

STATE OF SOUTH CAROLINA

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S.C. SUPREME COURT

DeAndrea G. Benjamin, Circuit Court Judge

NATHANIEL MCMILLIAN,

PETITIONER

v.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2018-000204

APPENDIX

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STATE OF SOUTH CAROLINA)
)
COUNTY OF LEXINGTON)

COURT OF GENERAL SESSIONS
2012-GS-32-02543
2012-GS-32-02551
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2012-GS-32-02553
2012-GS-32-02559

STATE OF SOUTH CAROLINA)
)
vs.)
)
NATHANIEL McMILLIAN)
)
DEFENDANT)

TRANSCRIPT OF RECORD

October 2, 2012
Lexington, South Carolina

B E F O R E:

HON. ROGER M. YOUNG, SR., Judge.

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

L. SUZANNE MAYES, ASSISTANT SOLICITOR
Attorney for the STATE

ROBERT M. MADSEN, PUBLIC DEFENDER
Attorney for the DEFENDANT

CAROL M. THUEME, RPR
Official Court Reporter

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EXHIBITS

(There were no exhibits marked.)

1 THE CLERK: Nathaniel McMillian, come around.

2 Indictment 2012-GS-32-02543, the State versus
3 Nathaniel McMillian, indicted for attempted burglary 1st,
4 pleading as charged.

5 Indictment 2012-GS-32-2551, State versus
6 Nathaniel McMillian, indicted for burglary 1st, pleading
7 as charged.

8 Indictment 2012-GS-32-2552, the State versus
9 Nathaniel McMillian, indicted for criminal sexual conduct
10 in the 1st degree, pleading as charged.

11 Indictment 2012-GS-32-2553, the State versus
12 Nathaniel McMillian, indicted for armed robbery, pleading
13 as charged.

14 Indictment 2012-GS-32-2559, the State versus
15 Nathaniel McMillian, indicted for possession of a weapon
16 during commission of a violent crime, pleading as charged.

17 They are all signed and properly attested to.

18 All true-billed. Represented by Mr. Madsen.

19 Raise your right hand, please, sir.

20 NATHANIEL MCMILLIAN, after being duly sworn,
21 testified as follows:

22 THE PROBATION AGENT: Your Honor, Mr. McMillian
23 is on YOA parole, and this plea -- all of these
24 indictments will violate that YOA parole.

25 THE COURT: It doesn't seem that that's a big

1 concern given what he's facing, but thank you for pointing
2 that out to me.

3 THE PROBATION AGENT: Okay.

4 THE COURT: All right. You're Nathaniel
5 McMillian?

6 THE DEFENDANT: Yes, sir.

7 THE COURT: All right. Mr. McMillian, the clerk
8 read out the indictments. Let me go over the sentencing
9 ranges for you to make sure you understand what you're
10 doing. I've been told you want to plead guilty to each of
11 these charges.

12 So Indictment 2012-GS-32-2543 for attempted
13 burglary 1st degree, that is 15 years to life. You want
14 to plead guilty to that?

15 THE DEFENDANT: Yes, sir.

16 THE COURT: All right. Indictment
17 2012-GS-32-2551 is for burglary 1st degree, 15 years to
18 life. You want to plead guilty to that?

19 THE DEFENDANT: Yes, sir.

20 THE COURT: Indictment 2012-GS-32-2552, criminal
21 sexual conduct, 1st degree, zero to 30 years, you want to
22 plead guilty to that?

23 THE DEFENDANT: Yes, sir.

24 THE COURT: Indictment 2012-GS-32-2553, armed
25 robbery, is 10 to 30 years. Do you want to plead guilty

1 to that?

2 THE DEFENDANT: Yes, sir.

3 THE COURT: Indictment 2012-GS-32-2559,
4 possession of a weapon during the commission of a violent
5 crime, zero to five years. Do you want to plead guilty to
6 that?

7 THE DEFENDANT: Yes, sir.

8 THE COURT: All right. Now, all of these other
9 than the possession of a weapon during a violent crime are
10 serious, most serious strike offenses and they are
11 no-parole offenses, and a couple of them even have minimum
12 terms. So let me go over, first of all, with you strike
13 offenses. Do you understand what those are?

14 THE DEFENDANT: Yes, sir.

15 THE COURT: Have you talked over that with your
16 lawyer?

17 THE DEFENDANT: Yes, sir.

18 THE COURT: Well, let me go over it with you on
19 the record to make sure you understand.

20 You're familiar with the game of baseball,
21 right?

22 THE DEFENDANT: Yes, sir.

23 THE COURT: And you understand that, you know,
24 they use the phrase three strikes and you're out? Well,
25 we use that phrase to talk about what strike offenses are.

1 And every state has them, I believe, but in
2 South Carolina we have two types of strike offenses; we
3 have two strikes and we have three strikes.

4 Two-strike offenses in this state are known as
5 most serious offenses, and if you get two of those, you're
6 out. "Out" in this case means you go to jail for the rest
7 of your life without the possibility of parole.

8 Three-strike offenses are called serious
9 offenses. And if you get three of those, you go to jail
10 for the rest of your life without the possibility of
11 parole.

12 All of the charges that you are pleading today
13 to, other than the possession of a weapon charge, is of
14 the two-strike type, and while the State is not seeking to
15 have you incarcerated for the rest of your life without
16 the possibility of parole today, you will have basically
17 all the strikes you're ever going to get without going to
18 jail because your next conviction, if you ever have one
19 during your life, will be for life without parole.

20 Do you understand that?

21 THE DEFENDANT: Yes, sir.

22 THE COURT: Do you still want to plead guilty?

23 THE DEFENDANT: Yes, sir.

24 THE COURT: Do you also understand that all of
25 these charges are no-parole offenses; in other words,

1 whatever sentence the Court gives, other than the weapon's
2 charge, you have to do 85 percent.

3 Do you understand that?

4 THE DEFENDANT: Yes, sir.

5 THE COURT: Do you still want to plead guilty?

6 THE DEFENDANT: Yes, sir.

7 THE COURT: All right. Now, when you plead
8 guilty, you have some rights that you're giving up;
9 namely, the right to a jury trial and the right to remain
10 silent. If you want to plead today, that's fine. If you
11 decide during this process you change your mind and you
12 want to go to trial, you stop me and we'll arrange to have
13 a trial for you.

14 If you want a trial, the State then has to
15 present enough evidence to present to 12 jurors that
16 you're guilty beyond a reasonable doubt. All 12 jurors
17 have to agree that you are guilty in order to convict you.
18 And if convicted, you still have the right to appeal.

19 You can challenge the admissibility of the
20 State's evidence, you can put up evidence of your own, you
21 could testify if you want to, and if you don't want to
22 testify, the judge will instruct the jury that they're not
23 to hold that against you while they're deliberating.

24 Do you understand those rights?

25 THE DEFENDANT: Yes, sir.

1 THE COURT: Do you want to give up all those
2 rights and plead guilty today?

3 THE DEFENDANT: Yes, sir.

4 THE COURT: And are you pleading guilty to each
5 of these charges because you're guilty of each of these
6 charges?

7 THE DEFENDANT: Yes, sir.

8 THE COURT: Has anyone -- are you under the
9 influence of drugs or alcohol today?

10 THE DEFENDANT: No, sir.

11 THE COURT: Do you take any kind of prescription
12 medication?

13 THE DEFENDANT: No, sir.

14 THE COURT: Do you have any mental, emotional or
15 physical conditions which keep you from understanding what
16 you're doing today?

17 THE DEFENDANT: No, sir.

18 THE COURT: You're standing next to your lawyer.
19 Are you satisfied with his representation?

20 THE DEFENDANT: Yes, sir.

21 THE COURT: Do you need to spend any more time
22 with him before we proceed?

23 THE DEFENDANT: No, sir.

24 THE COURT: Has he done everything that you've
25 asked him to do in this case?

1 THE DEFENDANT: Yes, sir.

2 THE COURT: Now, you and he sat down and talked
3 about whether or not you should plead or go to trial; is
4 that correct?

5 THE DEFENDANT: Yes, sir.

6 THE COURT: He went over the evidence the State
7 has with you?

8 THE DEFENDANT: Yes, sir.

9 THE COURT: You all talked about whether or not
10 you would go and do some of those things I just talked
11 about; for instance, putting up a case, calling witnesses,
12 testifying, that sort of thing. Is that correct?

13 THE DEFENDANT: Yes, sir.

14 THE COURT: You understand that you would have
15 the right to have him try to suppress evidence, such as
16 identification of you perhaps, DNA evidence, calling alibi
17 witnesses, that sort of thing. You have those rights if
18 you go to trial.

19 Do you understand that?

20 THE DEFENDANT: Yes, sir.

21 THE COURT: You give up those rights when you
22 plead guilty today.

23 Do you understand that?

24 THE DEFENDANT: Yes, sir.

25 THE COURT: You want to give up all of those

1 rights and plead guilty; is that correct?

2 THE DEFENDANT: Yes, sir.

3 THE COURT: This is your decision and your
4 decision alone?

5 THE DEFENDANT: Yes, sir.

6 THE COURT: Has anybody promised you anything or
7 threatened you to get you to plead guilty other than it
8 looks like you and the State have reached an agreement
9 that the cap of any sentence that I give you today will be
10 no more than 25 years, but you can get up to 25 years.

11 Do you understand that?

12 THE DEFENDANT: Yes, sir.

13 THE COURT: Other than that recommendation, that
14 I give you no more than 25 years, has anybody promised you
15 anything or threatened you to get you to plead guilty?

16 THE DEFENDANT: No, sir.

17 THE COURT: How old are you?

18 THE DEFENDANT: Twenty-five.

19 THE COURT: How far did you get in school?

20 THE DEFENDANT: Graduated.

21 THE COURT: From?

22 THE DEFENDANT: Bradwell Institute.

23 THE COURT: Where is that?

24 THE DEFENDANT: Hinesville, Georgia.

25 THE COURT: So that's like high school?

1 THE DEFENDANT: Yes.

2 THE COURT: Okay. Did you work before you got
3 arrested?

4 THE DEFENDANT: No, sir.

5 THE COURT: What did you do with your days?

6 THE DEFENDANT: Tried to find work.

7 THE COURT: Are you married?

8 THE DEFENDANT: No, sir.

9 THE COURT: Do you have children?

10 THE DEFENDANT: Yes, sir.

11 THE COURT: How many?

12 THE DEFENDANT: One son.

13 THE COURT: How old is he?

14 THE DEFENDANT: Six years old.

15 THE COURT: All right.

16 Well, Mr. Madsen, does this gentleman understand
17 what he's doing when he waives his right to a jury trial?

18 MR. MADSDEN: He does, Your Honor.

19 THE COURT: In your opinion, does he understand
20 what he's doing when he pleads guilty today?

21 MR. MADSDEN: He does, Your Honor.

22 THE COURT: Do you agree with his decision?

23 MR. MADSDEN: I do, Your Honor.

24 THE COURT: All right. I find his plea is
25 freely, voluntarily, and intelligently made.

1 What would the State like to tell me about the
2 case?

3 MS. MAYES: Yes, sir, Your Honor.

4 These incidents, there are three different
5 incidents with multiple charges as Your Honor sees before
6 you. The first incident -- I'm going to address them
7 briefly in chronological order.

8 The first incident occurred on November 22nd,
9 2011. That was a burglary 1st degree of the residence of
10 a Lindsey Nelson in the West Columbia area of Lexington
11 County.

12 Your Honor, at that point in time he was not
13 arrested and so he was still on the streets because they
14 were in the process of investigating that burglary.

15 Approximately five days later, on
16 November 27th, 2011, that is when the criminal sexual
17 conduct, 1st degree, the armed robbery and the possession
18 of a weapon during a violent crime occurred involving the
19 victim, Tiarra Tucker. Your Honor, that was a -- he was
20 completely unknown to that victim. He selected that
21 victim, and that crime occurred on November 27th, five
22 days after the burglary.

23 Because he was unknown and fled the scene, he
24 still had not been arrested at that point. And then later
25 on December 1st of 2011, approximately four days after

1 the rape and armed robbery, he was caught during the
2 commission of an attempted burglary, 1st degree, of the
3 residence of a Pamela Mack also in the West Columbia area
4 of Lexington County.

5 And I will go through at this point in time all
6 of the incidents and how he ultimately became -- was
7 identified as the person who committed each of these
8 crimes.

9 Also present in the courtroom, Your Honor, is
10 Detective Scott Neal of the West Columbia Police
11 Department who can also answer any questions that might
12 arise concerning these investigations.

13 Your Honor, I'm going to begin by addressing the
14 armed robbery and the rape of Tiarra Tucker.

15 Your Honor, as I stated before, that occurred
16 here in Lexington County on November 27th, 2011. This
17 crime occurred at 1:30 p.m. on a Sunday afternoon. And,
18 Your Honor, Tiarra Tucker, she is here and present in the
19 courtroom.

20 She was a student at Benedict College, which is
21 a local college here in the Columbia area. She was
22 actually in the process of walking from her home to the
23 library in West Columbia, which is within walking distance
24 of her home. And there is also a BoJangles right there
25 nearby, and so her plan -- she had her book bag with her.

1 Her plan was to sit down and get something to eat at
2 BoJangles and commence to studying there on a Sunday
3 afternoon, which is not unusual for a college student.

4 As she reported to law enforcement, they
5 actually located her at the area of the BoJangles at the
6 100 block of 12th Street in the city of West Columbia.
7 Officers made contact with Ms. Tucker who reported that
8 she had been attacked by an unknown male behind the
9 Wentworth Printing building located across the parking
10 lot.

11 Your Honor, when officers arrived, Ms. Tucker
12 was crying and the responding officer noted that she
13 appeared to have blood on her front teeth. The responding
14 officer asked Ms. Tucker if she needed medical attention
15 and began to ask her details about what had occurred.

