

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Berkeley County

Brooks P. Goldsmith, Circuit Court Judge

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FEB 26 2018

S.C. SUPREME COURT

ROBERT ANDREW MCFADDEN,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2017-00779

APPENDIX

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STATE OF SOUTH CAROLINA) COURT OF GENERAL SESSIONS
COUNTY OF BERKELEY) CASE NO. 2012-GS-08-1693
2015-GS-08-0120; 0391

STATE OF SOUTH CAROLINA,)
Plaintiff,) Transcript of Record
vs.)
ROBERT ANDREW MCFADDEN,) Date: March 5, 2015
Defendant.)

* * * * *

B E F O R E:

The Honorable DEADRA JEFFERSON

* * * * *

Denise J. Lauder, RPR
Ninth Judicial Circuit

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A P P E A R A N C E S

REPRESENTING THE PLAINTIFF:

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(No exhibits were offered or
marked for identification.)

1 (The following proceedings were held
2 March 5, 2015, Berkeley County, South Carolina.)

3 THE COURT: All right. Mr. McFadden.
4 Get Mr. Clark at the same time.
5 Any recommendations or negotiations?

6 MS. WILLIAMS: Yes, Your Honor. The
7 negotiated sentence is for the voluntary
8 manslaughter and the burglary first to run
9 concurrent. It's 30 years suspended to 20 years
10 and then --

11 THE COURT: Wait a minute. Let me make
12 sure that I'm being accurate in what I'm hearing.
13 Okay. I have a burg first, a voluntary
14 manslaughter, and a grand larceny.

15 MS. WILLIAMS: Right.

16 THE COURT: The grand larceny is a
17 waiver and the others have been true billed.

18 MS. WILLIAMS: Correct.

19 THE COURT: Now, you're saying the
20 negotiated plea is on the burglary first and the
21 manslaughter for what?

22 MS. WILLIAMS: 30 years suspended to
23 20 years active time to run concurrent, and then
24 followed by -- the time to be tolled until they're
25 finished with those sentences, and then followed by

1 ten years on the grand larceny suspended to five
2 years probation.

3 THE COURT: And that's on both of them?

4 MS. WILLIAMS: Both of them. And we'll
5 be dismissing a, on Mr. McFadden, receiving stolen
6 goods, and that's 2012-GS-08-01906, and shoplifting
7 on Mr. Clark, 2012-GS-08-01512.

8 THE COURT: That's receiving stolen
9 goods on both of them, correct?

10 MS. WILLIAMS: Actually, shoplifting is
11 on --

12 THE COURT: Shoplifting is on
13 Mr. Clark. So would that have been an enhancement
14 or just a regular --

15 MS. WILLIAMS: It would have been an
16 enhancement, Your Honor.

17 THE COURT: Mr. Seaton, and, Mr.
18 Schwacke, you represent Mr. McFadden and Mr. Clark
19 respectively?

20 MR. SEATON: I do, Your Honor.

21 MR. SCHWACKE: I do, Your Honor.

22 THE COURT: Have you explained to your
23 client the charges contained in the indictment, the
24 possible punishment, and their constitutional
25 rights?

1 MR. SEATON: I have, Your Honor.

2 MR. SCHWACKE: I have, Your Honor.

3 THE COURT: Do you believe they
4 understood the charges, the punishment, and their
5 rights?

6 MR. SEATON: I believe he does, Your
7 Honor.

8 MR. SCHWACKE: Yes, ma'am.

9 THE COURT: Do your clients wish to
10 plead guilty or not guilty?

11 MR. SEATON: He wishes to plead guilty,
12 Your Honor.

13 MR. SCHWACKE: Guilty, Your Honor.

14 THE COURT: Do you agree with that
15 decision?

16 MR. SEATON: I do, Your Honor.

17 MR. SCHWACKE: Yes, ma'am.

18 THE COURT: To your knowledge, have
19 either of them ever had to be evaluated to
20 determine their competency?

21 MR. SEATON: No, Your Honor.

22 MR. SCHWACKE: No, Your Honor.

23 THE COURT: And, Mr. Seaton, have you
24 explained to Mr. McFadden his right to have his
25 grand larceny indictment presented to the grand

1 jury?

2 MR. SEATON: I have, Your Honor.

3 THE COURT: Does he wish to give up
4 that right?

5 MR. SEATON: Yes, he does.

6 THE COURT: And, Mr. Schwacke, on the
7 grand larceny indictment for Mr. Clark, have you
8 explained to him his right to have that indictment
9 presented to the grand jury?

10 MR. SCHWACKE: Yes, ma'am.

11 THE COURT: And does he wish to give up
12 that right?

13 MR. SCHWACKE: He does, Your Honor.

14 THE COURT: Mr. McFadden, and, Mr.
15 Clark, please raise your right hands to be sworn.

16 ROBERT ANDREW MCFADDEN,
17 being first duly sworn, testified as follows:

18 MR. MCFADDEN: I do.

19 ROBERT CLARK,
20 being first duly sworn, testified as follows:

21 THE COURT: And Mr. Clark?

22 MR. CLARK: I do.

23 EXAMINATION

24 BY THE COURT:

25 Q. You can both put your right hands down.

1 I'm going to ask you both a series of questions.
2 Mr. McFadden, I need you to answer first followed
3 by Mr. Clark. Please answer loudly and clearly so
4 that the Court Reporter can take down your response
5 and please speak one at a time; she can only take
6 down one of your responses at a time.

7 Please state your full name for the
8 record.

9 A. Robert Andrew McFadden.

10 A. Robert Randolph Clark.

11 Q. How old are you?

12 A. 27.

13 A. 42.

14 Q. How far have you gone in school?

15 A. My GED.

16 Q. And what grade did you last complete?

17 A. Tenth.

18 A. Same.

19 Q. What type of work did you do before
20 incarceration?

21 A. Lawn care.

22 A. I had my own tattoo shop.

23 Q. Are you married?

24 A. No.

25 A. No, ma'am.

1 Q. Do you have any children?
2 A. Yes.
3 Q. How many?
4 A. One.
5 Q. Age?
6 A. Eight.
7 Q. Boy or girl?
8 A. Boy.
9 Q. And, Mr. Clark?
10 A. Three children.
11 Q. What are their ages?
12 A. I got two daughters and one little boy.
13 Q. And what are their ages?
14 A. 24, 22, and 5.
15 Q. And is the son five?
16 A. Yes, ma'am.
17 Q. Are you currently on probation or
18 parole?
19 A. No, ma'am.
20 A. No, ma'am.
21 Q. Have you ever been treated for the
22 abuse of alcohol, drugs, or mental illness?
23 A. No, ma'am.
24 A. Yes, ma'am.
25 Q. What were you treated for, sir, and

1 when?

2 A. Cocaine and heroin.

3 Q. And when was that?

4 A. Several years ago; I can't remember the
5 exact date.

6 Q. That's okay. Do you remember where you
7 got that counselling?

8 A. Drug Court.

9 Q. Okay. Through which county?

10 A. Charleston County.

11 Q. And you completed that program?

12 A. No, ma'am; I wish I did.

13 Q. Have you had any drugs, alcohol, or
14 medication in the last 72 hours?

15 A. No, ma'am.

16 A. No, ma'am.

17 Q. Are you aware of any physical,
18 emotional, or nervous problem that would keep you
19 from understanding where you are right now or what
20 you're doing?

21 A. No, ma'am.

22 A. No, ma'am.

23 Q. Mr. McFadden, on the charge of burglary
24 in the first degree, how do you plead?

25 A. Guilty.

1 Q. Do you understand that that carries a
2 minimum of 15 years and a maximum penalty of life?

3 A. Yes, ma'am.

4 Q. On the charge of voluntary
5 manslaughter, how do you plead?

6 A. Guilty.

7 Q. Do you understand that that carries a
8 minimum of two years and a maximum of 30 years?

9 A. Yes, ma'am.

10 Q. And on the charge of grand larceny, how
11 do you plead?

12 A. Guilty.

13 Q. Do you understand that that carries a
14 maximum of ten years or a fine in the discretion of
15 the Court?

16 A. Yes, ma'am.

17 Q. Do you understand that you've waived
18 your right to have that indictment presented to the
19 grand jury?

20 A. Yes, ma'am.

21 Q. Do you also understand that the
22 voluntary manslaughter and the burglary first are
23 classified as violent and most serious?

24 A. Yes, ma'am.

25 Q. Do you understand that under South

1 Carolina law that that subjects you to enhanced
2 penalty?

3 A. Yes, ma'am.

4 Q. Do you understand that if you receive
5 an additional most serious offense, you could face
6 life without the possibility of parole?

7 A. Yes, ma'am.

8 Q. Do you also understand that the violent
9 classification affects how you will serve your
10 time?

11 A. Yes, ma'am.

12 Q. Sir, you may have discussed parole or
13 parole eligibility with your lawyer or with others,
14 but until you're sentenced, no one can tell you
15 when, if ever, you will be eligible for parole or
16 under what conditions. You should assume that you
17 will serve the entire time in jail that you're
18 sentenced to day for day. Do you understand?

19 A. Yes, ma'am.

20 Q. And do you understand that you have
21 entered into what is called a negotiated plea?

22 A. Yes, ma'am.

23 Q. Do you understand that the Court's only
24 option in that plea is to either accept or reject
25 the plea?

1 A. Yes, ma'am.

2 Q. Mr. Clark, on the charge of voluntary
3 manslaughter, how do you plead?

4 A. Guilty.

5 Q. Do you understand that that carries a
6 minimum of two years and a maximum of 30 years?

7 A. Yes, ma'am.

8 Q. Do you understand that it is classified
9 as violent and most serious?

10 A. Yes, ma'am.

11 Q. On the charge of burglary in the first
12 degree, how do you plead?

13 A. Guilty.

14 Q. Do you understand that that carries a
15 minimum of 15 years and a maximum penalty of life?

16 A. Yes, ma'am.

17 Q. Do you understand that it is also
18 classified as violent and most serious?

19 A. Yes, ma'am.

20 Q. On the charge of grand larceny, how do
21 you plead?

22 A. Guilty.

23 Q. Do you understand that that carries a
24 maximum of ten years?

25 A. Yes, ma'am.

1 Q. Do you understand that you're waiving
2 your right to have that indictment presented to the
3 grand jury?

4 A. Yes, ma'am.

5 Q. Do you understand, as I have just
6 explained to Mr. McFadden, that the violent and
7 most serious classification subjects you to
8 enhanced penalty?

9 A. Yes, ma'am.

10 Q. Do you understand that if you receive
11 an additional most serious offence, you could face
12 life without the possibility of parole?

13 A. Yes.

14 Q. Do you understand that the violent
15 classification also affects how you will serve your
16 time?

17 A. Yes.

18 Q. Do you understand that you may have
19 discussed parole or parole eligibility with your
20 lawyer or with others, but until you're sentenced,
21 no one can tell you when, if ever, you will be
22 eligible for parole, under what conditions?

23 A. Yes.

24 Q. Do you understand that you should
25 expect to serve this time day per day?

1 A. Yes, ma'am.

2 Q. And do you also understand that you
3 have entered into a negotiated plea?

4 A. Yes, ma'am.

5 Q. Do you understand that the Court's only
6 option is to accept or reject that plea?

7 A. Yes, ma'am.

8 THE COURT: I want you both to listen
9 to the facts. Ms. Williams, you may proceed.

10 MS. WILLIAMS: Thank you, Your Honor.
11 Briefly, in the way of background, the victim was
12 71 years old and he had a -- this will become
13 important -- a pending case for child pornography.
14 He also was involved in a relationship over a
15 period of time with a 30-year-old crack-addicted
16 neighbor named Jamie Mallory.

17 Ms. Mallory frequented several hotels
18 near Rivers Avenue where she would smoke crack and
19 she became acquainted with Mr. Clark. Over a
20 period of time, Mr. Clark figured out that Ms.
21 Mallory was getting regular money from the
22 71-year-old victim. Supposedly she was going to
23 lie and say that she downloaded the pornography on
24 his computer, and he was paying her to do it. She
25 was threatening him, blackmailing him, telling

1 people that she had been molested by him when she
2 was younger, and so he was giving her checks every
3 couple of days, \$250 here, \$300 there, \$400 there.

4 Mr. Clark became acquainted with the
5 victim and knew he had this money, and a couple of
6 times Mr. Clark brought prostitutes over to the
7 victim's house so he knew where he lived, and he
8 knew that he had a lot of income, and he knew that
9 he had items of value.

10 The evening before the murder, which
11 was July 14, 2012, Mr. Clark went over to the motel
12 that Mr. McFadden was at and they got together and
13 then they went over to visit with Ms. Swanger, who
14 is the third co-defendant, who is not pleading
15 today. The three of them --

16 THE COURT: Swanger?

17 MS. WILLIAMS: S-W-A-N-G-E-R.

18 THE COURT: Thank you.

19 MS. WILLIAMS: The three of them were
20 smoking crack all night long. Sometime in the
21 early morning hours they ran out of money, but they
22 wanted more crack. They came up with the idea to
23 go get money or valuables from the victim,
24 Mr. Bennett, and I believe that the original plan
25 was to just rob him.

