AS COUNSEL

---

Counsel for Chuck Edward McCullough states:

1. He is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent petitioner.
2. He has reviewed the record of petitioner's trial before Judge R. Ferrell Cothran, which was held on January 13, 2016, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. He has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed an arguable legal issue which arose during the post-conviction relief process. Therefore, counsel requests that the Court relieve him as counsel for Chuck Edward McCullough.

Respectfully Submitted,



---

Taylor D Gilliam

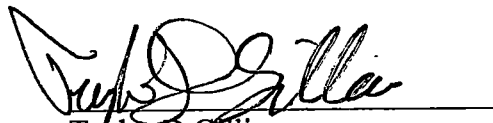
Appellate Defender

ATTORNEY FOR PETITIONER

This 21st day of February, 2017

**CERTIFICATE OF COUNSEL**

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



Taylor D Gilliam  
Appellate Defender

South Carolina Commission on Indigent  
Defense  
Division of Appellate Defense  
PO Box 11589  
Columbia, SC 29211-1589  
(803) 734-1330

ATTORNEY FOR PETITIONER

This 21st day of February, 2017

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

**RECEIVED**

MAR 06 2017

Certiorari to Spartanburg County

**S.C. SUPREME COURT**

Honorable R. Ferrell Cothran, Circuit Court Judge

CHUCK EDWARD MCCULLOUGH,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Johnson Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Alicia Olive, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Johnson Petition for Writ of Certiorari and a copy of the Appendix have been served on Chuck Edward McCullough, #311608, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 21st day of February, 2017.



Taylor D Gilliam  
Appellate Defender  
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me  
This 21st day of February, 2017

 (L.S)

Notary Public for South Carolina  
My Commission Expires: 5/12/2025

**RECEIVED**

MAR 06 2017

STATE OF SOUTH CAROLINA  
IN the Supreme Court

Certiorari to Spartanburg County  
Honorable R. Ferrell Cothran, Circuit Court Judge

**S.C. SUPREME COURT**

CHUCK EDWARD McCULLOUGH,

PETITIONER (PRO SE)

v.

STATE OF SOUTH CAROLINA,

RESPONDANT

Appellate CASE NO. 2016-001416

AFFIDAVIT OF CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Memorandum is support of Johnson Petition for writ of Certiorari (PROSE) and a copy(s) of supporting documents labeled Attachments has been Served upon the Supreme Court of South Carolina by depositing letter of Memorandum w/ attachments in the U.S. Postal mail and or in the interoffice mail of the Institution at McCormick Correctional, on this 1<sup>st</sup> day of March, 2017. Johnson Petition included

S/ Chuck Edward McCullough  
Chuck Edward McCullough #31608  
Petitioner (PRO SE)

Subscribed and Sworn to before me  
this 1<sup>st</sup> day of March, 2017, 2017  
Michelle Carriere

Michelle Carriere  
Notary Public for South Carolina

My Commission Expires: July 09, 2026