16 Ms. Tucker reported that as she was walking to
17 the library, she looked behind her and observed a black
18 male who was also traveling in the same direction.
19 Ms. Tucker advised that he was approximately 40 to 50 feet
20 behind her at this point. Ms. Tucker stated that she
21 turned on to Meeting Street and walked past the back of
22 the West Columbia Library. She stated that she would
23 periodically look behind her to see the subject still
24 following.

25 Ms. Tucker stated that she called a friend using

1 her mobile phone; however, the friend didn't answer. She
2 was getting nervous at this point.

3 Ms. Tucker stated that as she approached the
4 intersection of Sims Street and Meeting Street, the
5 suspect caught up to her and began walking to her right
6 side. Ms. Tucker stated that he then asked her, Where
7 your man at? Ms. Tucker replied, At home. She stated
8 that he continued asking questions, but she didn't
9 respond.

10 She stated that he appeared to drop back away
11 from her as she crossed over the street. When she turned
12 to see where the suspect had gone, Ms. Tucker stated that
13 he was right behind her and grabbed her from behind.
14 Ms. Tucker stated that the suspect's right arm came across
15 her face, hitting her in the mouth, and his left arm
16 wrapped around her neck. Ms. Tucker stated that she tried
17 to fight the suspect off. During the struggle, she said
18 that her glasses were knocked off and that they both fell
19 to the ground where the struggle to get away continued.

20 Ms. Tucker stated that the suspect then stood
21 up, at which time she observed him to be holding a knife.
22 She stated that the knife looked similar to a butter knife
23 but also had a sharp edge to it. Ms. Tucker stated that
24 the suspect then tried to pull her off the ground telling
25 her, get up, get up. She stated that she told him, No,

1 you're trying to kill me. She stated that the suspect
2 told her, If you cooperate, I won't kill you.

3 After several attempts, he then pulled her to
4 her feet. Still holding the knife in his right hand, she
5 stated that he pulled her toward the back of the Wentworth
6 building.

7 While pulling her, she stated that her pants
8 were falling down and she pulled them back up. While
9 standing at the corner of the building, she reported that
10 he asked her how much money she had on her. She stated
11 she had gave him all the money she had, including her
12 change, which she estimated to be approximately \$20.

13 She stated that he had picked up a beer bottle
14 and was holding both the beer bottle and the knife. As he
15 tried to pull her towards the north side of the building
16 which would be out of the view from the rear parking lot
17 so that she'd be out of the view of anyone nearby, she
18 again told him, No, you're trying to kill me. She stated
19 that she told him to throw the knife away.

20 Ms. Tucker stated that the suspect tossed the
21 knife a short distance; however, she told him that it
22 wasn't far enough. She reported that he then tossed it
23 over the fence and dropped the beer bottle.

24 She stated that after he tossed the knife, he
25 started walking back towards her. She stated she asked

1 him, What else do you want? He replied, I want sex. She
2 stated that she picked up the beer bottle that he had
3 previously had and threw it at him; however, it went in
4 the opposite direction.

5 Ms. Tucker stated that the suspect then demanded
6 for her to pull down her pants and take them off. After
7 refusing several times, she complied. Ms. Tucker stated
8 that the suspect also took off his pants and underwear.
9 She stated that he then approached her. While grabbing
10 his genitalia, she stated that he penetrated her twice
11 with his fingers on his right hand. She stated that the
12 suspect then told her to turn around and put her purse and
13 book bag down, which she refused to do. After being told
14 several times, she turned around and the suspect told her
15 to bend over, which she again refused. She stated that he
16 again penetrated her vagina with two fingers and attempted
17 to actually have intercourse with her. After that, she
18 reports that he -- the suspect backed up and began getting
19 dressed. She stated that she turned to see him pulling up
20 his pants. He told her, You don't know me, you didn't see
21 me, nothing happened, and then started walking away.

22 Ms. Tucker stated that she then put her clothes
23 and shoes back on and ran to BoJangles. Ms. Tucker stated
24 that she contacted her mother and then called 911. All of
25 that was confirmed, Your Honor, that she did go to

1 BoJangles and called 911 from there. That's actually
2 where law enforcement located her.

3 Upon arrival, the Lexington County Canine Unit
4 responded. Ms. Tucker advised that the last location, the
5 suspect had been in the area of Meeting Street and Sims
6 Street, but she didn't know which direction he had gone.
7 The canine unit was able to track that area; however, with
8 negative results. When asked, Ms. Tucker advised that she
9 had not used anything except a paper towel to wipe the
10 blood off of her mouth. As a result, she was sent to the
11 hospital for a sexual assault examination. She was able
12 to give a description of the suspect as approximately five
13 foot nine, 170 pounds, dark complexion, that he was
14 wearing an orange puffy jacket.

15 Your Honor, the orange puffy jacket stood out
16 because that apparently is an item of clothing that he was
17 known to wear around the area and it matched the
18 description to the suspect of one of the burglaries.

19 Your Honor, two days later, on November 29th,
20 2011, Officer Myers reported that he had been working a
21 burglary in the area that was in close proximity to where
22 Ms. Tucker lived. He stated that the suspect was a male,
23 had a distinct stutter, and provided photographs of the
24 suspect that were taken of surveillance video at Simba's
25 Express there in the West Columbia area.

1 He stated that the victim in the burglary
2 advised him that the male in the photograph was the same
3 person who had been seen leaving her residence during the
4 attempted burglary. It was further discovered that he was
5 known to wear an orange puffy-style jacket which had been
6 described by the victim in the sexual assault case. He
7 also advised that one of the only items stolen from the
8 burglary were the victim's underwear.

9 As a result of that, Your Honor, Nathaniel
10 McMillian was identified as a suspect in both the burglary
11 and the sexual assault of Tiarra Tucker. Officers noted
12 that he had actually on December 1, 2011, been found at
13 the incident location while breaking or attempting to
14 break into the residence of Pamela Mack, and that is the
15 final indictment before you, Your Honor. That is the
16 attempted burglary.

17 Captain Ziegler stated that he had called
18 Investigator Bramlett and requested for officers to
19 respond there to the crime scene. Investigator Turner was
20 in the process of obtaining a statement from Ms. Mack
21 while the defendant remained in a holding cell. As a
22 result, officers went to the interview room and advised
23 Mr. McMillian of his Miranda rights, which he did waive in
24 writing. He also agreed to voluntarily speak with
25 investigating officers.

1 Your Honor, Mr. McMillian was advised -- having
2 been advised of his Miranda rights, he reported that he
3 had been living in the West Columbia area since August of
4 2011. He stated that he was living in a halfway house in
5 Red Bank here in Lexington County following his release
6 from prison. He stated that while at the halfway house,
7 he had met a female through an online dating website. Her
8 name was Laquanda English, and as a result, he had moved
9 into her apartment which was located at [REDACTED]
10 [REDACTED], and that's in the West Columbia area. So, Your
11 Honor, that's actually what brought him apparently to the
12 West Columbia area, is having met a female online.

13 Mr. McMillian stated that on the day of this
14 incident, he and the girlfriend began arguing over money
15 for bills because her electricity had been cut off. This
16 is referring to the final attempted burglary. He stated
17 that he left the house around noon and left with all of
18 his belongings. He stated that he walked behind a trash
19 dumpster located across from the apartment and found a
20 crate that he sat on. And, Your Honor, that's important
21 because he was actually noted to be attempting to break
22 into that residence by use of the crate to stand up and
23 reach a window area.

24 The following day, Your Honor, the investigating
25 officer met with the victim, Ms. Tiarra Tucker, at her

1 residence. She was presented with a photo lineup that
2 included the defendant's photograph as a subject in the
3 sexual assault. The investigating officer -- she was able
4 to positively identify him as the person who committed the
5 sexual assault.

6 Following that, Your Honor, the investigating
7 officer then advised Mr. McMillian of his Miranda rights
8 and interviewed him in reference to the sexual assault of
9 Tiarra Tucker. He stated that he followed a black female
10 down past the library and attacked her near the entrance
11 to the Wentworth Printing. Mr. McMillian did complete a
12 written statement, detailed in his own words, in which he
13 admitted to the sexual assault of Tiarra Tucker.

14 The investigating officer also spoke with him
15 about the possibility of recovering the knife from the
16 incident. Investigator Wade went and asked Mr. McMillian
17 about the knife, which he stated that he had thrown the
18 knife over a fence line near a pond. Mr. McMillian then
19 led Investigator Wade to where the knife was recovered
20 within close proximity of the crime scene. The knife was
21 photographed and collected by Investigator Bramlett and
22 logged in to evidence.

23 Your Honor, also in reference to the sexual
24 assault of Tiarra Tucker and the armed robbery of Tiarra
25 Tucker, I will note that she went to the hospital for a

1 sexual assault examination immediately following her call
2 to 911 after running across the street to BoJangles, and
3 there were a number of injuries that were noted during the
4 course of her sexual assault examination.

5 Your Honor, these included an abrasion to the
6 right side of the neck, an abrasion to the front of the
7 neck, an abrasion to the upper lip, dried secretions which
8 were red in color consistent with blood to both the upper
9 and lower lips. Also a bruise, reddish-purple bruises
10 were noted inside the mouth on the inner aspect of the
11 right cheek consistent with being hit in the mouth as she
12 reported at the beginning of the sexual assault. They
13 also noted abrasions to the right foot, the knee, and the
14 lower left leg consistent with the struggle that ensued
15 there at the back of the Wentworth building as she was
16 trying to get away.

17 Your Honor, I'm going to also address the first
18 incident which was the burglary of the residence of
19 Lindsey Nelson, and this occurred on November 22nd, 2011.

20 On November 22nd, 2011, officers responded to
21 718 Andrea Court in West Columbia in reference to an
22 attempted burglary report. They made contact with Lindsey
23 Nelson who stated that she had been approached by an
24 unknown male subject wearing a large orange jacket outside
25 of her residence that morning as she went to go jogging.

1 Ms. Nelson stated that she had been approached
2 by this same subject before in the past and every time she
3 has seen him, the subject has worn the same large orange
4 jacket. Ms. Nelson stated that today, the subject
5 followed her on foot as she walked toward Double Branch
6 Road and asked where is she going and when will she be
7 back. Ms. Nelson stated that she told the subject to
8 leave her alone, and he stopped following her up the road.

9 Ms. Nelson stated that when she returned to her
10 residence at 9:45 a.m., she noticed the right side window
11 to her residence to be broken. Ms. Nelson further stated
12 that she was advised by a friend that when she returned
13 home, that he had walked up to her residence while she was
14 gone and observed the subject leaning halfway through the
15 broken window. Ms. Nelson stated that the neighbor,
16 Mr. Ramanda, advised her that the subject had seen him and
17 then took off on foot across the street. Ms. Nelson
18 stated that the neighbor reported that because the suspect
19 had fled prior to her arrival, he was not able to make any
20 further identification.

21 Ms. Nelson stated that her phone was currently
22 not working and that she -- basically, Your Honor, she was
23 not able to give any more details of what had happened
24 other than what the neighbor had reported to her about
25 seeing the subject leaning in the window.

1 What stuck out to her was that she had been
2 approached by the subject in the orange jacket asking her
3 questions just before she went on the jog. Ms. Nelson
4 confirmed that there had been no actual entry to the
5 residence. Nothing appeared to be taken from inside other
6 than the damage to the broken window. And, Your Honor,
7 that was consistent with what the neighbor reported which
8 had seen him lean in the window, then the neighbor, in
9 effect, interrupts the burglary and the defendant flees
10 the scene. That occurred approximately five days before
11 the rape and armed robbery of Tiarra Tucker.

12 The final incident, Your Honor, is the incident
13 which occurred on September 1st, 2011, and that is the
14 attempted burglary of the residence of Pamela Mack.

15 On December 1st, 2011, officers with the West
16 Columbia Police Department responded to [REDACTED]
17 within the city of West Columbia in response to a
18 suspicious person that had been located at that address.

19 The victim, Pamela Mack, stated that she had
20 observed the male subject, later identified as Nathaniel
21 McMillian, behind her residence. She stated that she saw
22 him coming towards her window, and she went to call 911.
23 She stated that she heard a loud noise as if the window
24 had been knocked out.

25 Once officers made contact with the defendant,

1 he was escorted to the West Columbia Police Department.
2 He was then advised of his Miranda rights, which he waived
3 and agreed to speak without -- agreed to speak about the
4 incident.

5 Ultimately, Your Honor, he stated that he had
6 been on the property and had been at the window as well as
7 on top of the air conditioner unit; however, he denied
8 breaking the window.

9 The actual statement, Your Honor, supplied by
10 Pamela Mack, who is the resident of that location, is that
11 on December 1st, 2011, a little after 4 o'clock, myself
12 and nephew was walking home and saw a guy in an orange
13 coat behind our house. He kept looking over the fence.
14 We ran upstairs, locked the door and called the police. I
15 stayed on the phone and watched him go from behind our
16 house to the back of Gentle Times Apartments. Then he got
17 up and walked through the bushes back towards the house.
18 I guess he saw the police and tried to break in. We heard
19 a loud noise, then the other officers walked him around on
20 the Earl Court side. We left and went across the street.

21 Then I was asked about the window. The one I
22 was looking through had not been broken. The cooler was
23 moved like he used it to stand on. I saw a second window
24 and it wasn't broken either.

25 So, Your Honor, that's how he was developed as a

1 suspect in the previous incident is he's still wearing
2 that orange jacket, he's still in a very close proximity
3 to where the other incidents occurred.

4 And, Your Honor, I will note that what seems to
5 stand out in all of these cases is that these are female
6 victims. And he certainly approached Tiarra Tucker
7 knowing that she was a female walking alone. And each of
8 the burglary cases also involved female victims. As
9 Ms. Mack stated, he actually would have seen her with the
10 child going there inside the residence, that he would know
11 she was in there.

12 All of the -- the selection of all of these
13 female victims, Your Honor, from the State's perspective
14 does indicate that he has some type of predator-like
15 behavior, in that he selects victims that he apparently
16 views as vulnerable.