1 We have a videotape of Mr. McFadden,
2 Ms. Swanger, and Mr. Clark pulling into the
3 Wal-Mart parking lot on Rivers Avenue. Ms. Swanger
4 remains at the car. You can see the two
5 co-defendants, Clark and McFadden, walking around
6 Wal-Mart with a cart. At some point you see Mr.
7 McFadden go get a roll of duct tape, and they're
8 putting other items in the cart.

9 Ms. Swanger, very early on in the case
10 agreed to cooperate, and what she tells us was in
11 addition to the duct tape they bought gloves, a
12 backpack, and some other items. They drove over
13 from there to the victim's house in Hannahan and
14 told her to go to the door, pretend that she worked
15 for his attorney. Of course Mr. Clark knew about
16 this ongoing case that he had.

17 She gained entrance into the home,
18 started to tell him that she was going to take some
19 notes about his case, at which point the two
20 co-defendants came to the door with their faces
21 covered, knocked on the door and then burst in, and
22 started asking him to give them access to his safe.
23 He refused at first.

24 Eventually, he was coerced into giving
25 them access to the safe and at some point,

1 according to Ms. Swanger, he recognizes Mr. Clark's
2 voice, and they decide that they're going to have
3 to tie him up and kill him. I'm not really sure if
4 they tied him up before he gave the name or not,
5 but at some point his hands are tied behind his
6 back with duck tape, his ankles are bound and a bag
7 is put over his head and duck-taped around and he
8 is suffocated to death.

9 Before they leave, they write, child
10 molester, on the wall, and Mr. Clark writes a
11 letter to -- I'm sorry, a check to Jamie Mallory
12 for 200 -- actually, it was for a lot more honey --
13 it was for I think \$1200 and leaves it on the table
14 next to the couch to make it look like Jamie
15 Mallory had been there and she was responsible for
16 the murder; hence, the reason they put child
17 molester on the wall, because they thought that
18 that whole story would come out.

19 In the meantime, Jamie Mallory and her
20 friends had been going in and out of the home
21 before the murder up until a few hours before these
22 three go there, and one of the neighbors gets
23 confused and can't even remember who it was that
24 was in there the day before the murder. So that
25 was an issue for the State. I think it's an issue

1 we could have clearly overcome with accomplice
2 liability, but it was one of the issues for the
3 State, that one of the neighbors is unclear whether
4 it's Jamie Mallory's boyfriend that's in the house
5 right before the murder or whether it's these other
6 three.

7 They drop Ms. Swanger off back at her
8 hotel and they -- excuse me, Your Honor, just to
9 backtrack. The three of them leave in Mr.
10 McFadden's car and they steal the victim's 2009
11 Toyota Tacoma. They leave that home in the two
12 cars. Swanger gets dropped off at her hotel at
13 some point, and then they follow each other and Mr.
14 McFadden is seen pulling into the Wal-Mart in Goose
15 Creek. He gets out of the car and he's clearly
16 seen, and then he walks over to the Murphy Oil Gas
17 Station where on tape you can see him meeting up
18 with Mr. Clark. Mr. McFadden then goes into the
19 convenience store and he's clearly seen and
20 identified on the tape in the convenience store.

21 The weapons have never been retrieved,
22 they've never been found. Ms. Swanger would
23 testify as to who they sold those weapons to. I
24 believe they traded them for crack before they
25 dropped her off at her hotel.

1 THE COURT: Is that the extent of the
2 facts?

3 MS. WILLIAMS: That is pretty much the
4 extent of the facts. Would you like to hear their
5 prior record, Your Honor?

6 THE COURT: Yes.

7 MS. WILLIAMS: For Mr. Clark, he has a
8 2012 assault and battery, third, 2011 DUS and a --

9 THE COURT: You said, Mr. Clark. So
10 you went in the opposite order. I need you to go
11 in the order of Mr. McFadden for the benefit of the
12 Court Reporter.

13 MS. WILLIAMS: Sure. For Mr. McFadden,
14 he has a 2012 obtaining signatures by false
15 pretenses, a 2010 property crime enhancement, a
16 2009 petit larceny, a 2009 entry on another's land
17 without their notice, a 2007 embezzlement of public
18 funds, receiving stolen goods, and possession of
19 28 grams, or less, of marijuana, a 2006 accessory
20 before the fact to a felony.

21 For Mr. Clark, a 2012 assault and
22 battery, third degree, 2011 driving under
23 suspension, possession of 28 grams, or less, of
24 marijuana, 2010 property crime enhancement, 2007
25 property crime enhancement, 2003 property crime

1 enhancement and breach of trust, a 2002
2 shoplifting, a 1997 possession of drug
3 paraphernalia, a 1991 burglary second, grand
4 larceny, forgery and shoplifting, 1990 burglary
5 second and grand larceny, and a 1982 burglary
6 second and grand larceny.

7 BY THE COURT:

8 Q. Do you agree or disagree with the
9 facts?

10 A. I do.

11 Q. I can't hear you.

12 A. I do, Your Honor.

13 Q. Agree or disagree?

14 A. Agree.

15 A. I agree, Your Honor.

16 Q. Do you feel anything needs to be
17 changed or added to the facts?

18 A. No, ma'am.

19 A. No, ma'am.

20 Q. Are you pleading guilty because you are
21 guilty?

22 A. Yes, ma'am.

23 A. Yes, ma'am.

24 Q. I want you to listen carefully. When
25 you plead guilty, you give up certain important

1 constitutional rights. Those rights include you're
2 your right to a jury trial. At a jury trial you're
3 entitled to a presumption that you're innocent.
4 The State has the burden of proving your guilt
5 beyond a reasonable doubt. You would have the
6 right to confront and cross-examine the State's
7 witnesses, call witnesses in your own defense,
8 present any defenses that you may have, challenge
9 any statements you may have made, as well as remain
10 silent and your silence cannot be used against you.

11 Do you understand your rights as I have
12 just explained them to you?

13 A. Yes, ma'am.

14 A. Yes, ma'am.

15 Q. Do you understand that you're giving up
16 each and every one of those rights?

17 A. Yes, ma'am.

18 A. Yes, ma'am.

19 Q. Other than what has been stated for the
20 record, have there been any other plea negotiations
21 made on your behalf?

22 A. No.

23 A. No.

24 Q. Have you been satisfied with your
25 lawyers' services?

1 A. Yes.

2 A. Yes.

3 Q. Have they answered all of your
4 questions?

5 A. Yes.

6 A. Absolutely.

7 Q. Done everything that you have asked or
8 expected?

9 A. Yes.

10 A. Yes.

11 Q. Anything more you would have them do
12 that they, have not already done?

13 A. No.

14 A. No.

15 Q. Any complaints about their services?

16 A. No.

17 A. No.

18 Q. Has anyone promised you anything or
19 held out any hope of a reward to cause you to plead
20 guilty?

21 A. No.

22 A. No.

23 Q. Has anyone used threats, coercion,
24 force, pressure, intimidation, or duress to cause
25 you to plead guilty?

1 A. No.

2 A. No.

3 Q. Are you pleading guilty freely and
4 voluntarily and of your own will?

5 A. Yes, ma'am.

6 A. Yes, ma'am.

7 Q. Have you had enough time to make up
8 your mind about pleading guilty?

9 A. Yes.

10 A. Yes.

11 Q. Have you understood my questions?

12 A. Yes.

13 A. Yes.

14 Q. Do you need to ask me about anything
15 we've been over?

16 A. No.

17 A. No, ma'am.

18 Q. Have you been truthful in your answers?

19 A. Yes, ma'am.

20 A. Yes, ma'am.

21 Q. Do you understand that you have the
22 right to appeal this guilty plea and sentence of
23 the Court, but that you must do so in writing
24 within ten days of today?

25 A. Yes.

1 A. Yes.

2 Q. Do you understand that if you cannot
3 afford an attorney for that process, one would be
4 appointed to you at no cost?

5 A. Yes.

6 A. Yes.

7 Q. I find there's a substantial factual
8 basis for each plea; that the defendants have
9 entered the pleas freely, voluntarily, knowingly,
10 and intelligently; that they have had the advice
11 and assistance of counsel with whom they've
12 indicated to the Court they're each satisfied, and
13 I will accept each plea.

14 Anything further from the State
15 recording Mr. McFadden?

16 MS. WILLIAMS: No, Your Honor.

17 THE COURT: Anything further? I've
18 accepted the negotiated plea, Mr. Seaton?

19 MR. SEATON: Your Honor, if you have
20 accepted the plea, then I would not add further to
21 it, other than that is simply all we were asking
22 the Court to do is to accept the negotiated plea,
23 Your Honor.

24 THE COURT: Sir, anything you want to
25 state for the record on your own behalf?

1 THE DEFENDANT: No, ma'am.

2 THE COURT: On the voluntary
3 manslaughter, you're sentenced to 30 years
4 suspended to 20 years, on the burglary first,
5 30 years suspended to 20 years. You will get
6 credit for any time that you've served. These
7 sentences are concurrent with one another. I've
8 ordered the ATU if it's available.

9 On the grand larceny indictment, you're
10 sentenced to ten years, suspended to time served
11 and five years -- how much time has he served?

12 MR. SEATON: I'm sorry.

13 THE COURT: How much time has your
14 client served in jail pre detention, Mr. Seaton?

15 MR. SEATON: It's been almost three
16 years, Judge.

17 MS. WILLIAMS: 960 days.

18 MR. SEATON: That was one of the
19 issues, as you're aware, that we were talking about
20 all morning.

21 THE COURT: And on the grand larceny,
22 you're sentenced to ten years, suspended to time
23 served of the 960 days, and five years probation.
24 Is this -- your probation is tolled during your
25 active sentences on 2015-GS-08-120 and

1 2012-GS-08-1693, and you'll get credit for any time
2 that you've served to be calculated and applied by
3 the Department of Corrections pursuant to 241340.

4 Thank you very much.

5 Anything further from the State
6 regarding Mr. Clark?

7 MS. WILLIAMS: No, Your Honor, just
8 that we have agreed that he gets 960 days time
9 served on his burglary and voluntary manslaughter
10 from the date of July 18, 2012.

11 THE COURT: Anything further, Mr.
12 Schwacke? I have accepted the negotiated plea.

13 MR. SCHWACKE: Thank you, Your Honor.
14 If you're accepting the negotiated sentence, just
15 briefly. We're thankful for the State to engage in
16 the negotiations that they have. I believe this
17 brings closure to the victim's family and
18 eliminates the possibility of a very complicated
19 case that could go bad either way. I would ask to
20 make certain that Your Honor will sign the consent
21 order that we have submitted to you.

22 THE COURT: Sir, anything you would
23 like to state for the record on your own behalf?

24 THE DEFENDANT: Yes, ma'am. I just
25 want to apologize to the family and ask for

1 forgiveness. I'm sorry for the things that I have
2 done and I'm willing to accept responsibility for
3 the things that I have done. And, once again, I
4 know it's a pretty bad situation and I've been
5 dealing with it now for three years almost and I'm
6 very sorry.

7 MS. WILLIAMS: And, Your Honor, I would
8 just add that we have talked with the victim's son,
9 Tim Bennett, extensively, and with his aunts who
10 are the sisters of the victim, and the victim's
11 ex-wife. They were very much in favor of a
12 resolution that didn't involve trial.

13 They were prepared to go through a
14 trial, but their father's name -- his father's name
15 has been dragged through the press, and he was
16 really reluctant to have to go through that again,
17 and they were very much in favor of this resolution
18 and very much involved.

19 THE COURT: And they were notified of
20 today's hearing?

21 MS. WILLIAMS: They were, Your Honor.

22 THE COURT: And they're not present?

23 MS. WILLIAMS: He is not present. He
24 is a school teacher that works in the upstate and
25 he did not want to come today.

1 THE COURT: Based on the negotiated
2 plea to voluntary manslaughter and the burglary,
3 first degree, you're sentenced to 30 years
4 suspended to 20 years. Those sentences are
5 concurrent with one another. On the grand larceny,
6 you're sentenced to ten years, suspended to
7 960 days time served, and five years probation.
8 That sentence is consecutive to Indictments
9 2012-1692 and 2015-119. Your probation is tolled
10 during your active sentence.

11 Thank you very much.

12 THE DEFENDANT: Thank you, Your Honor.

13 THE COURT: You're welcome, sir.

14 (These proceedings were concluded at
15 12:43 p.m.)

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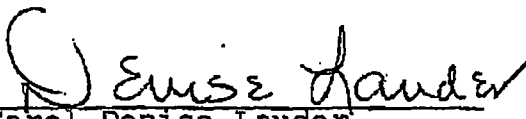
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CERTIFICATE OF REPORTER

I, Carol Denise Lauder, Registered Professional Reporter and Notary Public for the State of South Carolina at Large, do hereby certify that the foregoing transcript is a true, accurate, and complete record.

I further certify that I am neither related to nor counsel for any party to the cause pending or interested in the events thereof.