17 Your Honor, I can also add additional
18 information concerning his prior record when the Court
19 deems appropriate.

20 THE COURT: Go ahead.

21 MS. MAYES: It looks like, Your Honor, he is
22 originally from the state of Georgia or had ties to
23 Georgia prior to coming here to South Carolina. In 2005,
24 there is a conviction for theft by shoplifting. Other
25 than saying guilty and adjudicated, it doesn't give

1 specific details concerning that sentence.

2 Then here in South Carolina, he was convicted in
3 Georgetown County in 2007. The first conviction, the
4 sentencing date was March 21st, 2007, and that was a
5 conviction for burglary in the 2nd degree. Ultimately, he
6 pled to a non-violent burglary 2nd degree, but the
7 allegations are that he broke into the dwelling of an
8 Alicia Medina during the nighttime.

9 The second, Your Honor, is a conviction for
10 December 18th, 2007. This is also a conviction for
11 burglary 2nd degree that was pled as a non-violent
12 burglary. And there it is alleged that he broke into the
13 dwelling of Darlene Wilson in Dorchester County. The
14 information alleged is that when he broke into that
15 particular residence of Darlene Wilson, that once inside,
16 he removed property from the residence and placed it in
17 the wood line behind the house in an attempt to deprive
18 the owner of the property, and the defendant then fled the
19 residence upon the return of the homeowner. And he was
20 positively identified by the victim in that case after
21 being shown a photograph by officers.

22 Your Honor, in the previous burglary that I
23 noted, and that was the burglary of Alicia Medina in
24 Georgetown County, it's alleged in the warrant that he
25 broke into the house and took approximately \$13 in change

1 and was taken from the -- that was taken from the victim's
2 bedroom and a computer monitor from the living room. The
3 owner of the residence was inside at the time scared for
4 her life and she ran out the back door. And that crime
5 occurred, according to the warrant and to the indictment,
6 during the nighttime.

7 Your Honor, also present in court is Tiarra
8 Tucker and Scott Neal of the West Columbia Police
9 Department. I believe they do wish to address the Court
10 concerning sentencing at the appropriate time.

11 THE COURT: All right. Go ahead.

12 MS. FRAZIER: Your Honor, my name is Wendy
13 Frazier. I'm a victim advocate here at the Solicitor's
14 office.

15 Ms. Tucker is very nervous and she's afraid,
16 she's fearful. She would like for me to read a letter
17 that she wrote. I'll read brief portions of it.

18 For days I could not sleep or eat. My siblings
19 said that I used to fight sleep at night. She said she's
20 scared of going out of the house by herself and walking
21 anywhere. To this very day she still won't walk the way
22 that she went that day that she was attacked going to the
23 library. She said her heart used to jump sometimes
24 like -- and it felt like it was in her stomach when she
25 saw someone who looked similar to the defendant at school

1 and when she even -- she knew he was in jail even. She
2 would continuously look him up online to make sure he was
3 still there. And she made sure that she carried her Mace
4 with her everywhere that she went while looking all around
5 her to make sure she was safe. She's always on alert when
6 people are around her. She said it took her almost a
7 year, but she has forgiven him. But she will never forget
8 what he did to her. And she said she's very happy or very
9 glad that he's locked up because he can't hurt anyone
10 else. And she would like to tell Your Honor what she'd
11 like to see happen to the defendant.

12 THE COURT: Yes, ma'am.

13 MS. TUCKER: I would like him to see as much
14 time as he can so he won't hurt no one else.

15 THE COURT: All right. Thank you.

16 MS. MAYES: There is also an ambulance bill
17 associated with this case, Your Honor, following the
18 treatment of Ms. Tucker. We're not seeking restitution in
19 this case. I think it's pretty apparent we are seeking a
20 significant prison sentence.

21 DETECTIVE NEAL: As you can tell, the victim in
22 this case, Ms. Tucker, she's very shy and probably one of
23 the nicest people I've ever met in my life. And I'm glad
24 she was able to speak in front of you this morning.

25 She's a 21-year-old Benedict College student.

1 She's tried very hard. She has aspirations to be a
2 teacher. She wants to work with kindergarten kids when
3 she finishes school at Benedict.

4 In regards to Mr. McMillian, he had only been
5 staying in West Columbia for a short period of time, and
6 as you've heard earlier, he's caused a lot of issues and a
7 lot of problems for us. This is a community that's not
8 used to these kind of things happening. The attack on
9 Ms. Tucker was in broad daylight at 1:30 on a Sunday
10 afternoon as she was walking to the library. These things
11 don't happen in West Columbia, in particularly in this
12 neighborhood, in this area that all this stuff happened.
13 Everything that he's charged with all occurred within
14 probably a half mile of each other in this neighborhood.

15 And then Ms. Mack, the other victim in the
16 attempted burglary that lived on Earl Court was actually a
17 relative of Ms. Tucker, so this whole family has been
18 affected in more than just the charges involving
19 Ms. Tucker.

20 We ask that you give him the maximum sentence
21 possible due to the issues that he's caused us and due to
22 the problems and the pain he has given to this community.

23 THE COURT: What's the basis for the State's
24 recommendation of a 25-year cap?

25 MS. MAYES: Your Honor, I will say that he

1 confessed to all of the offenses when he was interviewed
2 by Investigator Neal. I think initially there might have
3 been some denials to some of the offenses, but ultimately
4 he gave a full confession to the sexual assault and the
5 armed robbery of Tiarra Tucker and actually led them to
6 the knife, and there is some consideration for that, Your
7 Honor. But these are no-parole offenses. So we do view a
8 25-year sentence or the potential of a 25-year sentence as
9 a significant sentence since he would serve 85 percent of
10 whatever sentence he receives. There's also the mandatory
11 minimum of at least 15 years because he's pleading to the
12 burglary 1st.

13 THE COURT: Okay. Anything else from the State?

14 MS. MAYES: Nothing at this time, Your Honor.

15 THE COURT: All right. Well, what would you all
16 like to tell me about Mr. McMillian?

17 MR. MADSDEN: Judge, obviously this is a tough
18 case. And I don't mean that -- some cases you have are
19 tough factually, and that's not this case. The State had
20 a strong case against Nate. I can tell you he's
21 cooperated, never denied any of this when I met with him,
22 so it's not tough that way. It's certainly not a tough
23 legal case. The tough part about this is kind of
24 reconciling that conduct that he did with the fellow that
25 I've gotten to know over ten months. I can tell you, and

1 you might have gotten the sense, he's a very soft spoken,
2 very easy to get along with client. He has been in jail
3 the entire time.

4 I can tell you that when I originally got the
5 case, this was never going to be a trial. In fact, quite
6 honestly, most of the time we've been waiting. He was
7 charged initially with, I believe, burglary 2nd and
8 attempted burglary 2nd. A majority of the time was the
9 Solicitor getting the prior convictions so that they could
10 be enhanced to a burglary 1st. She was able to get that
11 and we were able to negotiate this plea with her.

12 He has worked in the past mainly at Amick's
13 Farms and Columbia Farms, which are chicken plants. He
14 was living at that New Beginnings, quite honestly was
15 having trouble finding employment. As the Solicitor had
16 mentioned, he and his girlfriend had had kind of a dispute
17 because the lights had gotten turned out because they just
18 didn't have money and he obviously made some very bad
19 choices, but I can just tell you, I mean, it's just hard
20 to reconcile the guy that I go see in jail with the fellow
21 who has done this.

22 You know, he knows that he's going to serve a
23 significant punishment. He's been in jail since
24 December 1st, which by my calculation is 306 days.

25 I believe that he would like to address Your

1 Honor. But we would ask Your Honor to consider giving him
2 that 15-year sentence. It is still a significant
3 punishment. He would serve well over a decade in prison
4 and come out, quite honestly, middle-aged as compared to
5 being in his young twenties as he is right now.

6 THE COURT: Mr. McMillian, would you like to say
7 anything?

8 THE DEFENDANT: Yes, sir.

9 I want to take this opportunity to apologize. I
10 am aware of what I did, and as they said, I did cooperate
11 in the situation. I did as much as I could to cooperate
12 because of the fact that I couldn't take back what I did.
13 I can't take back the feelings or the things that the
14 victims are going through, but all I can do is accept the
15 fact that I did wrong and I have to be punished for that
16 wrong.

17 THE COURT: All right. Well, I suppose if
18 there's anything that is redeeming is you were willing to
19 step up and cooperate, and for that I suppose you should
20 get a little bit of credit. But in terms of the facts of
21 these cases, that means not putting you away for the rest
22 of your life as opposed to looking at a minimum of 15.

23 I think 25 years is very appropriate. I'm also
24 going to put down on here that I'm going to recommend that
25 you be evaluated by the sexually violent predator program

1 team at the end of your sentence so that -- because of the
2 pattern of the facts, I'm a little bit concerned about
3 whether or not you have a propensity towards reoffending.
4 And so they have a program called sexually violent
5 predator program. They will evaluate to determine whether
6 or not you ever get released back into the public.
7 Obviously, you're also going to have to register as a sex
8 offender on that as a result of the CSC charge.

9 So on each of the charges, other than the
10 weapon's charge, it's 25 years. The weapon's charge
11 you'll get five. They'll run concurrent. You'll get
12 credit for the 306 days that you've served. Good luck to
13 you.

14 MS. MAYES: Thank you, Your Honor.

15 MR. MADSDEN: Thank you, Your Honor.

16 (The proceedings were concluded.)

17 *** END OF REQUESTED TRANSCRIPT OF RECORD ***

18

19

20

21

22

23

24

25

ORIGINAL

FORM 5

STATE OF SOUTH CAROLINA)
COUNTY OF LEXINGTON)

IN THE COURT OF COMMON PLEAS

Nathaniel McMillian #320977)
Applicant.)

APPLICATION FOR
POST-CONVICTION RELIEF

v.
State of South Carolina)

2013 SEP 27 PM 2:46
GETH A. CAMPBELL
CLERK OF COURT
LEXINGTON SC

FILED

2013 CP 3203345

1. Place of detention Lieber Correctional Institution
2. Name and location of Court which imposed sentence Lexington County General Sessions
3. Name(s) of co-defendant(s) (if any) NA
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) 2012GS322552; Criminal Sexual Conduct -1st Degree 2012GS322553 Armed Robbery
 - (b) 2012GS322546; Attempted Burglary/Robbery 2012GS322559 Possession of weapon in violent crime
 - (c) 2012GS322551; Burglary 1st Degree
5. The date upon which sentence was imposed and the terms of the sentence:
 - (a) October 4, 2012 25 years ; October 4, 2012 25 years (concurrent)
 - (b) October 4, 2012 25 years (concurrent); October 4, 2012 5 years (concurrent)

(c) October 4, 2012 25 years (concurrent)

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6. Check whether a finding of guilty was made: ^{2013 SEP 27 PM 2: 46}

(a) after a plea of guilty ✓

(b) after a plea of not guilty

(c) after a plea of nolo contendere

DEBRA A. GARDING
CLERK OF COURT
LEXINGTON SC

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. NA

ii. NA

iii. NA

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

i. NA

ii. NA

iii. NA

(c) the date of each such result:

i. NA

ii. NA

iii. NA

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

i. NA

ii. NA

iii. NA

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

(a) Once shipped to SC Department of Corrections Reception + Eval. not entitled law library access

(b) Once shipped to Lieber Correctional Institution was in lockdown status and not entitled law library

(c) NA

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

- (a) Ineffective Assistance of Counsel
- (b) Erroneous Advice
- (c) Involuntary Guilty Plea

2013 SEP 27 PM 2:46
 OFFICE OF THE CLERK
 OF THE COURT
 CHARLESTON SC

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

- (a) See Attached
- (b) See Attached
- (c) See Attached

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

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

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. NA
- ii. NA
- iii. NA
- iv. NA

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

- i. NA
- ii. NA
- iii. NA
- iv. NA

(c) the disposition thereof:

- i. NA
- ii. NA
- iii. NA

*note: answers to 11, a, b, and c attached

- A) Ineffective Assistance of Counsel
- B) Erroneous Advice
- C) Involuntary Guilty Plea

2013 CP 3203345 FILED

2013 SEP 27, PM 2:46
Ineffective Assistance of Counsel

I, the applicant allege my conviction at plea hearing is the result of ineffective assistance of counsel. The burden of proof is on the applicant in a PCR proceeding to prove allegations in the application. Bell v. State, 321 S.C. 288, 467 S.E. 2d 926 (1996); Rule 71.1 ce, SCR CV.

For an applicant to be granted PCR as a result of ineffective assistance of counsel, he must show 1) that his counsel failed to render reasonably effective assistance under prevailing professional norms, and 2) that he was prejudiced by his counsel's ineffective performance. Strickland v. Washington 466 U.S. 668 (1984). Judge v. State 471 S.E. 2d 146 (1996).

In order to prove prejudice, an applicant must show that but for counsel's errors, there is a reasonable probability the result at trial would have been different. A reasonable probability is a probability sufficient to undermine confidence in outcome of trial.

Counsel was ineffective based on a lack of ~~communication~~^{HM} communication, lack of preparation, did not make a substantial investigation, failed to let applicant know he was charged with a charge (Burglary 2nd) that would enhance to Burglary 1st Degree, and not explaining the reasons and results of this.

Counsel was ineffective in giving erroneous advice. The only evidence against me was dealing with Armed Robbery, Criminal Sexual Conduct 1st Degree, and Possession of Weapon During Violent Crime. I would have considered taking a plea to these charges, I'd have took the Burglary 1st to trial and Attempted Robbery/Burglary due to lack of sufficient evidence against me. Counsel gave advice that made me feel I didn't have option to do so. The outcome could have been different if I knew of this option. There was no evidence to convict applicant of Burglary 1st Degree, but the statement of the victim which was hearsay, because she wasn't present during incident. The only evidence in Attempted Burglary/Robbery was a statement of inconsistencies. Neither victim was liable as witness, and I could have attacked credibility of witnesses under SRE 608 for impeachment. If not for deficiency of counsel in not advising me properly, I would have known this as well as lack of evidence. Failing to do so resulted in my prejudice.

I was looking at a minimum of 10 years for Armed Robbery. I wanted a plea deal with a minimum 10 and Possession of Weapon during violent crime ran concurrent. I also wanted Criminal Sexual Conduct 1st Degree ran concurrent with this. Leniency could be given in these are my first crimes of both nature. A plea could be agreed to on a sentence between 10-15 years, but counsel was ineffective in giving effective communication. Not just to myself but to solicitor in a plea deal, and I was prejudiced.

Counsel was ineffective not moving to squash warrants and indictments. The arrest warrant stated Burglary 2nd degree, and I was indicted on Burglary 1st degree. This is a higher element, then what I was arrested for. The indictment doesn't ~~meet~~^{MM} meet elements that establish this element. There was no weapon, no occupant in home, and it occurred in light hours. These are not elements of Burglary 1st degree. Counsel was ineffective in not explaining the only evidence or explanation of charge couldn't prove guilt beyond a reasonable doubt required under Jackson v. Virginia for Burglary 1st Degree and I was prejudiced.

I wanted counsel to file a motion to ~~suppress~~^{UM} Dismiss. This is right of person taking a guilty plea. I wanted to dismiss Burglary 1st Degree indictment. The state's only evidence was testimony of the victim. She wasn't there at time of incident and states what an unavailable witness told her (hearsay). He was ineffective and dismissal of indictment or striking testimony as hearsay. Counsel was ineffective in filing motion to sequester witness (main witness). Had counsel prepared pre-trial motions, outcome could be seen different. Burglary 1st could have been Nolle Prossessed. I took an involuntary plea since I was going by erroneous advice and ineffective assistance of counsel.

2013 SEP 27 PM 2:46
 OFFICE OF CLERK
 LEXINGTON SC

2013 SEP 27 PM 2:46

FILED

IV. NA

(d) the date of each such disposition:

i. NA

ii. NA

iii. NA

iv. NA

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

i. NA

ii. NA

iii. NA

iv. NA

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. NA

ii. NA

iii. NA

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

i. NA

ii. NA

iii. NA

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) NA

(b) NA

(c) NA

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

FILED
2013 SEP 27 PM 2:46
PETRA A. CLIFTON
CLERK OF COURT
LEXINGTON SC

FILED

- (a) your arraignment and plea? Yes
- (b) your trial, if any? NA
- (c) your sentencing? Yes
- (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? NA
- (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? NA

2013 SEP 27 PM 2:46
 DEPT. OF CORRECTIONS
 CLERK OF COURT

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. Robert Madsen; 11th Circuit Public Defender; 206 East Main Street; Lexington, SC 29072
 - ii. _____
 - iii. _____
- (b) the proceedings at which each such attorney represented you:
 - i. General Sessions Court
 - ii. _____
 - iii. _____

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

Reverse and Remand for Resentencing - Armed Robbery, Criminal Sexual Conduct 1st, Possession of Weapon

20. Are you now under sentence from any other court that you have not challenged? No

*note: Answer to 19. finished on attached page

19. (continued)

Reverse and Remand new trial - Burglary 1st Degree, Attempted Burglary/Robbery

2013 SEP 27 PM 2:46

BETH A. GIBSON
CLERK OF COURT
LEXINGTON SC

STATE OF SOUTH CAROLINA
County of LEXINGTON

FILED

VERIFICATION

ORIGINAL

2013 SEP 27 PM 2:46

I, Nathaniel McMillion ~~ESTELA GARRIDO~~, being duly sworn upon my oath, depose and say that I have ~~subscribed~~ ^{signed} 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.



SWORN to and subscribed before me
this 18th day of September 2013.

Quedeen Bayard (L.S.)

Notary Public

My Comm. Expires May 26, 2020

2013CP3203345

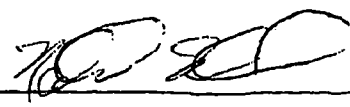
ORIGINAL

APPLICATION TO PROCEED WITHOUT PREPAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF

ESTHER A. GORTING
CLERK OF COURT
WILMINGTON SC

I, Nathaniel McMillian, 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 therefor.



Applicant

SWORN or affirmed to and subscribed before me
this 18th day of September 2013

Quellean Bryant

Notary Public

My Comm. Expires: May 26, 2020 2013 CP 3203345

To whom It may Concern,

September 22, 2013 ⁴⁵

Enclosed is a self-drawn application for Post-Conviction Relief. My reason for having to draw my own application is I'm an incarcerated inmate in the South Carolina Department of Corrections. I'm currently in segregation and being refused my legal work. This includes my PCR application, motion of discovery, indictments, and all addresses pertaining to my case. I've notified all necessary officials in SCDC on this yard with no response. They know my statute of limitations yet still refuse me my legal work. I also have notified Mr. David Tatarsley of SCDC General Counsel. He's notified the warden of this institution. I've also wrote previous letters to this office which I believe are not being received. Due to my deadline approaching and my situation this is the only matter of dealing with the situation. I've documented all my difficulties. For the record if necessary I will turn in my PCR application once received, but I hope this copy will be sufficient. All amendments to my application will be filed at a later date. Thank You.

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2013CP3203345

Nathaniel McMillian

Nath Mc

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STATE OF SOUTH CAROLINA **FILED** IN THE COURT OF COMMON PLEAS
ELEVENTH JUDICIAL CIRCUIT

LEXINGTON COUNTY

2014 APR 29) A 11:42

C.A. No. 2013-CP-32-3345

Nathaniel McMillian,
S.C.D.C. No. 320977,

BETH A. GARRIGG
CLERK OF COURT
LEXINGTON, SC

Applicant,

RETURN

v.

State of South Carolina,

Respondent.

The Respondent, making its Return to the application for post-conviction relief filed September 27, 2013 would respectfully show this Court:

I

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Lexington County Clerk of Court. The Applicant was true bill indicted at the October 2012 term of the Lexington County Grand Jury for attempted burglary, first-degree (2012-GS-32-2543); burglary, first-degree (2012-GS-32-2551); criminal sexual conduct, first-degree (2012-GS-32-2552); armed robbery (2012-GS-32-2553); and possession of a weapon during the commission of a violent offense (2012-GS-32-2559). Robert M. Madsen, Esq. represented Applicant. On October 2, 2012, Applicant pled guilty pursuant to the State's plea agreement that included a recommended twenty-five (25) year cap in sentence. The State was represented by Asst. Solicitor L. Suzanne Mays, Esq. The Honorable Roger M. Young, Sr., sentenced Applicant to twenty-five (25) years imprisonment for attempted burglary, first-degree, twenty-five (25) years imprisonment for burglary, first-degree, twenty-five (25) years imprisonment for CSC, first-degree, twenty-five (25) years imprisonment for armed

robbery, and five (5) years imprisonment on the weapons charge. The sentences were to be served concurrently. Applicant did not appeal his sentence of conviction.

Attached herewith and incorporated herein by reference are the records of the Lexington County Clerk of Court regarding the subject conviction and the guilty plea transcript. Applicant's Corrections records will be forwarded to his appointed counsel upon receipt by Respondent. The Respondent reserves the right to amend this Return upon receipt of any relevant materials.

II.

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

1. Ineffective Assistance of Counsel:
 - a. failure to adequately communicate with Applicant;
 - b. failure to investigate and prepare Applicant's case;
 - c. failure to advise Applicant of elements of the offenses for which he was charged;
 - d. failure to make a motion to dismiss the burglary, first-degree charge.

Any claims not specifically enumerated in the post-conviction 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.

In a post-conviction relief proceeding, the applicant bears the burden of establishing that he is entitled to relief. Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000). First, a post-conviction relief applicant must show that his counsel's performance was deficient such that it falls below an objective standard of reasonableness. Strickland v. Washington, 466 U.S. 668,

687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 693 (1984); Alexander v. State, 303 S.C. 539, 541, 402 S.E.2d 484, 485 (1991). Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry v. State, 300 S.C. 115 at 117, 386 S.E.2d 624 at 625 (1989), *citing Strickland*.

Second, an applicant must show there is a reasonable probability, but for counsel's unprofessional errors, the result of the proceeding would have been different. Strickland, 466 U.S. at 687, 104 S.Ct. at 2064, 80 L.Ed.2d at 693; Alexander, 303 S.C. at 541-42, 402 S.E.2d at 485. The Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, Id. Applicant must overcome this presumption in order to receive relief. Cherry, Id.

Where there has been a guilty plea, the applicant must prove prejudice by showing that, but for counsel's errors, there is a reasonable probability he would not have pleaded guilty and instead would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 59, 106 S.Ct. 366, 370, 88 L.Ed.2d 203, 210 (1985); Jordan v. State, 297 S.C. 52, 54, 374 S.E.2d 683, 684 (1988). In determining guilty plea issues, it is proper to consider the guilty plea transcript as well as evidence at the post-conviction relief hearing. Harres v. Leeke, 282 S.C. 131, 133, 318 S.E.2d 360, 361 (1984).

Respondent submits that 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.

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

V.

WHEREFORE, having made its Return, the State requests that an evidentiary hearing be held solely on the issue of ineffective assistance of counsel and whether the Applicants plea was involuntary.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

KAREN C. RATIGAN
Senior Assistant Deputy Attorney General

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By: 
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April 28th, 2014

STATE OF SOUTH CAROLINA)
)
 COUNTY OF LEXINGTON)
)
)
)
 NATHANIEL MCMILLIAN)
)
 Applicant,)
)
 vs)
)
 STATE OF SOUTH CAROLINA,)
)
 Respondent)

IN THE COURT OF COMMON PLEAS
 IN THE ELEVENTH CIRCUIT

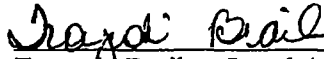
2013-CP-32-3345

AFFIDAVIT OF SERVICE BY MAIL

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

Anna R. Good
1720 Main St, Suite 303
Columbia, SC 29201

DATED this 28th day of April, 2014


 Troyeshi Brailey, Legal Assistant
 For Respondent

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF LEXINGTON) 2013-CP-32-3345

Nathaniel McMillian,
SCDC # 320977,

2014 MAY 19 10:14

Applicant, BETH A. CA
CLERK OF C
LEXINGTON

ORIGINAL

vs.

AMENDED APPLICATION
FOR POST CONVICTION RELIEF

State of South Carolina,
Respondant.

Based upon further investigation and research, the Post-Conviction Relief Application filed on behalf of the above named Applicant is hereby Amended as follows to include in addition to prior grounds stated in the original application for post-conviction relief:

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

- (a) Ineffective assistance of trial counsel – trial counsel failed to properly investigate the case; and
- (b) Ineffective assistance of trial counsel—trial counsel failed to object to prejudicial comments made Investigator during the plea.

LAW OFFICE OF ANNA GOOD, LLC

Anna Good, Esquire
Attorney for Applicant
1720 Main Street, Suite 303
Columbia, SC 29201
803-429-9107
803-799-4059 (fax)

Columbia, South Carolina
This 16th day of May, 2014

1 State of South Carolina)
 2 County of Lexington)
 3 Nathaniel McMillian,)
 4 Plaintiff,)
 5 vs.)
 6 State of South Carolina,)
 7 Defendant.)

In the Court
 Of Common Pleas
 Indictment No.: 2013-CP-32-3345

Transcript of Record

8

9

October 14, 2014

10

Lexington, South Carolina

11

12

BEFORE:

13

The Honorable DeAndrea G. Benjamin, Judge

14

15

APPEARANCES:

16

Walt Whitmire, Assistant Attorney General
 Attorney for the State

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Anna R. Good, Esquire
 Attorney for the Defendant

20

21

ALSO PRESENT:

22

Nathaniel McMillian

23

24

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1 Thereupon, the following proceedings were had,

2 THE COURT: I'm ready whenever you are.

3 MR. WHITMIRE: Thank you, Judge. Walt Whitmire
4 representing the State. The last matter before Your
5 Honor today is Nathaniel McMillian versus State of South
6 Carolina. Case number 2013-CP-32-3345. Mr. McMillian
7 entered a global plea of sorts to accept charges from
8 three separate incidents. One was a burglary, removed
9 five days later, CSC, armed robbery, possession of a
10 firearm, a few more days another burglary. All occurred
11 relatively close to the same area in West Columbia. He
12 was represented by Mr. Madsen. He inevitably entered a
13 guilty plea before Judge Young pursuant to the State's
14 plea agreement which was a cap of 25 on all the charges
15 and, of course, not to pursue those cases separately and
16 inevitably all of them are most serious offenses. For
17 the record, it's the State's position there was the
18 strength of the evidence was fairly overwhelming,
19 confessions connected to the weapon on almost all the
20 charges. Ms. Good has filed a timely application. Of
21 course did not appeal the sentence of conviction,
22 services by counsel, filed a PCR. Ms. Good filed a
23 timely application. At this time the State turns matters
24 over to Ms. Good to announce her allegations for the
25 record and pursue her case.

1 MS. GOOD: Thank you. Your Honor, Mr. McMillian is
2 going to be going forward on the allegations he did put
3 in his original post conviction relief application.
4 Basically ineffective assistance of counsel. I did amend
5 the application, Your Honor, to include two extra causes.
6 The first was trial counsel failed to properly
7 investigate the case. We will be withdrawing that one at
8 this time. But we will be going forward on that trial
9 counsel failed to object to a prejudicial comment made by
10 the investigator during the plea and with that, Your
11 Honor, I will call --

12 THE COURT: Do you have a copy of the amended?

13 MS. GOOD: I have one, Your Honor.

14 THE COURT: We are missing our packet on him.

15 MR. WHITMIRE: My apologies. May I approach? I'm
16 sorry.

17 THE COURT: And so he is not going forward on A?

18 MS. GOOD: Correct.

19 THE COURT: Just B?

20 MS. GOOD: Correct.

21 THE COURT: Okay. All right. Yes, ma'am. Call
22 your first witness.

23 MS. GOOD: I call Nathaniel McMillian.

24 Thereupon,

25 NATHANIEL McMILLIAN

1 after having been first duly sworn, testified as follows,

2 DIRECT EXAMINATION

3 BY MS. GOOD:

4 Q. Mr. McMillian, on October 2nd, 2012 you pled to
5 several different charges including a burglary first degree
6 and you received 25 years, correct?