Witness my hand, I have hereunto affixed my official seal this 30th day of September, 2015 at Charleston, Charleston County, South Carolina.


Carol Denise Lauder
Registered Professional
Reporter, CP
My Commission expires
August 2, 2017

FORM 5

STATE OF SOUTH CAROLINA)
 County of Berkeley)
Robert Andrew McEdden # 315301)
 Full name and prison number (if any) of Applicant)

IN THE COURT OF COMMON PLEAS

2015-CP-08-1774

v.

APPLICATION FOR

State of South Carolina

POST-CONVICTION RELIEF

2015 JUL 28 AM 9:05
 HENRY R. BROWN
 CLERK OF COURT
 BERKELEY COUNTY, S.C.
 TSM
 CLEEN

INSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legible 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 Berkeley

2. Name and location of Court which imposed sentence BERKELEY COUNTY
GENERAL SESSIONS

3. Name(s) of co-defendant(s) (if any) ROBERT CLARK, BRITANNY
SWANGET

4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) 2012GS0801693 (VOLUNTARY MANSLAUGHTER)
 - (b) 2015GS0800120 (BURGLARY 1ST DEGREE)

(c) 2015 G. 800391 (LARCENY / GRAND LARCENY, VALUE \$10,000)

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

- (a) 3/5/15
- (b) SAME
- (c) SAME

6. Check whether a finding of guilty was made:

- (a) after a plea of guilty Plead Guilty
- (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?

NO

8. If you answered "yes" to (7), list:

- (a) the name of each Court to which you appealed:
 - i. _____
 - ii. _____
 - iii. _____
- (b) the result in each such Court to which you appealed:
 - i. _____
 - ii. _____
 - iii. _____
- (c) the date of each such result:
 - i. _____
 - ii. _____
 - iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
 - i. _____
 - ii. _____
 - iii. _____

9. If you answered "no" to (7), state your reasons for not so appealing:

- (a) LAWYER did NOT inform ME THAT I COULD
- (b) SAME

(c) SAME

10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

(a) INEFFECTIVE ASSISTANCE OF COUNSEL

(b) Due Process Violation

(c) SAME

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

(a) SEE: ATTACHMENT

(b) _____

(c) _____

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

(a) any petition in a State Court under South Carolina Law? NO

(b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? NO

(c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? NO

(d) any other petitions, motions or applications in this or any other Court? NO

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. _____

ii. _____

iii. _____

iv. _____

N/A

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

i. _____

ii. _____

iii. _____

iv. _____

N/A

(c) the disposition thereof:

- i. _____
- ii. _____
- iii. _____
- iv. _____

N/A

(d) the date of each such disposition:

- i. _____
- ii. _____
- iii. _____
- iv. _____

N/A

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

- i. _____
- ii. _____
- iii. _____
- 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?

NO

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

(a) which grounds have been presented:

- i. _____
- ii. _____
- iii. _____

N/A

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

- i. _____
- ii. _____
- iii. _____

N/A

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) _____
- (b) _____
- (c) _____

17. Were you represented by an attorney at any time during the course of:

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

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. GROVER BEAU SEATON, ATTORNEY AT LAW, 108 WEST MAIN ST. MONCKS S.C., 29461
 - ii. _____
 - iii. _____
- (b) the proceedings at which each such attorney represented you:
 - i. ENTIRE PROCEEDINGS
 - ii. _____
 - iii. _____

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

NEW TRIAL

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

NO

STATE OF SOUTH CAROLINA)

County of Berkeley)

VERIFICATION

I, Robert Andrew McFadden, 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.

Robert McFadden

SWORN to and subscribed before me this 16 day of July, 2015.
Tamara Cinwell (L.S.)
Notary Public

My Commission Expires September 25, 2023

FILED
2015 JUL 28 AM 9:05
MARTIN R. BROWN
CLERK OF COURT
BERKLEY COUNTY, SC

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

I, Robert Andrew McFadden, 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.

Robert Andrew McFadden
Applicant

SWORN or affirmed to and subscribed before me this

16 day of July, 2015.

Tamara Conwell
Notary Public

My Commission Expires: My Commission Expires
September 25, 2023

TSM

FILED

2015 JUL 28 AM 9:05
MARI TEROUWIN
CLERK OF COURT
BERKELEY COUNTY, SC

Question: 11

Trial Counsel failed to: 1) File several motions on my behalf, I.E. Motion to Suppress, Motion to vacate, or motion for a bond hearing. 2) Inform me of new charges. 3) Refusing My Preliminary Hearings without consulting with me or my consent. 4) Failed to inform me of my right to Appeal. 5) And mislead me by lying to procure a guilty plea. 6) Due process violation; In which my Fifth and Fourteenth amendment rights were violated

STATE OF SOUTH CAROLINA)
 COUNTY OF BERKELEY)
)
)
 Robert Andrew McFadden, #315301,)
)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
)
 Respondent.)

IN THE COURT OF COMMON PLEAS
 NINTH JUDICIAL CIRCUIT

2015-CP-08-1774

RETURN

FILED
 2016 MAY 17 AM 11:05
 MARY P. BROWN
 CLERK OF COURT
 BERKELEY COUNTY S.C.

Respondent, making its Return to the application for post conviction relief (PCR) filed July 28 2015, 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 Berkeley County Clerk of Court. The Applicant was indicted by the September 2012 term of the Berkeley County Grand Jury for one (1) count of Murder (2012-GS-08-1693). The Applicant was indicted by the February 2015 term for one (1) count of Burglary, First Degree (2015-GS-08-0120). The Applicant was indicted by the March 2015 term for one (1) count of Grand Larceny (2015-GS-08-0391). Grover Beau Seaton, Esquire represented the Applicant. On March 5, 2015, the Applicant pled guilty as indicted to the counts of Burglary, First Degree and Grand Larceny. The Applicant plead guilty to the lesser included offense of Voluntary Manslaughter. The Honorable Deadra Jefferson sentenced the Applicant to thirty (30) years for each count of Voluntary Manslaughter and Burglary, First Degree, with eligibility for parole upon the service of twenty (20) years. The sentences run concurrently. The Applicant was sentenced to ten (10) years for the count of Grand Larceny, to be served

NIC

consecutive to the sentences for Voluntary Manslaughter and Burglary, First Degree. The Applicant did not appeal his conviction or sentence.

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

II.

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

1. "Ineffective Assistance of Counsel"
 - a. "Failed to file several motions on my behalf, inform me of new charges, refusing (sic) my preliminary hearings without consulting me or my consent (sic), and failed to inform me of my right to Appeal"
2. "Mislead me by lying to procure a guilty plea"
3. "Due Process Violation"
 - a. Fifth and Fourteenth Amendment rights were violated

Any claims not specifically enumerated in the PCR application or amendments will be opposed by the State at an evidentiary hearing, and the State will seek summary dismissal of vague or general claims at an evidentiary hearing. S.C. Code §17-27-50. All amendments should be made well in advance of an evidentiary hearing by counsel of record. Rule 11, SCRPC.

III.

For purposes of this Return, Respondent interprets Applicant's first allegation to be an allegation of ineffective assistance of counsel. In a post-conviction relief action, 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, Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 334 S.E.2d 813.

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

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of plea counsel. First, 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 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, 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).

Respondent submits 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, 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.

The Applicant also alleges his guilty plea was involuntary. To find a guilty plea is voluntarily and knowingly entered into, the record must establish the Applicant 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 (1969); Dover v. State, 304 S.C. 433, 405 S.E.2d 391 (1991). In determining guilty plea issues, it is proper to consider the guilty plea transcript as well as evidence presented at the PCR hearing. Harris v. Leeke, 282 S.C. 131, 318 S.E.2d 360 (1984).

The transcript reflects that the guilty plea was knowingly and voluntarily entered with a full understanding of the charges and consequences of the plea. Because a guilty plea is a solemn, judicial admission of the truth of the charges against an individual, [an Applicant's] right to contest the validity of such a plea is usually, but not invariably, foreclosed. Blackledge v. Allison, 431 U.S. 63, 97 S.Ct. 1621 (1977). Statements made during a guilty plea should be considered conclusively, unless an [Applicant] presents valid reasons why he should be allowed to depart from the truth of his statements. Crawford v. U.S., 519 F.2d 347 (4th Cir. 1975) overruled on other grounds by U.S. v. Whitley, 759 F.2d 327 (4th Cir.1985). This Court finds that the Applicant presented no reasons to show that he should be allowed to depart from the truth of the statements he made during his guilty plea hearing.

An Applicant who enters a plea on the advice of counsel may only attack the voluntary and intelligent character of the plea by showing that trial counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for trial counsel's errors, the defendant would not have pled guilty, but would have insisted on going to

trial. Roscoe v. State, 345 S.C.16, 546 S.E.2d 417 (2001); Richardson v. State, 310 S.C. 360, 426 S.E.2d 795 (1993). Given the Applicant's burden of proof and the analysis to be applied to this claim, the Applicant's claim of involuntary plea is, in essence, a claim of ineffective assistance of counsel, and it will be treated as such.

V.

The Applicant's third claim is an allegation that he was denied due process of law. The Applicant's allegation claims infringement of his rights under certain amendments to the United States Constitution. However, the Applicant fails to set forth with specificity the grounds upon which these constitutional violations are based. The Uniform Post-Conviction Procedure Act requires that the Applicant must "... specifically set forth the grounds upon which the application is based." Section 17-27-50 of the Code of Laws of South Carolina (1976). In an application for post-conviction relief, it is incumbent upon the Applicant to make at least a prima facie showing which would entitle him to relief before an evidentiary hearing will be scheduled and held. Welch v. MacDougall, 246 S.C. 258, 143 S.E.2d 455 (1965); Blandshaw v. State, 245 S.C. 385, 140 S.E.2d 784 (1965). Since the Applicant has failed to make even a prima facie showing, the Respondent would submit that this allegation should be dismissed for failing to meet the requirements of the Uniform Post-Conviction Procedures Act. This allegation is so vague that it is impossible for the State to respond.

VI.

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

VII.

WHEREFORE, having made its Return, the State requests that an evidentiary hearing be held on Applicant's allegations.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

JOHANNA C. VALENZUELA
Senior Assistant Deputy Attorney General

J. RUTLEDGE JOHNSON
Assistant Deputy Attorney General

By: 
ATTORNEYS FOR RESPONDENT

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

MAY 13th, 2016.

STATE OF SOUTH CAROLINA)	THE COURT OF COMMON PLEAS
)	
COUNTY OF BERKELEY)	DOCKET NO. 2015-CP-08-1774
)	
)	
ROBERT ANDREW MCFADDEN)	
)	
Applicant)	
)	
vs.)	
)	
STATE OF SOUTH CAROLINA)	
)	
Respondent)	
)	
)	
)	
)	TRANSCRIPT OF RECORD

April 17, 2017
Moncks Corner, S. Carolina

B E F O R E:

THE HONORABLE BROOKS P. GOLDSMITH, JUDGE

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

RODNEY D. DAVIS, ESQ.
Attorney for the Applicant

ALICIA OLIVE, ESQ.
Attorney for the State

JOYCE C. RUEGER, CVR-M
Circuit Court Reporter

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No Exhibits were introduced

Robert A. McFadden v State
Post Conviction Relief Hearing
April 17, 2017

1 PROCEEDINGS

2 THE COURT: Ms. Olive, whenever you're ready.

3 MS. OLIVE: Thank you, Your Honor. May it please
4 the court? This is Robert Andrew McFadden, 2015-CP-08-
5 1774. He was indicted in September 2012 for murder. He
6 was subsequently indicted in February 2015 for burglary
7 first degree and he subsequently waived presentment in
8 March of 2015 on grand larceny. He was represented by
9 Grover "Beau" Seaton.

10 On March 5, 2015 he pleaded guilty to the lesser
11 included offense of voluntary manslaughter and as
12 indicted to burglary first and grand larceny. That was
13 before Judge Deadra Jefferson. He was sentenced to 30
14 years suspended to 20 years on the burglary first and
15 voluntary manslaughter to be served concurrently as well
16 as 10 years suspended on the service of time served and
17 five years of probation. And that was to be tolled until
18 his voluntary manslaughter and burglary first sentences
19 were served. And that was a consecutive sentence.

20 He did not file an appeal in this case. This PCR
21 was filed on July 28, 2015 alleging several grounds of
22 ineffective assistance of counsel as well as a due
23 process violation. Your Honor, in the State's return we
24 moved to dismiss the due process violation because it
25 didn't set forth any specific claims of due process

Robert A. McFadden v State
Post Conviction Relief Hearing
April 17, 2017

1 violation. He is present in the courtroom today and
2 represented by Rodney Davis. I'll turn it over to Mr.
3 Davis at this time.

4 THE COURT: Mr. Davis?

5 MR. DAVIS: Judge, to answer that last part first
6 we would not go forward on the fourth -- I'm trying to
7 remember which -- on the Fifth and Fourteenth Amendment
8 violations rights so we have no objection to the State's
9 motion on that part.