7 A. Yes, ma'am.

8 Q. And during that time who was your attorney?

9 A. Robert Madsen.

10 Q. And was he your attorney the entire time during this
11 case?

12 A. Yes, ma'am.

13 Q. Okay. And when were you originally arrested on
14 this, do you remember?

15 A. November 1st, 2011.

16 Q. Okay. And from November 1st, 2011 until the date
17 you pled basically 11 months later, how many times did you
18 meet with Mr. Madsen?

19 A. About two times. Three including the day of the
20 plea.

21 Q. Okay. In that first meeting what did that entail?
22 When was it approximately, if you remember?

23 A. A couple days after I was detained.

24 Q. Okay. So in November of 2011?

25 A. Yeah.

1 Q. All right. What happened during that first Meeting?
2 Anything of significance?

3 A. It was just a general overview of the nature of the
4 charges.

5 Q. When was your next meeting with Mr. Madsen?

6 A. A little after my motion came in the mail.

7 Q. When you say your motion, you mean your motion for
8 discovery?

9 A. Yes, ma'am.

10 Q. When did that come in the mail?

11 A. A couple of weeks prior to the plea.

12 Q. Okay. So probably around September 2012 or August
13 maybe?

14 A. August, September, somewhere in there.

15 Q. Okay. So about a month before the plea?

16 A. Yes.

17 Q. Okay. How long was that meeting, do you remember?

18 A. I'm not really sure. It was just really just to
19 make sure I got the plea, I mean the motion of discovery and
20 tell me about a plea that they were talking about at that
21 time.

22 Q. Okay. And do you remember what that plea was?

23 A. 20 to 25.

24 Q. Okay. And at that point you said you had just
25 received the discovery. Had you gone through it at that

1 point?

2 A. I looked through it but I didn't really read it at
3 that time.

4 Q. Okay. And on that day that he came to go over the
5 plea agreement with you, did you tell him you wanted to
6 plea?

7 A. Uhm, I really didn't like the plea. Like I didn't
8 really understand the plea at that time so I was pretty unsure
9 about whether I wanted to go through with it or not.

10 Q. So at that time you hadn't told him yes?

11 A. No.

12 Q. Okay. Then ultimately on October 2nd, 2012 you were
13 brought to the courtroom; is that correct?

14 A. Yes, ma'am.

15 Q. Did you speak with him for a third time that
16 morning?

17 A. Yes, ma'am.

18 Q. When you spoke with him that morning, what did you
19 discuss?

20 A. We discussed the nature of the indictments and I
21 signed the indictments.

22 Q. And those indictments, you went through all those
23 with him. The burglary first indictment that was in there,
24 when was the first time you learned about the burglary first
25 charge?

1 A. The first time I learned about the burglary first
2 charge was when he mentioned it when he came with the 20 to 25
3 year plea.

4 Q. So you weren't aware up to that point that you had a
5 burglary first?

6 A. No.

7 Q. Did you understand why you were charged with
8 burglary first at that point?

9 A. No. Not initially.

10 Q. Did you eventually find out why you were charged
11 with it?

12 A. Yes, ma'am.

13 Q. When he went over the sentencing sheets with you in
14 the courtroom that morning on October 2nd, do you remember
15 anything about that?

16 A. Just that pretty much everything was 25 years and
17 that it all tied in with the 20, 25 year plea.

18 Q. Okay. When you pled guilty that day, did you have
19 any idea how much time you thought you were going to get?

20 A. After the burglary first came in the picture, it was
21 pretty much I wasn't sure at that point.

22 Q. Okay. Were you aware that you were going to be
23 getting potentially 25 years in prison?

24 A. I didn't -- At that time I didn't see that in my
25 future.

1 Q. What did you believe you were going to get that
2 day?

3 A. Somewhere -- I wasn't expecting a slap on the wrist,
4 but I was expecting like 10, 15, at the most 20.

5 Q. What had Mr. Madsen told you about what you could
6 potentially receive that day? What was your understanding
7 from him?

8 A. That I would get no higher than that cap, the 25
9 years.

10 Q. During the plea, do you recall any statements being
11 made that you thought were prejudicial to your case and to
12 your mitigation that shouldn't have been made?

13 A. Uhm, just a lot of the comments that the prosecution
14 was making as far as my, uhm, as far as my, the - the, uhm,
15 the twitch I have when I speak and my speech impediment and a
16 lot about being a menace the whole time I have stayed in the
17 area and things of that nature.

18 Q. And specifically about the menace to the area,
19 staying in the area, was that made by the West Columbia Police
20 Department investigator?

21 A. Yes, ma'am.

22 Q. If you had been fully aware of what you were
23 pleading to that day and the entire situation surrounding the
24 plea and the fact that you thought you were going to get less
25 than 25 years, would you have pled guilty that day?

1 A. No. I would have took it to trial.

2 Q. As a result of Mr. Madsen as you have stated failing
3 to correctly advise you regarding your burg first and all the
4 charges around you and that enhancement, do you believe he was
5 ineffective?

6 A. Yes, ma'am.

7 Q. Are you asking the Court today to overturn your
8 convictions and guilty plea and remand your case back to the
9 Solicitor's Office?

10 A. Yes, ma'am.

11 Q. Is there anything else you would like to tell the
12 Court that you think we may have missed or skipped over?

13 A. No, ma'am.

14 MS. GOOD: No further questions.

15 THE COURT: Yes, sir. Any questions?

16 MR. WHITMIRE: I just have a few questions on cross
17 examination, Your Honor. May it please the Court.

18 CROSS EXAMINATION

19 BY MR. WHITMIRE:

20 Q. Good afternoon, Mr. McMillian. You just testified
21 that had you known the full terms of the plea agreement, you
22 would have gone to trial. On which charges?

23 A. On the two burglary charges.

24 Q. Okay. You recall on the CSC, armed robbery and
25 weapons charge you gave confessions?

1 A. Yes, sir.

2 Q. You're looking at 65 years on all three of those
3 charges. On the last attempted burglary first you were caught
4 in the act?

5 A. No.

6 Q. You weren't caught in the house?

7 A. I wasn't in the house. I was caught in the area,
8 but that's because I lived in the area.

9 Q. You gave a confession on that one?

10 A. Yes.

11 Q. That's 15 to life?

12 A. Yeah.

13 Q. And the last is the very first offense that gets
14 tied back to you. So you want a new trial on all those
15 charges?

16 A. Yes, sir.

17 Q. Correct me if I'm wrong, the terms of your plea
18 agreement was a total cap of 25 years all at one time?

19 A. Yeah.

20 Q. Just for the record, how many times did Mr. Madsen
21 meet with you, do you recall roughly?

22 A. Two including, counting the day of the plea it was
23 three.

24 Q. Did you ever express any desire about wanting to go
25 to trial with him?

1 A. I mean, for the majority of the time I thought I was
2 looking at burglary second so I pretty much felt that I had
3 those particular burglary seconds beat, but then after the
4 plea came out and then when I actually saw the indictments, I
5 pretty much - I pretty much felt like it was over with, that I
6 didn't, it was going to be no fighting it so I just gave in
7 pretty much.

8 Q. And all of these arrest warrants were served on you
9 on December 2nd, 2011; is that correct?

10 A. (Witness nodding head.)

11 Q. And you were indicted all at the same time for these
12 three offenses?

13 A. (Witness nodding head.)

14 Q. Did Mr. Madsen and you talk about the burg first and
15 your options at that point after the indictment?

16 A. Yeah.

17 Q. Now, this isn't your first conviction in South
18 Carolina?

19 A. No.

20 Q. You have two Georgetown convictions?

21 A. Yeah.

22 Q. For what?

23 A. For burglary.

24 Q. Represented by counsel in those?

25 A. Yes.

1 Q. Did you plead guilty or go to trial on those?

2 A. I pled.

3 Q. Do you remember the judge?

4 A. Uhm, I don't remember the judge but the public
5 defender for both of those. I believe it was Ruben Gott.

6 Q. And y'all talk about, back in 2006 and '07, y'all
7 talked about your constitutional rights and the decision to
8 plea or go to trial?

9 A. He spoke on it but at that time in my life I wasn't
10 - it was all going over my head. I didn't understand any of
11 it.

12 Q. Did Mr. Madsen go over all of this with you?

13 A. Yeah. He spoke on it.

14 Q. Did you understand it now or was it different?

15 A. It was a little different but not much change. I
16 still didn't have an understanding of all the legal
17 terminology.

18 Q. Did you ever stop Judge Young and ask him what
19 something meant during your plea?

20 A. No. I pretty much, at the point when I seen the
21 indictments, I pretty much, I felt like it was over before it
22 began.

23 Q. I want to ask you a question, if you don't recall
24 it. Did you ask the judge back in Georgetown anything about
25 the process then?

ROBERT MADSEN - DIRECT BY MR. WHITMIRE

14

1 A. No.

2 MR. WHITMIRE: No further questions, Your Honor.

3 Thank you, Mr. McMillian.

4 THE COURT: Anything else?

5 MS. GOOD: No, Your Honor.

6 THE COURT: You may step down.

7 MS. GOOD: Applicant rests, Your Honor.

8 MR. WHITMIRE: At this time, Your Honor, the State
9 calls Mr. Madsen to the stand.

10 Thereupon,

11 ROBERT MADSEN

12 after having been first duly sworn, testified as follows,

13 DIRECT EXAMINATION

14 BY MR. WHITMIRE:

15 Q. Good afternoon, Mr. Madsen.

16 A. Good afternoon.

17 Q. How many years have you practiced criminal law?

18 A. 18.

19 Q. Have you had a chance to review your file in this
20 matter?

21 A. I have.

22 Q. Do you recall the representation?

23 A. I do.

24 Q. Do you recall just as kind of an initial matter the
25 circumstances that lead to the State implicating Mr. McMillian

1 in all of these events or incidents?

2 A. He was -- I think chronologically there was a
3 burglary first or excuse me, a burglary that they were looking
4 for an individual on. They were then looking for an
5 individual on an armed robbery CSC and then there was an
6 attempted burglary that he was arrested on which
7 chronologically was the last, but he was arrested on that and
8 then they went back and made the cases on the first two
9 against him.

10 Q. Was there any sort of federal act taking on the
11 perpetrator on the CSC charge?

12 A. From what I --

13 Q. A surveillance picture?

14 A. No. I believe it was just the description from the
15 victim.

16 Q. Did all the victims, the three separate victims end
17 up identifying Mr. McMillian in federal line-ups?

18 A. The two from the burglary weren't there. One was
19 from a witness and his statements to law enforcement but not
20 the victim. She had left or she was leaving although I think
21 they were able to somehow ID him from a video of a local
22 convenient store. I don't recall on the -- I believe that the
23 victim of the CSC did pick him out of a photographic
24 line-up.

25 Q. What is the approximate date that you began

ROBERT MADSEN - DIRECT BY MR. WHITMIRE

16

1 representing Mr. McMillian?

2 A. Our office was appointed -- We did initial -- Or he
3 was arrested on 12/1. We did an interview of him at the jail
4 on 12/5 of 2011, and my initial meeting with him was on
5 12/12/2011.

6 Q. Prior to your initial meeting, had Mr. McMillian
7 already provided law enforcement statements?

8 A. He had given statements from my understanding on the
9 CSC armed robbery and then on the burglary. I do not believe
10 he gave any type of statement on the attempted burglary.

11 Q. Do you recall your initial meeting with him?

12 A. I do.

13 Q. What did y'all discuss?

14 A. Basically on that initial meeting like with all my
15 clients I go over what he is initially charged with. I go
16 over his trial rights. I go over the elements. I go over the
17 minimum/maximum. Additionally with him because of the CSC I
18 went over sex offender registry. I went over the sexually
19 violent predator. I went over lesser included offenses and I
20 went over the facts of the strikes and the 85 percent and then
21 after that I went over his background with him.

22 Q. Did he provide his version of the facts to you?

23 A. I don't have it in my notes and a lot of times that
24 initial meeting I won't go over the version of the facts with
25 him, however, I will say that when they are initially screened

1 by our jail screener, I do have access to just kind of a
2 thumbnail of what they go over with that screener.

3 Q. Kind of again approximately what point during your
4 representation did this turn into a plea?

5 A. Well, he had, at least from the notes from the
6 initial screener and from what I recall, he had initially
7 always admitted that he had done the CSC and the armed robbery
8 so at least in my discussions with him he had never indicated
9 that he had anything but a desire to work out a plea.

10 Q. Did he ever communicate any desire to plead to some
11 and go to trial on others?

12 A. No. Not necessarily. Although, I will tell you in
13 our discussions they had stronger cases on the burglary and
14 the CSC and the armed robbery. Not as strong of a case on the
15 attempted burglary but that was also the case that he had not
16 confessed to.

17 Q. Did he ask you to look into any state evidence or
18 pursue any defense theories?

19 A. No. Not specifically.

20 Q. Can you briefly describe the plea negotiations in
21 this case?

22 A. Well, there was some back and forth. In fact, I had
23 contacted the Solicitor by e-mail about potentially a plea
24 that he and I had discussed to the armed robbery and the CSC.
25 I believe they rejected that saying they were still trying to

1 get information on the burglary. Sometime I believe in May I
2 received information from them, the Solicitor's Office that he
3 had two prior burglary convictions and that they would end up
4 enhancing the burglaries that he had been charged with up to
5 burglary first. I can tell you from my notes they
6 subsequently made an offer of basically a plea where he would
7 be looking at a minimum of 15 and a maximum of 25. I went
8 over to the jail and went over that offer with him on
9 8/1/2012. I then -- He had indicated at that point in time
10 that he would like that or that he would take that plea. I
11 then went back over to the jail because of the serious nature
12 of it and the fact that I knew that he was going to get a
13 substantial period of time, I went back over to the jail and
14 went back over that plea with him on 9/19 of '12 and then he
15 eventually pled a couple of weeks later on 10/2.