10 THE COURT: That motion is granted then.

11 MR. DAVIS: Judge, I know Mr. Boozer was before you
12 on the first two hearings. I believe his practice is to
13 simply go through these questions with his client on the
14 stand. I'd simply ask if on the record you remind my
15 client of the risks and benefits.

16 I've talked to him about that. His original charges
17 were murder, which is 30 years to life as a potential
18 punishment and burglary first 15 to life, grand larceny
19 is zero to 10. And there was a possession of a stolen
20 vehicle that was nol prossed on the plea, which is also
21 zero to 10.

22 We have talked about even if we are successful here
23 today it begins all these charges anew. But if you could
24 simply question him on the record about that before we
25 begin. I believe he wishes to go forward despite his

Robert A. McFadden v State
Post Conviction Relief Hearing
April 17, 2017

1 risks.

2 THE COURT: Mr. McFadden, did you hear your
3 attorney tell me that despite all of his -- despite the
4 downside to going forward today you still wish to do
5 that?

6 MR. MCFADDEN: Yes, sir.

7 THE COURT: And you understand that all I can do is
8 either grant your application and give you a new trial or
9 deny your application.

10 MR. MCFADDEN: Yes, sir.

11 THE COURT: I can't change the sentence. I can't
12 give you less, more, or probation or anything such as
13 that.

14 MR. MCFADDEN: Yes, sir.

15 THE COURT: Do you understand that?

16 MR. MCFADDEN: Yes, sir.

17 THE COURT: And do you understand if you are
18 successful and if the court grants your application you
19 go back to square one so to speak; you're back where you
20 started before you pled before the charges were reduced?

21 MR. MCFADDEN: Yes, sir.

22 THE COURT: Do you understand all of that?

23 MR. MCFADDEN: Yes, sir.

24 THE COURT: And you still wish to do that.

25 MR. MCFADDEN: Yes, sir.

Robert A. McFadden v State
Post Conviction Relief Hearing
April 17, 2017

1 THE COURT: Okay. I'm satisfied.

2 MR. DAVIS: Thank you very much, Your Honor. We're
3 prepared to go forward.

4 THE COURT: Okay. You may call your first
5 witness.

6 MR. DAVIS: We would call Mr. McFadden.

7 [Whereupon, Mr. McFadden comes forward]

8 [Whereupon, the witness is duly sworn by the Clerk
9 of Court]

10 CLERK OF COURT: State your full name and spell
11 your last name for the record.

12 THE WITNESS: Robert Andrew McFadden, M-C-F-A-D-D-
13 E-N.

14 THE COURT: Let me interrupt this one quick second.
15 Ms. Olive, are you okay or do we need to take a break.

16 MS. OLIVE: I'm fine, Your Honor. Thank you.

17 THE COURT: You may proceed.

18 MR. DAVIS: Make sure you keep your voice up so
19 everybody can hear you.

20

21

22

23

24

25

Robert A. McFadden v State
Post Conviction Relief Hearing-Robert McFadden-Direct Examination by Mr. Davis
April 17, 2017

1 ROBERT MCFADDEN
2 Having been first duly sworn,
3 Was examined and testified as follows:
4 DIRECT EXAMINATION
5 BY MR. DAVIS:
6 Q. Mr. McFadden, how old are you, sir?
7 A. Twenty-nine.
8 Q. And how far did you go in school?
9 A. I got my GED.
10 Q. Okay. When did you obtain your GED; before or
11 after this guilty plea?
12 A. Before.
13 Q. And what kind of work did you do before you were
14 incarcerated?
15 A. Landscaping.
16 Q. Do you have any health issues or do you take any
17 medication the court should know about today?
18 A. No, sir.
19 Q. At the time of your guilty plea were you on any
20 medication that is the basis for any claim today?
21 A. No, sir.
22 Q. We just went over the charges you had and the State
23 indicated what you actually pled to. Who was your
24 attorney for this group of charges?
25 A. Beau Seaton.

Robert A. McFadden v State
Post Conviction Relief Hearing-Robert McFadden-Direct Examination by Mr. Davis
April 17, 2017

- 1 Q. Do you see him in the courtroom here today?
- 2 A. Yes, sir.
- 3 Q. Do you recall when you were arrested in regards to
4 this incident?
- 5 A. Yes, sir.
- 6 Q. What date?
- 7 A. July 19th.
- 8 Q. Of what year?
- 9 A. 2012.
- 10 Q. And when you were first arrested on what charge were
11 you arrested?
- 12 A. I believe it was murder and possession of a stolen
13 motor vehicle.
- 14 Q. Okay. With murder being a charge that carries a
15 potential life and a magistrate not being able to set
16 bond on that was there ever a bond hearing requested by
17 your attorney on the murder charge?
- 18 A. No, sir.
- 19 Q. Okay. Do you recall the date you finally went to
20 court and handled the guilty plea we are complaining
21 about?
- 22 A. It was March 5th of 2015.
- 23 Q. So almost three years later?
- 24 A. Yes, sir.
- 25 Q. Now during those almost three years how many times

Robert A. McFadden v State
Post Conviction Relief Hearing-Robert McFadden-Direct Examination by Mr. Davis
April 17, 2017

1 would you say you met with your attorney?
2 A. Personally or him and his paralegal?
3 Q. Answer both.
4 A. I think I've seen Mr. Beau or Mr. Seaton probably
5 twice. I saw his paralegal probably three more times
6 other than that.
7 Q. There were two other folks arrested in relation to
8 this murder case, this burglary?
9 A. Yes, sir.
10 Q. And for the record can you tell me who those people
11 were?
12 A. Brittany Swanger and Randy Clark.
13 Q. It's actually Robert Randall Clark, right?
14 A. Robert Randall Clark.
15 Q. But he goes by Randy?
16 A. Yes.
17 Q. Okay. And they were likewise charged with murder?
18 A. I believe so.
19 Q. Okay. Now in addition to the two charges you were
20 originally arrested for you ultimately had four charges,
21 correct?
22 A. Correct.
23 Q. When were you made aware of the two additional
24 charges?
25 A. The day that I took the plea.

Robert A. McFadden v State
Post Conviction Relief Hearing-Robert McFadden-Direct Examination by Mr. Davis
April 17, 2017

- 1 Q. And how did you become aware of the additional
2 charges?
- 3 A. My lawyer, Mr. Seaton provided me with the paperwork
4 and said that he needed me to sign the paperwork in order
5 for us to continue with the plea agreement.
- 6 Q. Would those have been the sentencing sheets?
- 7 A. They would have been I believe the sentencing sheets
8 for the -- or the direct indictments for the grand
9 larceny and the burglary first.
- 10 Q. She showed those to you; the indictments?
- 11 A. Yes.
- 12 Q. But that was the March date in 2015.
- 13 A. Yes, sir.
- 14 Q. Okay. So now on the date of the plea you had
15 charges of murder, burglary first, and grand larceny, is
16 that right?
- 17 A. Yes, sir.
- 18 Q. The State did make an offer to reduce the murder
19 charge to a lower charge, right?
- 20 A. To voluntary manslaughter.
- 21 Q. Okay. Now on any of those charges did your
22 attorney ever discuss the elements of the charge?
- 23 A. No, sir.
- 24 Q. So was there ever a discussion about the elements of
25 murder or what the State would have to prove to convict

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1 you of murder?

2 A. No, sir.

3 Q. What about the lesser included offense of voluntary
4 manslaughter that you pled to?

5 A. No, sir. I didn't know anything about the voluntary
6 manslaughter until the day we were going to court so.

7 Q. Let me just go through this. Burglary first; was
8 there a discussion about the elements that the State
9 would have to prove on burglary first?

10 A. No, sir.

11 Q. What about grand larceny?

12 A. No, sir.

13 Q. What about possession of a stolen motor vehicle that
14 was dismissed?

15 A. No, sir.

16 Q. So in the three years while you are in jail before
17 going to court and these handful of meetings with Mr.
18 Seaton or his paralegal what were the nature of the
19 discussions? Can you tell the Judge?

20 A. I discussed several times with having -- trying to
21 get some things done as far as my case was concerned
22 because like I said I sat in the county for almost three
23 years with no bond even.

24 I expressed my want to get those things taken care
25 of and we never made it to that point. Like I said I was

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1 seeing him sporadically like I said a handful of times
2 the entire time I was locked up. And then all of a
3 sudden he comes to me the day before we're supposed to
4 take this plea and tells me about the plea agreement
5 saying 20 years day for day -- I mean 20 years 85 percent
6 or if I take it to court 40 years day for day or life.

7 I got the chance to call my family that night and
8 discuss it with. And when you look at a situation like
9 that and somebody tells you you're facing 40 years day
10 for day or life you get scared. To be honest with you,
11 you get scared.

12 And I talked to my family about it and they told me
13 that the best decision in their opinion was for me to
14 take the time and have the ability to come home instead
15 of taking the chance of going to court and never have the
16 ability to come home.

17 Q. Let's break down a few of the things you said there.
18 First of all this discussion about the State's offer was
19 the day before you actually went to court?

20 A. The day before like 3 o'clock in the afternoon.

21 Q. Okay. And what was your attorney's opinion on
22 whether you should plead guilty or whether you should go
23 to trial?

24 A. That I should take the plea.

25 Q. What was his opinion if you went to trial on these

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1 charges?
2 A. That I was going to lose.
3 Q. And did he discuss what the outcome might be if you
4 lost?
5 A. Forty years day for day or life.
6 Q. Forty years day for day?
7 A. Or life.
8 Q. Or life? That's what your attorney indicated to
9 you?
10 A. Yes, sir.
11 Q. Okay. Now I believe you said he did in fact talk
12 about the fact any time you received was going to be 85
13 percent if it wasn't day for day, is that right?
14 A. Yes.
15 Q. Did he also discuss what is called strikes? Did he
16 talk to you about that?
17 A. Yes.
18 Q. Okay. Let me take a huge step backwards. During
19 these meetings had he already provided you with your
20 discovery or your Rule 5 paperwork or did he bring that
21 each time he visited?
22 A. No, I was probably 16 months into my time at the
23 county before I finally received the Rule 5. And to be
24 honest with you I don't think it's complete. I don't
25 have some of the other stuff that my other co-defendants

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1 have received in their case like pictures and stuff like
2 that. I don't have any of that.

3 Q. So you've got police reports and you got paperwork
4 but you didn't get photographs?

5 A. Yeah. I didn't get photographs, apparently there is
6 a statement that I've never seen before of my own that I
7 don't have.

8 Q. So when he is indicating to you what is likely to
9 happen if you went to trial versus if you took this
10 guilty plea was there any discussion about potential
11 defenses to the murder charge?

12 A. No, sir.

13 Q. Were there any discussions about possible defenses
14 to the burglary first charge?

15 A. No, sir.

16 Q. Or grand larceny?

17 A. No, sir.

18 Q. Or what about even if there had been a claim that
19 this was voluntary manslaughter at trial was there any
20 discussion of a defense to that charge?

21 A. No, sir.

22 Q. Now there was a discussion about one of your co-
23 defendants and how they were handling their case, is that
24 right?

25 A. Yes, sir.

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1 Q. You had a discussion about how Brittany was handling
2 her case?

3 A. Yes, sir.

4 Q. What were you informed about the way she was
5 handling her case?

6 A. She was taking a plea and that was within the first
7 I'd say first six or seven months of me being locked up
8 that I found out about that. But she signed a 30 year
9 plea in order to I guess work with the State and get a
10 lower sentence.

11 But she signed a plea to make it look good. Of
12 course that didn't reflect that she was trying to catch a
13 deal, which is really what she got.

14 Q. So you knew she was pleading guilty, correct?

15 A. Yes, sir.

16 Q. And there were discussions about the fact that she
17 very well could be a witness against you at trial?

18 A. Yes, sir.

19 Q. Beyond those things though were there any
20 discussions about how Mr. Seaton might handle her
21 testimony if this went to trial?

22 A. No, sir.

23 Q. Any discussion about how he might portray her
24 cooperation as simply trying to gain a benefit for
25 herself?

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- 1 A. No, sir. I actually approached both of those on a
2 couple of different occasions with the paralegal. I
3 never saw any return from that.
- 4 Q. You referenced not having a copy of a statement of
5 yours, is that right?
- 6 A. Yes, sir.
- 7 Q. How is it you came to find out about that statement?
- 8 A. One of my co-defendants. We were on the same yard
9 together at Perry; Perry Correctional Institution.
- 10 Q. After ---
- 11 A. --- after we got our time.
- 12 Q. Was there ever any discussion between your attorney,
13 you and your attorney, about how your statement might be
14 dealt with at trial?
- 15 A. No, sir.
- 16 Q. Any discussion about how he might attempt to block
17 the jury from hearing any bad statement you made?
- 18 A. No sir, because as far as I knew there was no
19 statement other than the verbal statement that was made
20 on the recorder.
- 21 Q. You don't recall ever talking about a Denno hearing
22 or a State v Denno? No discussion about that?
- 23 A. No, sir. I don't even know what that is.
- 24 Q. Okay. Now you do recall discussions about some
25 video surveillance?

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- 1 A. Yes, sir.
- 2 Q. In this case, right?
- 3 A. Yes, sir.
- 4 Q. And what -- do you recall the evidence was dealing
5 with videos as it pertained to you? What did the State
6 claim to have?
- 7 A. That they seen me in Walmart. They don't have me in
8 Walmart doing anything wrong. They don't have me in
9 Walmart taking anything or anything like that or -- they
10 just have a video of me entering Walmart and exiting it.
- 11 Q. Mr. Clark was also in that video, correct?
- 12 A. Yes, sir.
- 13 Q. Was there any discussion with you and your attorney
14 about how to deal with that video surveillance?
- 15 A. No, sir.
- 16 Q. Any discussion about how someone might identify you
17 or not?
- 18 A. No, sir.
- 19 Q. Any discussion about who might be identifying you?
- 20 A. No, sir.
- 21 Q. Any discussion about how any identification like
22 that might be challenged or tried to be blocked from the
23 jury hearing it at trial?
- 24 A. No, sir.
- 25 Q. Ever hear about a Biggers case or Neil v Biggers?

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1 A. No, sir.

2 Q. When you met with Mr. Seaton the day before your
3 plea you discussed this offer from the State. Were you
4 expecting that or was that a surprise?

5 A. Say that one more time.

6 Q. Were you expecting that or was that a surprise?

7 A. The deal from the State? No, I was not expecting
8 it. It was definitely a surprise.

9 Q. And how long did you have to make a decision on
10 that?

11 A. A day; less than a day. Like I said he came to see
12 me at probably 3 o'clock in the afternoon I guess when he
13 got out of court.

14 And then I had to make the decision over night and
15 have it ready for him in the morning when he came to pick
16 me up to go to court.

17 Q. You did have time, I think you testified about this,
18 you had time to contact your parents and speak with them
19 that evening?

20 A. He made it a point to tell the county jail to let me
21 use the phone upfront and then call my family.

22 Q. And before he left at the end of that meeting what
23 was his advice on whether to go to trial or take the
24 deal?

25 A. He told me not to make the decision at that time to

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1 discuss it with my family and that he would get my answer
2 when we went to court in the morning.

3 Q. So the next morning did you have a chance to talk
4 before you came to court like we did this morning?

5 A. Yes, sir.

6 Q. Okay. And was that discussion about the trial or
7 the guilty plea?

8 A. It was about the guilty plea. Take the plea, you
9 know what I'm saying and be done with it or you can go to
10 trial and face 40 years day for day or life.

11 Q. So is that when he made the comment about the time
12 you were facing or was it ---

13 A. --- no, he told me that the day before.

14 Q. Okay. So in this almost three years when were
15 there discussions about trial, if any?

16 A. The day he came to talk to me about the plea. I had
17 been saying that I wanted to go to trial from the start.
18 And my family can even tell you that that's been my push
19 when I first got this case was to go to trial because the
20 evidence is not there and my co-defendants statements are
21 unreliable.

22 So I was pushing for trial the entire time. Two
23 weeks before we go to trial is when he came to me with
24 the plea. He also told me that my co-defendant Mr. Clark
25 was going to testify on behalf of the State as well

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1 against me in order to tell me not to go to trial. He
2 said I would have had two co-defendants testifying
3 against me instead of one.

4 Q. One quick thing on that. You have a -- I sent you a
5 transcript of the guilty plea that you did, correct?

6 A. Yes, sir.

7 Q. And it's a combination plea between you and Mr.
8 Clark. You both pled at the same time?

9 A. At the same time in court together.

10 Q. Okay. Can you tell the Judge what your opinion is
11 about Mr. Seaton's readiness for preparation to go to
12 trial if you had not taken this deal?

13 A. I don't think he was ready to go. I honestly don't.
14 I don't think he had prepared or even assembled any kind
15 of defense as far as that was concerned. I think
16 honestly his push was to get me to take the plea. If you
17 want my honest opinion that's what it is.

18 Q. Just a few more questions, Mr. McFadden. Let's do
19 sort of a reverse order here. If you had believed at the
20 time that Mr. Seaton was preparing or had prepared and
21 was ready to give you a trial rather than plead guilty
22 would you have pled guilty or would you have gone to
23 trial?

24 A. I would have gone to trial.

25 Q. If he had discussed how to handle one or both of

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1 your co-defendants testifying at trial would you have
2 likely pled guilty or gone to trial?
3 A. I would have went to trial.
4 Q. If he had discussed with you the elements of each
5 charge that you were facing and what the State would have
6 to prove to convict you of each and every charge would
7 you have pled guilty or gone to trial?
8 A. I would have went to trial.
9 Q. If he had talked about how to try to block any
10 statement that you made that was harmful from the jury
11 hearing it at trial would you have gone to trial and
12 tried to do that or would you have pled guilty?
13 A. I would have went to trial and tried to do it.
14 Q. If he had discussed any attempt at trial to try to
15 block any identification of you being involved in any of
16 these crimes would you have taken the chance on a hearing
17 on that issue at trial or pled guilty?
18 A. I would have went to trial.
19 Q. Let's go ahead and deal with this while you're on
20 direct. Do you recall after the guilty plea being asked
21 about whether you had enough time to speak with Mr.
22 Seaton or not?
23 A. Yes, sir.
24 Q. So first of all did you answer the court honestly?
25 A. Yes sir, at the time I did.

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- 1 Q. You were under oath, correct?
- 2 A. At the time I did, yes sir.
- 3 Q. And do you recall when you were asked if you were
4 satisfied with your lawyer's services do you recall
5 answering that yes you were?
- 6 A. I'm sorry?
- 7 Q. At your guilty plea when the Judge asked you if you
8 were satisfied with your lawyer's services do you recall
9 answering yes?
- 10 A. Yes, sir.
- 11 Q. Okay. Asked if your lawyer had answered all of
12 your questions you answered yes?
- 13 A. Yes, sir.
- 14 Q. Done everything you asked or expected and you
15 answered yes?
- 16 A. Yes, sir.
- 17 Q. And they asked anything more you would have them do
18 that they have not already done and you answered no. Do
19 you remember that?
- 20 A. Yes, sir.
- 21 Q. Any complaints about their services and you said no,
22 correct?
- 23 A. Yes, sir.
- 24 Q. If anyone had threatened you to do this or promised
25 you anything to do this, meaning pleading guilty, your

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1 answer was no. Do you recall that?

2 A. Yes, sir.

3 Q. But today you're making complaints about Mr. Seaton
4 and his handling of your case.

5 A. Yes, sir.

6 Q. Tell the Judge how you could answer that way then
7 and you have a different answer now?

8 A. At the time I didn't know the things that were
9 required by my lawyer to do in order to best represent
10 me.

11 I had more time to study that once I got into the
12 prison system and had access to a law library where the
13 information is there for you to see; the case law is
14 there for you to see. So I had more time to sit down and
15 study and actually observe the things that he should have
16 done.

17 Q. You've been in the State Department of Corrections
18 for almost two years now.

19 A. Yes, sir.

20 Q. Knowing what you know now, the research that you've
21 done and the communications that we have had to prepare
22 for this PCR would your answers have been the same -- are
23 your answers the same now as they were then?

24 A. No, sir.

25 Q. And what is it you are hoping this court will do

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1 today?

2 A. Give me a new trial.

3 MR. DAVIS: Your Honor, if I could have just one
4 moment.

5 THE COURT: Yes, sir.

6 [Whereupon, Mr. Davis reviews documents]

7 MR. DAVIS: Thank you, Your Honor.

8 Q. [Mr. Davis] Thank you, Mr. McFadden. I have no
9 other questions. The Attorney General will have some
10 questions for you.

11 THE COURT: Cross-examination, Ms. Olive?

12 MS. OLIVE: Thank you.

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1 CROSS-EXAMINATION

2 BY MS. OLIVE:

3 Q. Good afternoon, Mr. McFadden.

4 A. Good afternoon.

5 Q. So your testimony today is that you want a new trial
6 on all of these charges?

7 A. Yes, ma'am.

8 Q. And you understand that on the murder you're facing
9 30 years to life?

10 A. Yes, ma'am.

11 Q. And on the burglary first you're facing 15 years to
12 life?

13 A. Yes, ma'am.

14 Q. You testified that your attorney gave you the offer
15 and you discussed the offer with your family and they
16 told you to take the plea?

17 A. Yes, ma'am.

18 Q. Did you want to take the plea at that time?

19 A. No, ma'am.

20 Q. Why did you take the plea?

21 A. Like I said I got scared.

22 Q. You got scared?

23 A. I got scared and ---

24 Q. --- because your attorney told you the time that you
25 would be facing if you ---

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- 1 A. --- forty years day for day or life; yes, I got
2 scared. I've got a ten year old son right now. I got
3 scared.
- 4 Q. Do you understand you're facing that same time ---
- 5 A. --- I understand that. But when I look back over my
6 case and I had the chance to study like I said -- he said
7 I've been in there for two years. I've been able to go
8 to the law library all the time. And it wasn't for
9 probably about four or five months or maybe six months
10 before I actually filed for the PCR.
- 11 But that's after I started learning the things that
12 should have happened in my case and the things that
13 didn't happen; the things that should have been done that
14 didn't happen. So I want the chance to have those things
15 happen. I believe the outcome will be much different.
- 16 Q. So you said that you took the plea because you were
17 scared because you were facing a substantial amount of
18 time and the plea agreement was for 20 years.
- 19 A. Yes, ma'am.
- 20 Q. So you took the plea so that you could get less
21 time?
- 22 A. Yes.
- 23 Q. And again this was a negotiated plea, correct?
- 24 A. Yes, ma'am.
- 25 Q. And as part of that plea the State dismissed a

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1 charge of receiving stolen goods. Do you recall that?
2 A. Yes, ma'am.
3 Q. And your attorney represented to the court that he
4 had explained to you the charges against you, the
5 potential punishment as well as your constitutional
6 rights?
7 A. Yes, ma'am.
8 Q. Okay. And the Judge went over those constitutional
9 rights with you again, your right to a jury trial, your
10 right to confront witnesses against you and your right to
11 remain silent?
12 A. Yes, ma'am.
13 Q. And you agree that you were waiving those by
14 pleading guilty that day?
15 A. Yes, ma'am.
16 Q. And you agree with the facts that were presented by
17 the Solicitor?
18 A. In order to get the plea, yes ma'am.
19 Q. And you admitted your guilt as well?
20 A. Yes, ma'am.
21 Q. And you told the Judge that no one had promised you
22 anything or threatened you to get you to plead?
23 A. Yes, ma'am.
24 Q. And you testified that your two co-defendants would
25 have testified against you at trial?

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- 1 A. I was told that the second one -- I know that one
2 would have for sure because she signed a plea agreement
3 to testify. I was told that the second co-defendant
4 would.
- 5 Q. You were told by your attorney?
- 6 A. Yes, ma'am.
- 7 Q. So your attorney discussed with you the sort of
8 things that the State would be presenting against you if
9 you had gone to trial?
- 10 A. No.
- 11 Q. But you knew that ---
- 12 A. --- he just told me that my co-defendant was going
13 to testify against me if I tried to go to trial.
- 14 Q. Okay. And you stated that the attorney -- when you
15 said that the attorney, excuse me; the paralegal met with
16 you probably three times. Was that with the attorney?
- 17 A. No ma'am; by himself.
- 18 Q. He was by himself?
- 19 A. Yes, ma'am.
- 20 Q. And how many times did you say you met with your
21 attorney?
- 22 A. Twice I think; twice.
- 23 Q. Did you have any conversations with him on the
24 phone?
- 25 A. No, ma'am.

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1 MS. OLIVE: Beg the court's indulgence.
2 [Whereupon, Ms. Olive reviews documents]
3 MS. OLIVE: That's all the questions I have, Your
4 Honor.
5 THE COURT: Redirect?
6 MR. DAVIS: No, Your Honor. No thank you.
7 THE COURT: Thank you. You may step down.
8 [Whereupon, the witness is excused and exits the
9 witness stand]
10 THE COURT: Call your next witness.
11 MR. DAVIS: Judge that would be the applicant's
12 presentation.
13 THE COURT: The applicant rests?
14 MR. DAVIS: Yes, Your Honor.
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1 MS. OLIVE: Your Honor, the State would call Beau
2 Seaton.

3 [Whereupon, Mr. Seaton comes forward]

4 [Whereupon, the witness is duly sworn by the Court]

5 - - - - -

6 BEAU SEATON,

7 Having been first duly sworn,

8 Was examined and testified as follows:

9 DIRECT EXAMINATION

10 BY MS. OLIVE:

11 Q. Mr. Seaton, I apologize I didn't ask you this
12 previously. How long have you been practicing law?

13 A. Twenty-one years.

14 Q. Mr. McFadden testified that you only met with him
15 twice. Is that correct to your recollection?

16 A. I believe it was more than that. But I agree with
17 him that primarily my paralegal would bring information
18 over to him and then he would tell me the things that Mr.
19 McFadden was requesting.

20 Along with that I had gotten clearance from him to
21 discuss with his parents, who are here in the courtroom.
22 They were very frequent visitors in my office.