16 Q. Were you surprised when the State enhanced the
17 attempted burglary and the burglary second to burglary
18 first?

19 A. It wouldn't be unusual for them to do that. It
20 would fit under the elements of a burglary first if he had two
21 prior convictions and they did provide me with the sentencing
22 sheets showing that that was something that they can do even
23 though law enforcement didn't initially charge him with
24 that.

25 Q. Did you discuss this matter with Mr. McMillian prior

1 to the indictments coming down?

2 A. I did.

3 Q. Did he express any trepidation or concern at that
4 point?

5 A. No, sir.

6 Q. Do you believe this plea offer was in Mr.
7 McMillian's best interest?

8 A. I think he would have been convicted and gotten
9 potentially a much larger sentence than 25 years considering
10 that he had three separate sets of charges and that they, I
11 guess they could have potentially tried to strike him out if
12 they wanted to.

13 Q. Last question, Mr. Madsen. Appreciate your patience
14 today. Was the mitigation in this case basically getting this
15 offer?

16 A. Part, or I mean, that was the most of it. And, in
17 fact, I think Judge Young, I recall that he kind of questioned
18 the State on the offer in and of itself, made it sound like he
19 didn't think that it was a sufficient offer. That the State
20 should have been a little bit harsher. And I will tell you at
21 least, and I told the judge this, in my conversations with
22 Nate, very soft spoken, easy to get along with and I think I
23 might have mentioned to the judge that it's kind of hard to
24 reconcile the individual that I had been dealing with as
25 compared to the kind of conduct that he was charged with.

1 MR. WHITMIRE: No further questions. Please answer
2 any questions Ms. Good has for you.

3 THE COURT: Yes, ma'am.

4 MS. GOOD: Thank you, Your Honor.

5 CROSS EXAMINATION

6 BY MS. GOOD:

7 Q. Good afternoon, Mr. Madsen.

8 A. Good afternoon.

9 Q. You stated a minute ago that I guess it was May 2012
10 the burglary second became a burglary first?

11 A. I believe so. I have got -- I had sent the
12 Solicitor an e-mail on May 31st indicating that he would be
13 willing to plead to the armed robbery and the CSC next week.
14 She had e-mailed me back the same day saying that she
15 appreciated my efforts to try to wrap it up but there were
16 multiple issues and that she was confirming that he had two
17 separate burglary convictions and that that would then enhance
18 the burglaries that he was charged with up to burglary
19 first.

20 Q. And you said you discussed with him prior to the
21 indictments coming down about the burglary first, correct?

22 A. Well, I discussed with him as part of the plea.

23 Q. Okay.

24 A. I'm not a hundred percent sure when the indictments
25 came down.

1 Q. Okay. So on the first meeting in December of 2011
2 he was not aware of the burg first?

3 A. He would not have been. I would have gone over what
4 he was charged with at that point in time.

5 Q. You said you met with him twice regarding the plea
6 offer, once in August and once in September?

7 A. Correct. I met with him times before that. In
8 fact, I met with him a couple of times before that. But as
9 far as the specific plea, I met with him about the plea twice.

10 Q. How many times did you meet with him?

11 A. Including the plea seven times and the prelim. We
12 conducted a prelim. So in the jail five times, once at
13 prelims and then obviously once before the plea. Seven
14 total.

15 Q. When you were doing the plea negotiations, what was
16 the exact plea negotiation with Ms. Mayes?

17 A. I know he was looking at between 15 and 25 years
18 because the burglary first had a minimum of 15 so it was
19 basically a cap of 25 from what I recall, a plea to the
20 attempted burglary first, a plea to the burglary first and I
21 believe a plea to the CSC and the armed robbery. I don't
22 remember whether or not he pled to the weapon or not.

23 Q. So basically it was 15 to 25 years, correct?

24 A. Correct.

25 Q. And during those negotiations did Ms. Mayes indicate

1 to you at any time that they would not ask for a specific
2 number or was it just straight up?

3 A. I don't recall.

4 Q. Okay. Regarding during the plea the victim was
5 there obviously and she gave a statement or the victim's
6 advocate spoke on her behalf and read something from the
7 victim?

8 A. And I think she actually spoke a sentence or two
9 afterwards.

10 Q. Yes. You are correct. And beginning on page 29 of
11 the transcript to page 30, Investigator Neil or Detective Neil
12 began to speak. Do you recall his speaking at the plea?

13 A. Quite honestly I did not necessarily recall but once
14 I read this I don't have any doubt that he had done that but I
15 don't have an independent recollection of that.

16 Q. And during his, I guess, testimony you would call it
17 during the plea, he went into a great bit of detail regarding
18 not so much the facts but the fact that he considered Mr.
19 McMillian just a menace to his society in West Columbia,
20 correct?

21 A. He basically, in reviewing the transcript, he had
22 kind of indicated that it was an attack in broad daylight on a
23 Sunday afternoon while she was walking to the library and that
24 Mr. McMillian had not lived in the area all that long to have
25 the three separate sets of charges.

1 Q. And then he testified again that, line 20, he says
2 we ask that you give him the maximum sentence possible due to
3 the issues that he's caused us and due to the problems and the
4 pain he has given to this community. Do you recall that?

5 A. I see it there now. I don't independently recall it
6 but I don't doubt that he said that.

7 Q. When that occurred, did that give you any pause that
8 he was phrasing it in a sense that it was West Columbia that
9 had the problem and this wasn't against the victim or anything
10 of that nature?

11 A. Not necessarily although I would say looking back
12 the one thing that I thought was interesting is his saying
13 West Columbia doesn't necessarily have problems like that.
14 Through my employment I'm familiar otherwise that there are
15 crimes that occur there, some of them major crimes.

16 Q. From reviewing the transcript and your recollection
17 did the victim ask for the maximum sentence in this case?

18 A. I think she did. On page 29, line 13 and 14 she
19 indicated that she would like to see him to get as much time
20 as he can so he would not hurt anyone else. I think that's
21 the only thing that she had said.

22 Q. And then Detective Neil asked for him to get the
23 maximum, correct?

24 A. Yes, ma'am. I think there was between the Solicitor
25 and the Judge as far as what was the basis for the plea

1 offer.

2 Q. And the Solicitor didn't actually ask for the
3 maximum, did she?

4 A. I would have to read it back through but I don't
5 recall.

6 Q. Looking back on the comments made by Detective Neil
7 would you have believed that you should have objected to that
8 regarding his emotional feelings on West Columbia and not so
9 much on the facts of this particular case?

10 A. No. I do not.

11 MS. GOOD: No further questions, Your Honor.

12 MR. WHITMIRE: Just two quick follow up, Your Honor.

13 REDIRECT EXAMINATION

14 BY MR. WHITMIRE:

15 Q. When the State is making a recommendation for the
16 max and the victim, was this all in context of the
17 recommendation of the cap of 25 years?

18 A. Well, they have the right to tell the judge what
19 they think is appropriate within that parameter that we had
20 negotiated.

21 Q. Did the judge ultimately follow the cap
22 recommendation?

23 A. He did.

24 MR. WHITMIRE: No further questions, Your Honor. I
25 just ask that Mr. Madsen be excused and released from his

1 subpoena and the State rests on the record.

2 THE COURT: Sir, you may step down. Any objection
3 to him being excused?

4 MS. GOOD: No, Your Honor.

5 THE COURT: You're free. Excused. All right.
6 Anything else from the Applicant?

7 MS. GOOD: No, ma'am, Your Honor. We would just
8 like you to take into account the testimony regarding
9 Detective Neil's statement as he was phrasing it more of
10 emotional plea on his behalf of the City of West Columbia
11 instead of the victim in this case and the facts that
12 actually occurred.

13 THE COURT: Yes, sir, anything else?

14 MR. WHITMIRE: Just brief response. I guess those
15 comments are kind of in connection with 403 type
16 prejudicial context. But this isn't in front of a jury.
17 It's in front of Judge Young who has had many years on
18 the bench and it sufficiently undercuts their deficiency
19 argument. Just rest on the record, Your Honor, unless
20 you have any questions.

21 THE COURT: All right. In reviewing the transcript
22 and the testimony that was presented to the Court today I
23 find that on page 4 of the transcript the Court
24 specifically reviewed potential sentences. Actually I
25 think page 4 through 6 of the transcript the Court

1 specifically reviewed potential sentences with the
2 Applicant who responded that he understood. I find that
3 this Court discussed the negotiations on page 10 of the
4 transcript with the defendant/applicant for purposes of
5 this hearing and asked him if he understands the cap of
6 25. I further find that the Court went on on page 30 and
7 31 and I think as Mr. Madsen said questioning the State
8 regarding the basis for the negotiations. I find that
9 counsel rendered adequate assistance within the range of
10 competence required in a criminal case. I further find
11 that counsel rendered adequate assistance in making
12 decisions in the exercise of reasonable and professional
13 judgment. I find that the applicant has failed to prove
14 his counsel's performance as deficient and deny his
15 application for post conviction relief and a new trial.
16 All right. Thank you. Get me that order.

17 MR. WHITMIRE: Thank you, Your Honor. I will get
18 you a proposed order on that.

19 THE COURT: Thank you.

20 WHEREUPON, THE HEARING WAS CONCLUDED.

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CERTIFICATE OF REPORTER

(STATE OF SOUTH CAROLINA)

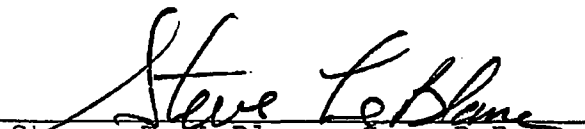
(COUNTY OF LEXINGTON)

I, THE UNDERSIGNED, Steven E. LeBlanc, Sr., R.P.R., and Official Circuit Court Reporter for the Eleventh Judicial Circuit in and for the State of South Carolina, do hereby certify that I reported the proceedings in the before captioned case in the Court of Common Pleas in and for the State of South Carolina on the 14th day of October, 2014.

I FURTHER CERTIFY that the forgoing 26 pages constitute a true and accurate record of said proceedings.

I FURTHER CERTIFY that I am neither related, counsel to, nor of interest to any party hereto.

IN WITNESS WHEREOF, I have hereunto set my hand at Lexington County, this 13th day of October, 2016.



Steven E. LeBlanc, Sr., R.P.R.
Eleventh Circuit Court Reporter
State of South Carolina.

FILED

STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON

IN THE COURT OF COMMON PLEAS
FOR THE ELEVENTH JUDICIAL CIRCUIT

2018 FEB - 5 AM 11:35

Nathaniel McMillian, #320977,

LISA M. COMER
CLERK OF COURT
LEXINGTON SC

C/A No. 2013-CP-32-03345

ORIGINAL

Applicant,

ORDER OF DISMISSAL

v.

State of South Carolina,

Respondent.

This matter commenced pursuant to a *pro se* application for post-conviction relief filed September 27, 2013, by Applicant Nathaniel McMillian ("Applicant"). Pursuant to S.C. Code Ann. § 17-27-80, this action came before this Court for an evidentiary hearing at the Lexington County Courthouse on October 14, 2014. Applicant was present and represented by appointed counsel Anna Good, Esquire. Assistant Attorney General Walt Whitmire appeared on behalf of Respondent.

I. Procedural History

a. The Underlying Prosecution

Applicant is presently confined in the Broad River Correctional Institution pursuant to orders of commitment of the Lexington County Clerk of Court. On October 1, 2012, the Lexington County Grand Jury indicted Applicant for attempted burglary, first-degree (2012-GS-32-2543); burglary, first-degree (2012-GS-32-2551); criminal sexual conduct, first-degree (2012-GS-32-2552); armed robbery (2012-GS-32-2553); and possession of a weapon during the commission of a violent crime (2012-GS-32-2559). The charges stemmed from a series of events occurring in West Columbia. They began with a burglary on November 22, 2011, and culminated on December 1, 2011, when Applicant was identified as attempting to break into the

residence of a second burglary victim. (Plea Tr. pp. 12-3). The criminal sexual conduct, first degree, armed robbery, and the possession of a weapon during the commission of a violent crime charges stemmed from a November 27, 2011 incident in which Applicant targeted a college student who was walking home from the library in West Columbia at 1:30 PM on a Sunday afternoon. (Plea Tr. pp. 12, 13-8).

On October 2, 2012, Applicant pled guilty to each crime as charged before the Honorable Roger M. Young, Sr. (Plea Tr. pp. 1-35). At the plea hearing, Robert Madsen of the Eleventh Circuit Public Defender's Office represented Applicant, and L. Suzanne Mayes of the Eleventh Circuit Solicitor's Office appeared on behalf of the State. *Id.* As part of a plea agreement, the State recommended Applicant's sentence be capped at 25 years. (Plea Tr. p. 10).

Judge Young accepted Applicant's plea and sentenced him to 25 years' imprisonment each for one count of burglary, first-degree, one count of attempted burglary, first-degree, one count of criminal sexual conduct, first-degree, and one count of armed robbery. (Plea Tr. p. 34). Applicant received a five-year sentence for the possession of a weapon during the commission of a violent crime conviction. Judge Young issued the sentences to run concurrent. (Plea Tr. p. 34).

Applicant did not appeal his convictions and sentence.

b. The Instant PCR Action

Applicant presented the following initial claims for PCR, supporting each claim in a memorandum attached to the *pro se* application:

(a) Ineffective Assistance of Counsel

- 1) failure to adequately communicate with Applicant;
- 2) failure to investigate and prepare Applicant's case;
- 3) failure to advise Applicant of elements of the offenses for which he was charged;
- 4) failure to make a motion to dismiss the burglary, first-degree charge.

(b) Erroneous Advice

(c) Involuntary Guilty Plea

Following the *pro se* PCR application, Respondent filed its Return on April 29, 2014, requesting an evidentiary hearing. Counsel Good, appointed to represent Applicant on November 13, 2013, filed an amended application on May 19, 2014. The amended application included the following claims of ineffective assistance of trial counsel:

- (a) Trial counsel failed to properly investigate the case; and
- (b) Trial counsel failed to object to prejudicial comments made [by an] investigator during the plea.