23 Q. Did you file discovery motions in this case?

24 A. I did.

25 Q. Did you review that discovery with Mr. McFadden?

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- 1 A. I did.
- 2 Q. And would your paralegal have taken that to him?
- 3 A. That's correct.
- 4 Q. Was the statement that he referred to during his
5 direct examination testimony was that provided with the
6 discovery?
- 7 A. I would certainly imagine it was. I can't think of
8 any reason why it wouldn't have been. I don't recall the
9 statement as being anything but exculpatory so I don't
10 know that the statement was relevant because I don't
11 think he ever implicated himself in the statement.
- 12 Q. So you recall there being a statement?
- 13 A. I do. I can't specifically tell you whether that
14 was from when they went and arrested him or at a later
15 time. I don't recall.
- 16 Q. And as part of your discovery motions would you have
17 requested any written or recorded statements?
- 18 A. Certainly.
- 19 Q. Did you discuss with Mr. McFadden the State's
20 evidence against him?
- 21 A. I did.
- 22 Q. Did he tell you everything that he knew about the
23 facts of the case?
- 24 A. He did.
- 25 Q. Did you discuss with him the elements of each of

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1 these charges against him?

2 A. Yes. All the original charges, yes and then the
3 agreement that he would plead to the weapons charge was
4 after we had already made the agreement.

5 Q. You said weapons charge?

6 A. We agreed to the I think it was the ---

7 Q. --- would that have been grand larceny?

8 A. I was thinking it was the weapons charge. Yes, the
9 grand larceny; that would have been for the vehicle.

10 Q. And that was the charge that he waived presentment
11 on?

12 A. Correct.

13 Q. But as far as the -- he was originally indicted for
14 murder, correct?

15 A. Correct.

16 Q. And burglary first did you explain the elements to
17 him of each of those offenses?

18 A. Yes.

19 Q. Okay. As to voluntary manslaughter did you explain
20 that to him as well?

21 A. Yes.

22 Q. Did you discuss any possible defenses with Mr.
23 McFadden?

24 A. We did. We had a lengthy discussion about an alibi
25 of him not actually being at the scene.

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1 Q. Did he provide an alibi witness for you to
2 interview?

3 A. There wouldn't have been any alibi witnesses. He
4 was just saying that he had been dropped off close to the
5 scene but not at the scene and then they picked him up
6 after the crime had been committed.

7 Q. And what was your advice to him concerning whether
8 that defense would have been successful at trial?

9 A. I didn't think that the defense would have been
10 successful at all. It was his car and the idea that he
11 would have been dropped off in the middle of the night in
12 a parking lot while they took his car, and these were
13 people he didn't know very well, and went and committed a
14 crime and then they came back and picked him up I just
15 didn't think was something that was going to fly.

16 Q. Are you aware of any other defenses that would have
17 been available to Mr. McFadden?

18 A. Not really. There was a neighbor that identified
19 him or a description of someone like him going into the
20 house along with the girl. And then of course the co-
21 defendants both were willing to testify that he was there
22 and participated.

23 Q. At some point you entered into negotiations with the
24 State?

25 A. We did.

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1 Q. What was -- did Mr. McFadden authorize you to enter
2 into those negotiations on his behalf?

3 A. He did.

4 Q. Did you have discussions with Mr. McFadden
5 concerning the likelihood that he would prevail if he
6 went to trial?

7 A. We did.

8 Q. What was your advice to him?

9 A. My advice was to enter into an agreement to
10 something less than murder.

11 Q. Had you reviewed the co-defendants statements as
12 part of your discussions with Mr. McFadden?

13 A. I did.

14 Q. Were you aware of the sort of testimony they would
15 provide if they testified at trial?

16 A. The co-defendant Swanger she had given a proffer
17 quite some time before the plea. The co-defendant Clark
18 because we were willing to testify against him and
19 Swanger was certainly testifying against him and they
20 believed he was the guy who actually killed the
21 defendant.

22 They were more interested in our help than in
23 Clark's help. But Clark at the last minute decided that
24 he was willing to testify against Mr. McFadden.

25 Q. Did the fact that his co-defendants were prepared to

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1 testify against him at trial factor into your advice to
2 him concerning whether to accept or reject the guilty
3 plea?

4 A. Absolutely.

5 Q. Was it Mr. McFadden's decision to plead guilty?

6 A. It was.

7 Q. He testified that he only had one evening to
8 consider the plea offer. Was the plea offer made to him
9 the day before he pled?

10 A. The plea offer was based on the fact that we had to
11 make a decision on the record as to whether or not we
12 would accept an offer or whether we were going to reject
13 all offers. All offers would be taken off the table and
14 we would have to go to trial.

15 So the deadline that he spoke of that was the
16 deadline. And that was why I had suggested that he not
17 tell me at that moment because he had testified earlier,
18 and I agree with him, he has been adamant all along that
19 he wanted a trial.

20 And I had suggested that he take overnight and make
21 sure that he had access to a private phone so that he
22 could talk with his parents about such an important
23 decision.

24 Q. Do you recall when the offer for this negotiated
25 sentence was provided to him? Was it the day before?

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1 A. It would have been the day before, yes. That was
2 the first time they made a real move in terms of what
3 they would let him plead to.

4 Q. Why did you advise him -- did you advise him to
5 accept the plea offer?

6 A. I did.

7 Q. Why did you advise him of that?

8 A. Because as much as nobody wants to do as much time
9 as he is facing it certainly beats the alternative as he
10 said of 40 years or more.

11 Q. Did you advise him about the likelihood -- did you
12 have an opinion about whether he would have been
13 convicted if he had gone to trial?

14 A. If we had gone to trial with both of the co-
15 defendants testifying against him and our defense being
16 that he wasn't there and a neighbor gives a description
17 of someone similar to Mr. McFadden as having been there I
18 think our likelihood was less than good.

19 Q. And did you explain that to him?

20 A. I did.

21 Q. If Mr. McFadden had wished to go to trial, would you
22 have been prepared?

23 A. I was prepared to try the case if necessary. But it
24 certainly was not my desire at the time.

25 Q. And you said it was not your desire because you felt

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1 -- why was it not your desire?

2 A. Because I didn't think we would win and I don't like
3 losing.

4 MS. OLIVE: Beg the court's indulgence.

5 [Whereupon, Ms. Olive reviews documents]

6 Q. [Ms. Olive] Did you have any discussions with Mr.
7 McFadden about the trial preparation and how you would
8 have for example whether you would have been able to
9 impeach his co-defendants had they testified against him
10 at trial?

11 A. We did as a general -- I mean if we -- if I was
12 actually going to try the case then a week or so before
13 the trial we would sit down and go through the entire
14 process from start to finish.

15 But as a general matter yes, we talked about
16 certainly both of the co-defendants had numerous problems
17 that their creditability could have been called into
18 question.

19 Q. And on the day of his plea was this a situation
20 where he -- was the case on the trial docket already or?

21 A. It was on the trial docket but it wasn't for that
22 specific week. The only thing that was on the trial
23 docket for that week would have been a rejection of the
24 offer.

25 Q. Thank you. That's all the questions I have.

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1 THE COURT: Cross-Examination?
2 MR. DAVIS: Thank you, Your Honor.
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1 CROSS-EXAMINATION

2 BY MR. DAVIS:

3 Q. Mr. Seaton, let's start with that. So the court
4 date was to accept or reject the offer on March 5th of
5 2015, right?

6 A. That's my recollection.

7 Q. And obviously he pled, but had he not was it two
8 weeks out for the trial?

9 A. I would assume, and again this is just my
10 recollection, in Berkeley we are generally once a month.
11 So it would have been two weeks to a month depending
12 on...

13 Q. And since Brittany had already pled it was you and
14 Mr. McFadden and Mr. Clark and then Mr. Schwacke as his
15 attorney, do you recall?

16 A. Correct.

17 Q. And so the same deadline for them?

18 A. I don't have a clue about their deadline.

19 Q. Okay. Y'all pled at the same time, you recall
20 that?

21 A. We pled at the same time; that's correct.

22 Q. Sticking with Mr. Clark while you had been advised
23 he was willing to be a witness if Mr. McFadden went to
24 trial you are not aware of a formal proffer that he did
25 like Brittany did ---

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1 A. --- that's correct, that's correct.

2 Q. Brittany had done a proffer and you had talked to
3 Robert about that?

4 A. Right. I think the threat of testifying was more on
5 a decision that they were exploring what they might get
6 out of it. I don't think there was any real discussion
7 for a proffer.

8 Q. I think he testified to this. Was it not clear that
9 the opinion of the State was that Mr. Clark was the
10 triggerman?

11 A. Correct. Correct.

12 Q. One thing I do want to ask you about you're talking
13 about a neighbor giving a description similar to Mr.
14 McFadden.

15 A. Right.

16 Q. The whole issue of the neighbor identification that
17 was strange though if you recall.

18 A. It was. It absolutely was.

19 Q. Even in the transcript when Ms. Williams, the
20 Solicitor is talking --

21 MR. DAVIS: And Your Honor, this is page 18 around
22 line 21, 22.

23 Q. [Mr. Davis] One of the neighbors gets confused and
24 can't remember who was there the day before the murder.

25 There were a lot of people in and out of this house,

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1 right?

2 A. Correct. Correct.

3 Q. And it's also been a little dispute the three co-
4 defendants knew each other; Mr. Clark, Ms. Swanger, and
5 Mr. McFadden ---

6 A. --- correct.

7 Q. Okay. So the whole issue was who in fact was
8 present in the residence when the crimes happened. That
9 would have been the issue?

10 A. Sure, absolutely.

11 Q. And out of the alleged four people, the deceased
12 early on Brittany was the one to testify, and only late
13 in the game was Mr. Clark willing to testify, is that
14 right?

15 A. Yes. I don't know that it was really even a fair
16 statement to say he was willing to testify as much as it
17 was a threat.

18 Q. Fair enough. And just one more step on that.
19 Certainly eyewitness, meaning co-defendant Brittany
20 testimony, but you don't recall in the State's case
21 forensics that placed Mr. McFadden in the house, do you?

22 A. I knew there was no DNA evidence or any other
23 forensic evidence.

24 Q. You recall speaking with Mr. McFadden the day before
25 the plea and reviewing things, correct?

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1 A. Sure.

2 Q. And then saw him a little bit before court on the
3 day of the plea. Is it fair that since -- prior to the
4 plea you hadn't filed any pretrial motions because until
5 that day you weren't sure whether it was going to go to
6 trial?

7 A. Yes, and I -- yes; that's probably the best way to
8 put it, yes.

9 MR. DAVIS: Your Honor, can I have just one moment?

10 THE COURT: Certainly.

11 [Whereupon, Mr. Davis confers with his client]

12 Q. [Mr. Davis] Thank you, Mr. Seaton. No further
13 questions.

14 MS. OLIVE: Nothing further from the State, Your
15 Honor.

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

17 [Whereupon, the witness is excused and exits the
18 witness stand]

19 THE COURT: You may call your next witness.

20 MS. OLIVE: Nothing further from the State.

21 THE COURT: The State rests. Anything in reply?

22 MR. DAVIS: No, Your Honor.

23 THE COURT: I'll be glad to hear arguments.

24 MR. DAVIS: Thank you very much, Your Honor. May
25 it please the court?

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April 17, 2017

1 CLOSING ARGUMENT

2 BY MR. DAVIS:

3 Judge, the sole thrust of our application is that
4 it's the flip side of the same coin that this was a rush
5 to plea even though it had been almost three years that
6 Mr. McFadden had been incarcerated. But in that time
7 even with comparing the two -- few visits, the majority
8 by the paralegal, even if the testimony of Mr. McFadden
9 is discounted and in three years on these serious charges
10 we would argue that that led to then the day before the
11 plea this rush to plea; this undue pressure to plea
12 without fully being informed by his attorney.

13 So Mr. McFadden felt pressured into the plea and he
14 testified as much that he felt scared based on what he
15 was facing based on the advice that he was given the day
16 before the plea of what was likely going to happen in a
17 trial that was upcoming in two or four weeks.

18 And then the flip side, Your Honor, is there had
19 been little to no discussions about the alternative.
20 Here's what it looks like if we go to trial. Here's the
21 bad evidence. I believe that was discussed but here's
22 how we might try to defend against that and here's why
23 even attempting to do that this is your better choice.
24 No discussions like that occurred. So we have one thrust
25 that he entered into this plea based on ineffective

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1 assistance of counsel. On the one hand undue pressure;
2 at the last minute a hurried rush to plea. On the flip
3 side little to no confidence that his attorney was
4 prepared to go to trial if that was sought out.

5 I'll point out two things that may be obvious to the
6 court if you don't mind me highlighting them. This was a
7 take the deal or don't. Even with Mr. Seaton's testimony
8 a trial, if it had happened, would have been two to four
9 weeks from this date. No motions filed and no discussion
10 of any motions to suppress in any way whether it's
11 identification or statement or dealing with a co-
12 defendant and their creditability and their proffer. At
13 a minimum you're two weeks away; at a maximum you're a
14 month away. There had been no discussions and nothing
15 filed at that point.

16 Mr. McFadden makes a good point in dealing with the
17 State does and should and always will do referring back
18 to the in court conversations. And certainly he did not
19 deny his answers under oath to Judge Jefferson at the
20 time of the plea. But as he testified he knows more
21 since the plea than he knew prior to. And I will point
22 out he mentioned that this guilty plea was March the 5th,
23 2015. It was four months later that he -- a little more
24 -- almost five months later, July 28th that he filed the
25 application. So this wasn't a heated reactionary

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1 emotional I'm just mad at my lawyer and mad at my
2 sentence. He did review things. He did some research.
3 He did realize there were some things that he believes
4 were amiss and we've presented those today.

5 So his application was almost five months after his
6 guilty plea. I would argue that shows contemplation
7 rather than pure emotional filing on that. He
8 understands the risks and benefits. You went over that
9 with him at the beginning. We would argue that we have
10 shown sufficient evidence today of ineffective assistance
11 of counsel leading up to this most crucial decision to
12 plead guilty.

13 He had less than 24 hours notice and was pushed into
14 it by threat of much more significant time of 40 years or
15 life day for day is what he was told would likely happen
16 at trial. And on the flip side he was given absolutely
17 no assurances that his lawyer was prepared to fight these
18 at trial that was happening within a matter of weeks if
19 he had rejected that offer.

20 Given all that we also have shown that the outcome
21 of his decision to plead guilty rather than go to trial
22 would have been different had his lawyer acted more
23 effectively. So we would ask you to grant his
24 application for post conviction relief, vacate his
25 sentences and allow him to begin again. Thank you, Your

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1 Honor.

2 THE COURT: Thank you, Mr. Davis. Ms. Olive?

3 MS. OLIVE: Thank you, Your Honor.

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Post Conviction Relief Hearing-Closing Arguments-Remarks by Ms. Olive
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1 CLOSING ARGUMENT

2 BY MS. OLIVE:

3 Your Honor, it's the State's position that Mr.
4 McFadden has shown neither deficiency nor prejudice in
5 this case. He testified that he met with counsel only
6 two times and the paralegal three times, however counsel
7 testified he likely met with him more than three times
8 and he had all the necessary discussions with him.

9 He filed the appropriate discovery motions. He
10 reviewed that discovery with Mr. McFadden. He reviewed
11 the State's evidence with Mr. McFadden. And he discussed
12 Mr. McFadden's version of what happened. He discussed
13 the elements of the offenses as well as any potential
14 defenses that he might have. He also testified
15 concerning how that defense likely would not have been
16 successful at trial considering that Brittany Swanger had
17 made a proffer and that she was -- even if Robert Clark
18 did not testify against him Brittany Swanger was prepared
19 to testify against him had he proceeded to trial.

20 Simply the fact that no pretrial motions had been
21 filed yet is no indication of deficiency in this case had
22 counsel known that they were proceeding to trial. At
23 this point there was an offer made and Mr. McFadden had a
24 choice to either accept or reject the offer. Mr. Seaton
25 testified it would have been at least two weeks if not a

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1 month until they had trial. He had time in that amount
2 of time to file any pretrial motions. Furthermore, there
3 has been really no showing as to what those pretrial
4 motions would have been. Mr. Seaton testified that the
5 statement that Mr. McFadden had given did not implicate
6 him therefore there would have been no reason to have a
7 Jackson v Denno hearing.

8 In addition there has really been no showing that a
9 Biggers hearing was necessary. It's our position Mr.
10 McFadden has made no showing as to what pretrial motions
11 should have been filed in this case. With respect to
12 impeaching his co-defendants that's just a matter of
13 trial strategy and what would have happened at trial.

14 So it's our position he's shown no deficiency in
15 this case and further that he made a reasoned and
16 voluntary decision based on the advice of counsel to
17 plead guilty. And the record is sufficient to reflect
18 that the guilty plea was voluntary.

19 Furthermore given counsel's testimony as to the
20 likelihood that he would have been convicted if he had
21 gone to trial in addition to Mr. McFadden's own testimony
22 that he chose to plead guilty because he would have --
23 because the negotiated offer was for 20 years, which was
24 significantly less than he would have faced had he been
25 convicted of murder at trial. It's our position that he

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1 has also failed to show prejudice.

2 THE COURT: Anything in response?

3 MR. DAVIS: No, Your Honor. Thank you.

4 THE COURT: Thank you.

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Robert A. McFadden v State
Certificate of the Court Reporter
April 17, 2017

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C E R T I F I C A T E

I, the undersigned, Joyce C. Rueger, Official
Circuit Court Reporter for the Ninth Judicial Circuit of
the State of South Carolina, do hereby certify that the
foregoing is a true, accurate, and complete Transcript of
Record of the proceedings had and evidence introduced in
the trial of the captioned case, relative to appeal, in
the Court of Common Pleas for Berkeley County, South
Carolina on the 17th day of April, 2017.

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

June 15, 2017



Joyce C. Rueger, CVR-M
Court Reporter

STATE OF SOUTH CAROLINA)
 COUNTY OF BERKELEY)
 Robert Andrew McFadden, #315301,)
 Applicant,)
 v.)
 State of South Carolina,)
 Respondent.)

IN THE COURT OF COMMON PLEAS
 FOR THE NINTH JUDICIAL CIRCUIT

Case No.: 2015-CP-08-1774

ORDER OF DISMISSAL

17 AUG -3 PM 3:25
 MARY P. TIGHE
 CLERK OF COURT
 BERKELEY COUNTY, S.C.
 FWB/D

This matter comes before the Court by way of an application for post-conviction relief filed July 28, 2015, by Robert Andrew McFadden (Applicant) alleging plea counsel was ineffective. Respondent made its Return on May 13, 2016, requesting an evidentiary hearing be held. An evidentiary hearing into the matter was convened September 14, 2016, at the Berkeley County Courthouse. Applicant was present at the hearing and represented by Rodney D. Davis, Esquire. Assistant Attorney General Alicia Olive from the South Carolina Attorney General's Office appeared on behalf of the State. At the conclusion of the hearing, this Court denied the application from the bench. This order follows.

PROCEDURAL HISTORY

The records before this Court establish Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Berkeley County Clerk of Court. During its September 2012 term of court, the Berkeley County Grand Jury indicted Applicant for murder (2012-GS-08-1693). During its February 2015 term of court, the Berkeley County Grand Jury indicted Applicant for first-degree burglary (2015-GS-08-0120).

On March 5, 2015, Applicant appeared in the Berkeley County Court of General Sessions before the Honorable Deadra Jefferson, circuit court judge. Applicant was represented by Grover C. Seaton, Esquire. Assistant Solicitor Anne Williams represented the State. At this hearing, Applicant pled guilty to first-degree burglary as indicted, and the lesser-included offense of voluntary manslaughter. Applicant also waived presented to the grand jury and pled guilty to grand larceny (more than \$10,000) (2015-GS-08-0391). Pursuant to negotiations between Applicant and the State, Judge Jefferson sentenced Applicant to thirty years imprisonment suspended upon the service of twenty years imprisonment for first-degree burglary and voluntary manslaughter, with both sentences to be served concurrently, and to ten years imprisonment suspended upon the service of time served followed by five years probation to be served *consecutively* to the other sentences. Pursuant to plea negotiations, the State dismissed Applicant's pending charges for receiving stolen goods (2012-GS-08-1906) and enhanced shoplifting (2012-GS-08-1512). Applicant did not appeal his guilty pleas or sentences.

FACTUAL HISTORY

These charges arise from the home invasion and subsequent murder of a seventy-one-year-old victim. Applicant and two co-defendants spent the evening of July 14, 2012, smoking crack cocaine in Applicant's motel room. When they ran out of crack cocaine and money, Applicant and his co-defendants decided to rob the victim, of whom they were aware through mutual friends and knew kept a large amount of money in his home. The three proceeded to a Wal-Mart, where they were seen on store surveillance footage purchasing duct tape, gloves, a backpack, and other items. Then they drove to the victim's home in Hannahan, where they tricked him and gained entry into his home. Once inside, they demanded access to his safe until

the victim eventually acquiesced. At some point, the victim recognized one of the co-defendant's voices and the three decide to kill him. They tie the victim's hands behind his back with duct tape, bind his legs, and secure a plastic bag over his head with duct tape; thereafter, the victim suffocated to death. Before the defendants leave the home, they attempted to stage a scene to implicate another acquaintance in the murder. The three then steal the victim's truck. (Plea Tr. p. 15-18).

ALLEGATIONS RAISED

In his application, Applicant alleged he is being held in custody unlawfully based on allegations of ineffective assistance of counsel for:

- 1) Failure to file several motions on Applicant's behalf, including a motion to suppress, a motion to vacate, and a motion for a bond hearing
- 2) Failure to inform Applicant of new charges
- 3) Refusal of a preliminary hearing without consulting with Applicant or receiving his consent
- 4) Failure to inform him of his right to appeal
- 5) Mislead Applicant by lying to procure his guilty plea
- 6) Due process violation which include his Fifth and Fourteenth Amendment rights

In its Return, the State moved to dismiss the due process allegation for failure to state a ground for relief with any specificity. At the start of the evidentiary hearing, Applicant stated he had no objection to the State's motion to dismiss and this Court dismissed this allegation.

SUMMARY OF TESTIMONY PRESENTED AT THE EVIDENTIARY HEARING

At the evidentiary hearing, Applicant testified on his own behalf. Applicant testified he was arrested on July 19, 2012, and charged with murder and possession of a stolen vehicle. (PCR Tr. p. 8). He testified he never had a bond hearing on his murder charge. (PCR Tr. p. 8). He

testified he pled nearly three years after his arrest. (PCR Tr. p. 8). Applicant testified he met with his attorney twice and met with his paralegal three times. (PCR Tr. p. 9). He testified he was not aware of the two additional charges (first-degree burglary and grand larceny) until the day of his plea when counsel presented him with sentencing sheets and asked him to sign them. (PCR Tr. p. 9-10). He testified the State allowed him to plead guilty to the lesser-included offense of voluntary manslaughter. (PCR Tr. p. 10). He testified counsel did not review the elements of any of the offenses with him. (PCR Tr. p. 10-11).

Applicant testified shortly before his plea, counsel told him about the State's plea offer in exchange for a twenty year sentence. (PCR Tr. p. 11-12). Applicant testified counsel advised him if he took the plea offer, he would have to serve eighty-five percent of his sentence, as opposed to forty years day-for-day up to life if convicted of murder. (PCR Tr. p. 12-13, 19). Applicant testified he discussed the plea offer with his family and they advised him to accept the offer. (PCR Tr. p. 12). He testified counsel also advised him to accept the State's plea offer and he would likely be convicted if he proceeded to trial. (PCR Tr. p. 12-13). He testified he had an evening to decide whether to accept the State's plea offer and he pled the next day. (PCR Tr. p. 18). Applicant testified he had been pushing counsel for a trial the entire time, but he elected to accept the State's plea offer because he did not think counsel was ready for trial. (PCR Tr. p. 19-20). He testified he would have gone to trial if counsel had discussed how to combat his co-defendants' statements, his identification, and other evidence that would likely come in at trial (PCR Tr. p. 20-21). He testified he pled guilty because he was scared, but acknowledged he also took the plea offer to get less time. (PCR Tr. p. 25, 26).



Applicant testified he never reviewed discovery with counsel, but that he did receive a copy of his discovery materials sixteen months after his arrest. (PCR Tr. p. 13). He testified he believes his discovery materials were incomplete because his co-defendants' discovery had additional materials his discovery did not, such as photographs. (PCR Tr. p. 13-14). He testified he and counsel never discussed possible defenses to any of his charges. (PCR Tr. p. 14). Applicant testified his co-defendant accepted a plea offer with six months of their arrests and agreed to cooperate with the State. (PCR Tr. p. 15). He testified he and counsel never discussed the possibility of his co-defendant testifying against him. (PCR Tr. p. 15-16). He also testified counsel and he never discussed his statement or who they could challenge its admission at trial. (PCR Tr. p. 16). Applicant testified he was aware of the surveillance video from inside the Wal-Mart, but that he and counsel did not discuss how to challenge its admission. (PCR Tr. p. 17). He testified he and counsel did not discuss how to challenge any possible identification evidence that might come in at trial either. (PCR Tr. p. 17).

Applicant testified he remembered telling the plea court he was satisfied with counsel's services and wanted to plead guilty. (PCR Tr. p. 22-23, 26-28). He testified at the time of his plea, those answers were honest and accurate, but now that he has had two years in the Department of Corrections to research the law and his case, he feels counsel did an inadequate job preparing and handling his case. (PCR Tr. p. 23, 26).