II. The PCR Evidentiary Hearing

At the hearing, this Court had before it the Lexington County Clerk of Court records pertaining to Applicant's indictments and sentencing, Applicant's South Carolina Department of Corrections records, the *pro se* and amended PCR applications, the State's Return, and the guilty plea transcript.

When the evidentiary hearing convened, Counsel Good withdrew the claim regarding trial counsel's alleged failure to investigate. (PCR Tr. p. 4). Counsel Good advised that Applicant would pursue the claims raised in his initial application and the claim from the amended application that alleged "trial counsel failed to object to a prejudicial comment made by the investigator during the plea." (PCR Tr. p. 4, ll 8-10).

a. Applicant's Testimony

Applicant testified on his own behalf. (PCR Tr. p. 5). He testified Counsel Madsen represented him through the duration of the prosecution of the charges for which he is now in custody. (PCR Tr. p. 5). Applicant recalled he was arrested on November 1, 2011, and he met with Counsel Madsen three times thereafter including the day of the plea. *Id.* Applicant testified that when he met with Counsel Madsen prior to the plea hearing, Applicant was unsure as to whether he wanted to proceed with a guilty plea. (PCR Tr. p. 7). He testified Counsel Madsen

reviewed the nature of the charges during their first meeting. (PCR Tr. p. 6). During their second meeting, Applicant and Counsel Madsen confirmed Applicant received his discovery, and the two discussed the plea offer made by the State. (PCR Tr. pp. 6-7). Applicant indicated he learned about the first-degree burglary charge in that meeting. (PCR Tr. pp. 7-8). Applicant testified he met with Counsel Madsen again on the day of his plea. During that meeting, he and Counsel Madsen discussed the indictments, and Applicant signed his indictments. (PCR Tr. pp. 7-8).

Applicant recalled the plea offer was for a maximum sentence of 25 years. (PCR Tr. pp. 6, 8). When asked whether he was aware that he was getting potentially 25 years in prison, Applicant answered “[a]t that time I didn’t see that in my future.” (PCR Tr. p. 8, ll 24-5). Applicant testified he expected to receive “like 10, 15, at the most 20” years’ incarceration, and Counsel Madsen told him he would “get no higher than” the 25-year cap. (PCR Tr. p. 9, ll 4, 8-9).

Applicant further testified the prosecution made comments about Applicant having a speech impediment, and a West Columbia investigator commented about Applicant “being a menace” during his residency in West Columbia. (PCR Tr. p. 9, ll 13-7). Applicant concluded by stating he would have proceeded to trial had he known the entirety of the situation surrounding his plea. (PCR Tr. pp. 9-10). He believed Counsel Madsen was ineffective in not correctly advising Applicant about the enhancement of his burglary charge to a charge of first-degree burglary. (PCR Tr. p. 10).

During the State’s cross-examination, Applicant recalled confessing to the criminal sexual conduct, armed robbery, and possession of a weapon during the commission of a violent crime charges. (PCR Tr. pp. 10-11). Applicant testified he was not caught inside the house

during the attempted burglary, but he was caught "in the area" because he lived there. (PCR Tr. p. 11). Applicant additionally testified he thought he could beat the second-degree burglary charges, but he "gave in" and agreed to the plea when he actually saw the indictments. (PCR Tr. p. 12). Applicant agreed he was presented with all of his arrest warrants on December 2, 2011. *Id.*

Applicant testified he previously pled guilty to two counts of burglary in Georgetown County. (PCR Tr. p. 12). He stated his plea proceeding for the Lexington County charges was "a little different" than the previous plea he entered, but he "still didn't have an understanding of all the legal terminology." (PCR Tr. pp. 12-13). Applicant also admitted he never stopped the plea judge in either his Georgetown County plea or this plea to ask questions regarding any legal terminology during either plea proceeding. (PCR Tr. pp. 13-14).

b. Counsel Madsen's Testimony

The State called Applicant's plea counsel, Robert Madsen, to testify. (PCR Tr. p. 14). Counsel Madsen stated he had been practicing criminal law for eighteen years. *Id.* Having reviewed Applicant's file, Counsel Madsen testified Applicant was arrested on December 1, 2011, and they had their initial meeting on December 12. (PCR Tr. pp. 14, 16). Counsel Madsen recalled that during that meeting, he reviewed the crimes charged, the elements of those crimes, and the possible penalties. (PCR Tr. p. 16). Because of the criminal sexual conduct charge, Counsel Madsen reviewed the sex offender registry and sexually violent predator act with Applicant. *Id.* Counsel Madsen also went over the lesser included offenses for each charge, as well as the implications of S.C. Code Ann. § 17-25-45, the three-strikes law, which mandates life imprisonment without the possibility of parole for offenders with one or more prior convictions for certain offenses, including burglary. *See Id.* Counsel Madsen also testified he reviewed

Applicant's background with him, and he discussed the requirement that Applicant serve 85% of his sentence as provided for by S.C. Code Ann. § 24-13-150. *See id.*

Counsel Madsen testified that prior to meeting with Applicant, Applicant had made statements to law enforcement regarding the criminal sexual conduct, armed robbery, and the burglary charges, but not on the attempted burglary charge. (PCR Tr. p. 16). Counsel Madsen testified the victim of the criminal sexual conduct charge identified Applicant in a photo lineup, and Applicant was connected to the other incidents through his statements and by a witness who may have identified Applicant from a video from a local convenience store. (PCR Tr. pp. 14-15). Counsel Madsen recalled Applicant admitted from the outset that he committed the criminal sexual conduct, first degree, and the accompanying armed robbery. Accordingly, Counsel Madsen testified that in their discussions Applicant "never indicated that he had anything but a desire to work out a plea." (PCR Tr. p. 17, II 8-9). Counsel Madsen also indicated Applicant never communicated to him that he would want to go to trial for some of the charges. (PCR Tr. p. 17). In their discussions, it was noted the State had stronger cases on the burglary, criminal sexual conduct, and armed robbery charges than it had on the attempted burglary charge, which Applicant had not confessed to committing. *Id.*

In regards to the progression of the plea bargaining in this case, Counsel Madsen testified he contacted the State about a potential plea to the armed robbery and first degree criminal sexual conduct, which the State rejected. (PCR Tr. pp. 17-8). The State followed-up by notifying Counsel Madsen of its intent to upgrade Applicant's initial second-degree burglary charge to a first-degree burglary charge due to Applicant's two prior convictions for burglary.¹ (PCR Tr. p.

¹ One may commit burglary in the first degree if "the burglary is committed by a person with a prior record of two or more convictions for burglary or housebreaking or a combination of both." S.C. Code Ann. § 16-11-311(A)(2).

18). The State subsequently offered Applicant a plea for a sentence minimum of 15 years and a maximum of 25 years, which Counsel Madsen relayed to Applicant on August 1, 2012. *Id.* Counsel Madsen testified that at that time, Applicant indicated he would like to accept that plea offer. *Id.* Counsel Madsen reviewed the plea offer with Applicant again on September 19, 2012, a couple of weeks prior to the plea hearing. *Id.*

Counsel Madsen stated that in mitigation, he focused on Applicant's soft-spoken nature. (PCR Tr. p. 19). Counsel Madsen additionally recalled the plea court questioned the State on the plea offer, making "it sound like he didn't think it wasn't a sufficient offer," and "[t]hat the State should have been a little bit harsher." (PCR Tr. p. 19, ll 18-20).

On cross-examination, Counsel Madsen testified he discussed the first degree burglary charge with Applicant as part of the plea deal. (PCR Tr. p. 20). Counsel did not recall at what point during his representation the indictments arose, but Applicant was not charged with first-degree burglary during their first meeting in December 2011. (PCR Tr. pp. 20-21). Counsel met with Applicant a total of seven times, including twice just about the negotiations for the plea agreement with a sentencing range of fifteen to 25 years. (PCR Tr. p. 21).

Counsel Madsen further testified that an investigator from West Columbia spoke at the plea. The investigator indicated Applicant had not lived in the area very long, yet Applicant had incurred three separate sets of charges in a short period of time, including one set for an attack in broad daylight. (PCR Tr. pp. 22-23). When that investigator asked for the maximum sentence at the plea, the request did not necessarily give Counsel Madsen pause. (PCR Tr. p. 23). However, looking back on the statement, and from his employment, Counsel Madsen found it interesting that the investigator intimated West Columbia did not have those kinds of crimes because counsel's experience indicated otherwise. (PCR Tr. p. 23).

III. Findings of Fact and Conclusions of Law

After considering the allegations raised in the initial and amended application, hearing the testimony presented at the evidentiary hearing, considering the record in this action incorporated by way of the State's Return, and after reviewing of the transcript of the PCR proceedings occurring on October 14, 2014, the undersigned denies the application. Pursuant to S.C. Code Ann. § 17-27-80, this Court makes the following findings based upon all of the probative evidence presented.

a. Standard of Review

When an applicant "enters a plea on the advice of counsel, [he] may only attack the voluntary and intelligent character of the plea" by fulfilling a two-prong test established regarding proof of ineffective assistance of counsel. *Frasier v. State*, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (citing *Hill v. Lockhart*, 474 U.S. 52, 58-59, 106 S.Ct. 366, 370 (1985)) (adopting seminal ineffective assistance of counsel standard from *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052 (1984), and applying to cases resolved via guilty plea)). "A claim of ineffective assistance of guilty plea counsel requires the applicant present evidence satisfying two prongs: first, evidence that counsel's performance was deficient; and second, evidence that the applicant was prejudiced by that deficiency." *Stalk v. State*, 383 S.C. 559, 560-61, 681 S.E.2d 592, 593 (2009) (citing *Hill v. Lockhart*, *supra*). In regards to the first prong, "[t]he proper measure of attorney performance remains reasonableness under prevailing professional norms." *Strickland v. Washington*, *supra* at 688, 104 S.Ct. at 2065. In order to satisfy the prejudice requirement, "the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pled guilty and would have insisted on going to trial." *Hill v. Lockhart*, *supra* at 59, 106 S.Ct. at 370.

At all times during the proceeding, the Applicant maintains the burden of establishing that he is entitled to relief. *Suber v. State*, 371 S.C. 554, 558, 640 S.E.2d 884, 886 (2007). Moreover, the proceeding is coupled with "a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case." *Morris v. State*, 371 S.C. 278, 282, 639 S.E.2d 53, 55 (2006). Therefore, Applicant must demonstrate 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." *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 441(1985) (quoting *Strickland v. Washington, supra* at 686, 104 S. Ct. at 2064).

b. The Merits of the Allegations

As a matter of general impression, this Court finds Applicant's testimony and assertions were not credible. In contrast, this Court finds counsel's testimony were credible and persuasive on all matters. These credibility findings have been applied to the Court's findings and conclusions set forth below.

Ineffective Assistance of Counsel Claims

This Court notes that in its review of the initial and amended application, this Court identifies six allegations of ineffective assistance of counsel raised by Applicant. This Court finds all the claims were either voluntary withdrawn or lack merit. They are addressed as follows:

A. Failure to Investigate

This Court finds that at the outset, Applicant withdrew his claims regarding counsel's alleged failure to investigate. Thus, this Court finds Applicant has withdrawn his second

allegation in the initial application for post-conviction relief, and the first allegation in the amended application for post-conviction relief.

B. Failure to Object to Investigator's Comments

Applicant's second claim in the amended application pertains to counsel's alleged failure to object to prejudicial comments made by an investigator during the plea hearing. (Amended App. filed May 19, 2014). This Court finds that claim is without merit.

Detective Scott Neal of the West Columbia Police Department was present during the plea hearing. (Plea Tr. p. 13). During the sentencing phase of the plea hearing, Detective Neal addressed the court. He spoke to the court regarding his experience with the victim of the criminal sexual conduct and armed robbery charges. (Plea Tr. pp. 29-30). He additionally told the court the following regarding Applicant:

... he had only been staying in West Columbia for a short period of time, and as you've heard earlier, he's caused a lot of issues and a lot of problems for us. This is a community that's not used to these kinds of things happening. The attack on Ms. Tucker was in broad daylight at 1:30 on a Sunday afternoon as she was walking to the library. These things don't happen in West Columbia, in particular in this neighborhood, in this area that all this stuff happened. Everything that he's charged with all occurred within probably a half mile of each other in this neighborhood.

And then Ms. Mack, the other victim in the attempted burglary that lived on Earl Court was actually a relative of Ms. Tucker, so this whole family has been affected in more than just the charges involving Ms. Tucker.

We ask that you give him the maximum sentence possible due to the issues that he's caused us and due to the problems and the pain he has given to this community.

(Plea Tr. p. 30, ll 4-22).

This Court finds credible counsel's testimony that Detective Neal's address, including his request for the maximum negotiated sentence, did not necessarily give counsel pause, even to the extent he may have disagreed with Detective Neal's characterization of the presence or absence

of crime in West Columbia. (See PCR Tr. p. 23). This Court finds that Detective Neal's testimony fell within the bounds of testimony appropriate during the sentencing phase of a guilty plea proceeding. Thus, the testimony was not ripe for objection; and, even if counsel had objected, there is no basis upon which counsel could have prevailed in suppressing the Detective's address in support of the victim. Furthermore, as with any testimony presented in support of or in opposition to a recommended sentence, the experienced plea judge in this case was free to give the Detective's testimony whatever weight it deemed appropriate.