The State presented trial counsel Grover Seaton (Counsel). Counsel testified he has been practicing law for twenty-one years. (PCR Tr. p. 30). He testified he recalls meeting with Applicant more than two times, and additionally, that he met with Applicant's parents multiple times and his paralegal frequently met with Applicant. (PCR Tr. p. 30). He testified he reviewed



discovery with Applicant and that his paralegal delivered a copy to Applicant. (PCR Tr. p. 30-31). He testified both of Applicant's co-defendants were going to testify against him and that he discussed this with Applicant. (PCR Tr. p. 34). He elaborated one of the co-defendants had already provided a proffer for the State, and at the last minute, Applicant's other co-defendant decided he was willing to testify against Applicant. (PCR Tr. p. 34, 39-40). He testified this "absolutely" impacted his decision to advise Applicant to plead guilty because he thought Applicant would be convicted if he went to trial. (PCR Tr. p. 35-37). He testified there was no DNA or forensic evidence implicating Applicant. (PCR Tr. p. 41).

Counsel testified he entered into plea negotiations with the State at Applicant's request. (PCR Tr. p. 34). He testified he advised Applicant it was in his best interest to accept the State's plea offer that allowed him plead to the lesser-included offense of voluntary manslaughter. (PCR Tr. p. 34). He testified the State's plea offer was only available until the following day and he advised Applicant to discuss the offer with his parents over the evening before making his decision. (PCR Tr. p. 35-36). Counsel testified this was the first real offer the State made. (PCR Tr. p. 36). He testified he would have been prepared to go to trial if necessary and he would have fully prepared Applicant for trial. (PCR Tr. p. 37). He testified a trial was two weeks to a month off when Applicant pled guilty. (PCR Tr. p. 39). He testified he had not yet filed any motions on Applicant's behalf. (PCR Tr. p. 42).

He testified he reviewed the elements of all of Applicant's original charges and the lesser-included offense to which he pled. (PCR Tr. p. 32). Counsel testified he discussed possible defenses with Applicant, including a purported alibi defense that would not have been successful at trial. (PCR Tr. p. 32). Counsel elaborated the defense would not have been successful because



both of his co-defendants were going to testify against him and neighbors reported someone matching Applicant's description going into the victim's house. (PCR Tr. p. 33).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony at the post-conviction relief hearings. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility and weigh their testimony accordingly. Specifically, this Court finds trial counsel's testimony credible and finds Applicant's testimony not credible. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (1985).

Ineffective Assistance of Counsel

In a post-conviction relief action, an applicant has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant alleges ineffective assistance of counsel as a ground for relief, he or she 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." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. 441, 334 S.E.2d 813. The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Courts presume counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, 286 S.C. 441, 334 S.E.2d 813. The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). Judicial scrutiny of counsel's performance must be highly deferential, as it is all too tempting for a defendant to second-guess counsel's assistance after

conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. Strickland, 466 U.S. at 689. "[W]hen counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel." Smith v. State, 386 S.C. 562, 567, 689 S.E.2d 629, 632 (2010) (citing Caprood v. State, 338 S.C. 103, 110, 525 S.E.2d 514, 517 (2000)).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. With respect to guilty plea counsel, 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 (1985).

The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 466 U.S. 668.



After careful review of the entire record, including the testimony presented at the evidentiary hearing, based on the standard discussed above, this Court finds Applicant has failed to carry his burden in this action in regards to all of his allegations of ineffective assistance of counsel. The Court finds plea counsel adequately conferred with Applicant, reviewed all pertinent discovery materials with Applicant, was prepared for trial when Applicant elected to forgo trial and enter a guilty plea, and fully advised Applicant of all aspects of his guilty plea. Ultimately, this Court finds plea counsel was thoroughly competent in his representation of Applicant and in his advice to Applicant that a guilty plea was in his best interest.

Allegation: Failure to File Motions on Applicant's Behalf

Applicant alleges plea counsel was ineffective for failing to file motions on his behalf, including a motion to suppress, motion to vacate, or a motion for a bond hearing. At the hearing, counsel testified he had not filed any motions on Applicant's behalf. However, counsel also testified Applicant's trial was likely at least two weeks to a month. This Court finds Applicant has failed to meet his burden of establishing counsel's deficiency regarding failure to file motions. As counsel testified, Applicant's trial was at least two weeks away, giving counsel ample time to research, draft, and file any appropriate pre-trial motions on Applicant's behalf. This court declines to find counsel deficient for failing to file motions on Applicant's behalf weeks before an anticipated trial date, particularly when Applicant asked counsel to negotiate a favorable plea offer on his behalf. Moreover, Applicant failed to establish any potential motions would have been successful and had any impact on Applicant's proceeding. Therefore, Applicant cannot establish any requisite prejudice necessary for relief.



Allegation: Failure to Inform Applicant of New Charges

Applicant alleges counsel was ineffective for failing to inform him of new charges. Applicant testified counsel did not advise him of the grand larceny of first-degree burglary charges until shortly before his guilty plea when he presented Applicant with the guilty plea sheets and asked him to sign them. To the contrary, Counsel testified he reviewed all charges with Applicant, including the new charges and lesser-included offenses. As mentioned above, this Court finds counsel's testimony to be credible and find counsel adequately conferred with Applicant regarding all of his charges. Therefore, this Court finds this allegation must be denied and dismissed.

Allegation: Refusal of Preliminary Hearing

Applicant alleges counsel was ineffective for refusing a preliminary hearing on his behalf without consulting with him or obtaining his consent. Applicant failed to present any testimony or evidence to support this allegation. Therefore, this Court finds Applicant has failed to meet his requisite burden of proof.

In a preliminary hearing, the State must show that there was "probable cause" to arrest the defendant for the commission of some crime. Absent this showing, the charge must be dismissed. State v. McClure, 277 S.C. 432, 434, 289 S.E.2d 158, 160 (1982) The defendant's right to request a preliminary hearing is provided solely by state statute; it is not required by either the State or Federal Constitution and is not necessary before a grand jury can indict a person for a crime. State v. Irby, 166 S.C. 430, 164 S.E. 912 (1932). South Carolina statutory law specifically provides that an accused may be brought to trial under indictment by a grand jury without a preliminary hearing in some cases. State v. Nesmith, 213 S.C. 60, 48 S.E.2d 595



(1948). The indictment itself constitutes a finding of probable cause and thus avoids the need for a preliminary hearing. United States v. Werbrouck, 589 F.2d 273 (7th Cir. 1978).

S.C. Code Ann. § 22-5-320, provides a right to preliminary hearing upon proper demand.

However, an accused can waive this right in several ways:

- (1) Failure to request a hearing;
- (2) Failure to comply with statutory requirements for the request;
- (3) Failure to appear, at least through an attorney, at the scheduled hearing; and
- (4) Plea negotiations and silence before the trial court regarding the desire for a preliminary hearing when entering a guilty plea.

O'Neil v. State, 277 S.C. 230, 231-32, 285 S.E.2d 352, 352-53 (1981) (internal citations omitted). In the post-conviction relief context, our courts have held an applicant waived his right to a preliminary hearing by entering into plea negotiations with the State and for failing to raise the issue when entering his or her guilty plea. Bonnette v. State, 277 S.C. 17, 282 S.E.2d 597 (1981); O'Neil, 277 S.C. at 231-32, 285 S.E.2d at 352-53.

In the present case, Applicant entered into plea negotiations with the State and did not voice any objections or otherwise request a preliminary hearing when entering his guilty plea. Therefore, this allegation must be denied and dismissed with prejudice.

Allegation: Failure to Inform of Right to Appeal

Applicant alleges counsel was ineffective for failing to inform him of his right to appeal. No testimony was presented on this issue at the evidentiary hearing. However, at the guilty plea proceeding, the plea court advised Applicant of his right to appeal, that an appeal must be filed in writing within ten days of the plea proceeding, and that an attorney would be appointed to

present him on his appeal if he could not afford one. (Plea Tr. p. 24-25). Applicant acknowledged this and told the plea court he understood his appellate rights. (Plea Tr. p. 24-25).

"In determining guilty plea issues, it is proper to consider the guilty plea transcript as well as evidence at the PCR hearing." Suber v. State, 371 S.C. 554, 558, 640 S.E.2d 884, 886 (2007). "Specifically, the voluntariness of a guilty plea is not determined by an examination of a specific inquiry made by the sentencing judge alone, but is determined from both the record made at the time of the entry of the guilty plea, and also from the record of the PCR hearing." Roddy, 339 S.C. 29, 33, 528 S.E.2d 481, 420 (2000).

Based on the record from Applicant's guilty plea proceeding, this Court finds Applicant was fully informed of and understood his appellate rights. Therefore, this allegation must be denied and dismissed with prejudice.

Allegation: Misled Applicant to Plead Guilty by Lying to Him

Applicant alleges counsel was ineffective by misleading him to plead guilty by lying to him. However, Applicant has failed to set forth how counsel lied to him to procure his guilty plea. Counsel testified he thoroughly advised Applicant of all of the State's evidence and the entered into plea negotiations with the State at Applicant's request. This Court finds Applicant has failed to meet his requisite burden of proof and must be denied and dismissed with prejudice.

CONCLUSION

Based on all the foregoing, this 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.

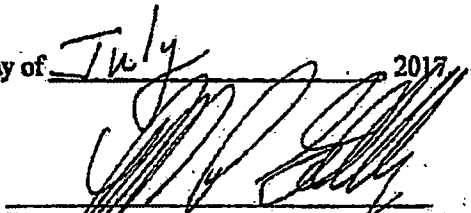


This Court notes Applicant must file and serve a notice of appeal within thirty days from the receipt of this Order by counsel of record to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an applicant has a right to an appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCR, provides if the applicant wishes to seek appellate review, post-conviction relief counsel must serve and file a Notice of Appeal on the Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. This application for post-conviction relief must be denied and dismissed with prejudice; and
2. The Applicant shall remain in the custody of the State.

AND IT IS SO ORDERED this 28 day of July 2017



BROOKE P. GOLDSMITH
Presiding Judge
Ninth Judicial Circuit

_____, South Carolina

AMW2012-07-01146

WITNESSES

Hanford Police Department

AGENCY CASE NUMBER

201227996

ARREST WARRANT NUMBER

2012A0820300025

DATE OF ARREST

July 19, 2012

ACTION OF GRAND JURY

True Bill

[Signature]
Foreperson of Grand Jury
Date: 9-19-12

VERDICT

Foreperson of Petit Jury

Date:

INDICT

DOCKET NO. 2012GS0801693

The State of South Carolina

County of Berkeley

COURT OF GENERAL SESSIONS

September Term 2012

THE STATE

Vs

ROBERT ANDREW MCFADDEN
DOB: 1987 [REDACTED]
B/M

Indictment for

Murder

MARY P. BRAUN
CLERK OF COURT
BERKELEY COUNTY, S.C.

12 SEP 19 PM 12:12

FILED

[Signature]

[Handwritten mark]

AMW2012-07-01146

WITNESSES

Hanahan Police Department

AGENCY CASE NUMBER

201227996

ARREST WARRANT NUMBER

Direct Indictment

DATE OF ARREST

July 19, 2012

ACTION OF GRAND JURY

True Bill

Foreperson of Grand Jury

Date: 2-10-2015

VERDICT

Foreperson of Petit Jury

Date:

INDICT

DOCKET NO. 2015GS0800120

The State of South Carolina

County of Berkeley

COURT OF GENERAL SESSIONS

February Term 2015

THE STATE

vs.

ROBERT ANDREW MCFADDEN

DOB: 1987-[REDACTED]

B/M

Indictment for

Burglary, First Degree

CDR: 0079

FILED
15 FEB 10 PM 1:14
JPH
CLERK OF COURT
BERKELEY COUNTY, S.C.

JPH

STATE OF SOUTH CAROLINA)
)
COUNTY OF BERKELEY)

INDICTMENT

At a Court of General Sessions, convened on February 10, 2015 the Grand Jurors of Berkeley County present upon their oath:

Burglary, First Degree

That Robert Andrew McFadden did in Berkeley County, South Carolina, on or about July 15, 2012, willfully, unlawfully, and feloniously enter the dwelling of Roy Ray Bennett, located at [REDACTED], without consent and with the intent to commit a crime therein, to wit; larceny. These acts occurring with the following circumstances of aggravation, the defendant was armed with a deadly weapon or explosive; or causes physical injury to a person who is not a participant in the crime; or is in violation of Section 16-11-311 of the South Carolina Code of Laws (1976) as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.



ANNE M. WILLIAMS
ASSISTANT SOLICITOR

AMW2015-03-00674

WITNESSES

Hanahan Police Department

AGENCY CASE NUMBER

201227996

ARREST WARRANT NUMBER

2015GS0800391

DATE OF ARREST

July 19, 2012

ACTION OF GRAND JURY

Person of Grand Jury
Date:

VERDICT

Foreperson of Petit Jury

Date:

INDICT

DOCKET NO. 2015-GS-08-00391

The State of South Carolina

County of Berkeley

COURT OF GENERAL SESSIONS

March Term 2015

THE STATE

vs.

ROBERT ANDREW MCFADDEN

DOB: 1987-[REDACTED]

B/M

Indictment for

Grand Larceny

Date of Arrest: 7/19/12
 Agency: Hanahan Police Department
 Arrested by: [Signature]
 Date: 7/19/12
 Agency: Hanahan Police Department