This Court additionally finds Applicant was not prejudiced by Detective Neal's address to the court. There is no reasonable probability that had counsel objected to the testimony, that the result of the sentencing proceeding would have been different. There existed ample evidence as presented by the State to support the sentence negotiated and rendered in this case including Applicant's own statements to law enforcement regarding his involvement in the crimes, as well as victims' identifications of Applicant.²³ (Plea Tr. pp. 12-26). This Court further finds that in

² Applicant was charged with one count of first degree burglary; one count of first degree attempted burglary; one count of first degree criminal sexual conduct; and one count of armed robbery. Each of these charges are classified as most serious offenses under S.C. Code Ann. § 17-25-45(C)(1). Applicant also had two prior convictions for second-degree burglary. (Plea Tr. 27). Second-degree burglary is classified as a serious offense by statute. S.C. Code Ann. § 17-25-45(C)(2)(b). Applicant faced life imprisonment without the possibility of parole had he not pled guilty and had instead proceeded to trial on each of the three separate incidents. S.C. Code Ann. § 17-25-45. This Court finds the State could have sought life without parole upon each of these convictions. Further, even without considering the availability of life without parole sentences upon each of his charges, Applicant faced significant prison time. These charges carried sentences ranging from ten years to life, with the burglary charges carrying a mandatory minimum of fifteen years. S.C. Code Ann. § 16-11-311 (first degree burglary, carrying sentence of fifteen to life); S.C. Code Ann. § 16-11-330 (armed robbery, carrying sentence of ten to 30); S.C. Code Ann. § 16-3-652 (first degree criminal sexual conduct, carrying maximum sentence of 30 years); S.C. Code Ann. § 16-1-90 ("A person who commits the common law offense of attempt, upon conviction, must be punished as for the principal offense."). Applicant also faced a weapons enhancement charge of possession of a weapon during the commission of a violent crime which carried an additional five-year sentence. S.C. Code Ann. § 16-23-490.

line with plea counsel's testimony, the plea court did question the State regarding its basis for the plea negotiations. (Plea Tr. p. 30). The State premised the propriety of its recommended fifteen- to twenty-five year sentence for the crimes pled upon Applicant's cooperation with law enforcement and its understanding the charges were no-parole offenses with a requirement of 85% service of sentence. (Plea Tr. p. 31).

Altogether, since Applicant fails to meet his burden of establishing he is entitled to relief upon either prong of this claim of ineffective assistance of counsel under *Hill* and *Strickland*, this claim for relief is denied and dismissed with prejudice.

***C. Failure to Adequately Communicate with Applicant; and
D. Failure to Advise of Elements of Offenses for which
Applicant was Charged***

This Court addresses the first and third claims of ineffective assistance of counsel raised by Applicant in his initial Application for Post-Conviction Relief together and they appear to be related. In the first claim, Applicant asserts plea counsel was ineffective because he did not adequately communicate with Applicant. In his third claim, Applicant contends counsel failed to advise Applicant of the elements of the offenses for which he was charged. This Court finds these two claims are without merit.

At the PCR evidentiary hearing, counsel testified he met with Applicant seven times prior to the guilty plea hearing. (PCR Tr. 21). Counsel Madsen further testified that at the initial meeting, he would have discussed with Applicant his charges, his trial rights, the elements of each charge, and the potential sentences Applicant faced. (PCR Tr. 16). Counsel Madsen also reviewed Applicant's potential parole eligibility and the applicability of the sex offender registry.

³ S.C. Code Ann. § 17-25-45(A)(2) provides that upon conviction of a most serious offense, a defendant convicted of two prior serious offenses must be sentenced to life without parole. Further, S.C. Code Ann. § 17-25-45(A)(1) provides that upon conviction of a most serious offense, a defendant convicted of a prior most serious offense must be sentenced to life without parole.

in light of Applicant's criminal sexual conduct charge. (PCR Tr. 16). Counsel Madsen testified he had further discussions with Applicant after her was informed by the State that his initial second-degree burglary charge was enhanced to a first-degree burglary charge because of Applicant's prior convictions. (PCR Tr. 18). Counsel Madsen also noted the State had offered Applicant a plea deal at that point in time, and Counsel Madsen and Applicant discussed that plea offer. (PCR Tr. 18).

At the PCR evidentiary hearing, Applicant testified he only met with counsel two or three times. (PCR Tr. 5-7, 11). He acknowledged that in the first meeting, he and counsel had a discussion about the general overview of the nature of his charges. (PCR Tr. 6). Applicant believed the second discussion was a couple of weeks before the guilty plea, and during that meeting they discussed the plea offer and Applicant's receipt of a copy of the discovery that had been provided. (PCR Tr. 6). Applicant testified they met a third time on the day of the guilty plea. (PCR Tr. 7). At that meeting, Applicant stated they discussed the nature of the indictments and Applicant signed the indictments. (PCR Tr. 7). Applicant admitted that counsel told him he would receive a sentence no higher than the cap of twenty-five years. (PCR Tr. 9). Applicant also admitted that counsel discussed the first-degree burglary charge and Applicant's options relating to that charge after that indictment was issued.

This Court finds credible counsel's testimony regarding his seven pre-plea meetings with Applicant, and further finds counsel is an experienced defense attorney who thoroughly reviewed the elements of the offenses charged, the evidence, and the potential outcomes with his client. (See PCR Tr. pp. 14-21). This Court also finds Applicant's testimony that he only met with counsel two or three times prior to his guilty plea was not credible. In light of counsel's testimony regarding his meetings with Applicant, this Court finds Applicant fails to show

counsel was deficient in his communications with Applicant. Furthermore, in light of counsel's credible testimony that he discussed the elements of the charges with Applicant, and Applicant's admissions that he and counsel discussed the nature of his charges and later discussed the nature of the first-degree burglary charge and his options relating to it, this Court finds Applicant fails to show counsel was deficient in not advising him of the elements of his charges. Since Applicant fails to meet his burden of establishing the first prong of ineffective assistance of counsel under *Strickland* for these two claims, both claims are denied and dismissed with prejudice.

E. Failure to Move for Dismissal of First-Degree Burglary Charge

In his fourth claim in the initial Application for Post-Conviction Relief, Applicant asserts trial counsel was ineffective in not moving to dismiss the first-degree burglary indictment. This claim is without merit.

Applicant has presented no evidence or argument to support this claim for relief. This Court finds he has failed to meet his burden of showing plea counsel was deficient in not making such a motion. Applicant has not shown counsel had a legal basis for moving to dismiss the indictment for first-degree burglary. Applicant also fails to show he was prejudiced in not moving for dismissal of the indictment. Since Applicant has failed to meet his burden for this allegation, this claim for relief is denied and dismissed with prejudice.

Altogether, Counsel negotiated a plea bargain in which Applicant could resolve charges stemming from three separate incidents in one plea, avoid a mandatory life sentence, and receive a sentence capped at the lower end of all potential sentences faced. Considering the consequences of alternative resolutions, and giving additional consideration to the strength of the

evidence presented by the State during the plea hearing, this Court finds counsel's advice to so plead to be within the range of reasonable assistance under prevailing professional norms.

In sum, this Court finds Applicant has failed to prove his counsel's performance was deficient and additionally finds that counsel rendered adequate assistance within the range of competence required in a criminal case. Counsel did not act below the range of competence required in a criminal case. All of Applicant's claims of ineffective assistance of trial counsel are denied and dismissed with prejudice.

Voluntariness of the Guilty Plea

The undersigned also finds Applicant pled guilty freely, knowingly, and voluntarily. To find a guilty plea is voluntarily and knowingly entered into, the record must establish the defendant had a full understanding of the consequences of his plea and the charges against him. *Boykin v. Alabama*, 395 U.S. 238, 89 S. Ct. 1709 (1969). "In addition to the requirements of *Boykin*, a defendant entering a guilty plea must be aware of the nature and crucial elements of the offense, the maximum and any mandatory minimum penalty, and the nature of the constitutional rights being waived." *Anderson v. State*, 342 S.C. 54, 57, 535 S.E.2d 649, 651 (2000).

A defendant's knowing and voluntary waiver of statutory or constitutional rights must be established by a complete record, and "may be accomplished by colloquy between court and defendant, between court and defendant's counsel, or both." *Roddy v. State*, 339 S.C. 29, 34, 528 S.E.2d 418, 421 (2000).

A guilty plea is a solemn, judicial admission of the truth of the charges against an individual; thus, a defendant's right to contest the validity of such a plea is usually, but not invariably, foreclosed. *Dalton v. State*, 376 S.C. 130, 137-38, 654 S.E.2d 870, 874 (Ct. App. 2007) (citing *Blackledge v. Allison*, 431 U.S. 63, 97 S. Ct. 1621 (1977)). Therefore, statements

made during a guilty plea should be considered conclusive unless an applicant presents valid reasons why he should be allowed to depart from their truth. *Blackledge v. Allison, supra*; *Crawford v. United States*, 519 F.2d 347 (4th Cir. 1975).

This Court finds meritless any contention by Applicant that he did not plead guilty knowingly and voluntarily. This Court finds very credible Counsel's testimony regarding his preparation and advice concerning the charges and the amount of time Applicant was facing, while finding Applicant's testimony on this topic not credible. This Court also finds the plea court specifically reviewed the potential sentences with Applicant who responded that he understood. (Plea Tr. pp. 4-6). This Court finds the record reflects Applicant was advised of the waiver of his constitutional rights by the plea court. (Plea Tr. p. 7-9). This Court finds the plea court further discussed the breadth of the plea negotiations with applicant, asking him if he understood that the sentence would be capped at 25 years. (Plea Tr. pp. 5-7, 10). Moreover, the State presented its basis for the recommended sentence on the record prior to entry of the sentence. (Plea Tr. p. 31).

Accordingly, this Court finds the plea judge correctly found Applicant's plea was freely, voluntary, and intelligently made. (See Plea Tr. p. 11). This Court finds Applicant failed to meet his burden in proving he pled guilty involuntarily and unknowingly. The record reflects Applicant admitted his guilt to the plea court after being fully informed of the nature and consequences of his plea by his attorney and by the plea court. (Plea Tr. p. 10). The record further reflects and this Court further finds Applicant entered his plea on his own accord. (Plea Tr. p. 11). This Court also finds that in regard to the length of sentence received, Applicant cannot prove prejudice for the reasons stated above. This Court therefore denies and dismisses with prejudice any allegation any allegation that Applicant pled guilty involuntarily.

IV. Conclusion

Upon conclusion and consideration of the testimony presented at the evidentiary hearing, a review of the pertinent portions of the file made part of this record by way of attachment to the State's Return, and the applicable case law, the undersigned finds that Applicant has failed to meet his burden of establishing error and prejudice, or that he entered an unknowing, involuntary guilty plea. Even if Applicant had put forth sufficient evidence that plea counsel's performance was unreasonable under prevailing professional norms, which this Court finds he did not, Applicant has failed to present any evidence that would tend to establish that he was prejudiced by some act or omission of counsel, or that had counsel not acted in the manner complained of, that Applicant would not have pled guilty and would have instead proceeded to trial. Applicant additionally failed to put forth any evidence sufficient for this Court to find that he did not have a full understanding of the plea deal into which he entered.

IT IS THEREFORE ORDERED THAT:

1. The Application for Post-Conviction Relief is denied and dismissed with prejudice; and
2. Applicant shall remain in the custody of the South Carolina Department of Corrections to complete service of his sentence.

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

Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

AND IT IS SO ORDERED this 30 day of Jan, ²⁰¹⁸~~2017~~.


DEANDREA G. BENJAMIN
Presiding Judge

Columbia, South Carolina

FILED
2018 FEB -5 AM 11:35
LISA M. COHER
CLERK OF COURT
LEXINGTON SC

WITNESSES

West Columbia Police Department

S Neel

Law Enforcement Case #: 1130291

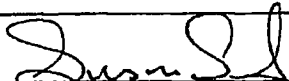
LSM

ARREST WARRANT NUMBER

J034830

ACTION OF GRAND JURY

TRUE BILL



Foreperson of Grand Jury

Date: 10/1/2012

VERDICT

Foreperson of Petit Jury

Date:

DOCKET NO. 2012GS3202543

The State of South Carolina

County of Lexington

COURT OF GENERAL SESSIONS

OCTOBER TERM 2012

THE STATE

vs.

Nathaniel Mcmillian

CDR #: 0019

Indictment for

Attempted Burglary - First degree

§ 16-01-80

DONALD V. MYERS, SOLICITOR

STATE OF SOUTH CAROLINA)
)
COUNTY OF LEXINGTON)
)

INDICTMENT FOR
Attempted Burglary - First degree
§ 16-01-80

At a Court of General Sessions, convened on October 2012, the Grand Jurors of Lexington County present upon their oath:

That Nathaniel McMillian in Lexington County, South Carolina, on or about December 1, 2011, did attempt to enter the dwelling of Pamela Mack, located at 1 [REDACTED] in the West Columbia area of Lexington County, without consent and with the intent to commit a crime therein, and the attempted burglary was committed by a person with a prior record of two or more convictions for burglary or housebreaking or a combination of both; to wit: Nathaniel McMillian has two prior convictions for burglary as follows, Burglary – 2nd degree, conviction date of 3/21/07, and Burglary – 2nd degree, conviction date of 12/18/07, in violation of Section 16-11-311 and 16-1-80 and 17-25-30 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.

Suzanne Hayes
ASSISTANT SOLICITOR

WITNESSES

Lexington County Sheriffs Department

Shawn Spivey

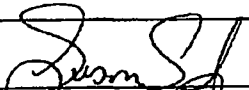
Law Enforcement Case #: 11034060

LSM

ARREST WARRANT NUMBER

J811727

ACTION OF GRAND JURY



Foreperson of Grand Jury

Date: 10/1/2012

VERDICT

Foreperson of Petit Jury

Date:

DOCKET NO. 2012GS3202551

The State of South Carolina

County of Lexington

COURT OF GENERAL SESSIONS

OCTOBER TERM 2012

THE STATE

vs.

Nathaniel Mcmillian

CDR #: 0079

Indictment for

Burglary - First Degree

§ 16-11-0311

DONALD V. MYERS, SOLICITOR

STATE OF SOUTH CAROLINA)
)
 COUNTY OF LEXINGTON)
)

INDICTMENT FOR
 Burglary - First Degree

§ 16-11-0311

At a Court of General Sessions, convened on October 2012, the Grand Jurors of Lexington County present upon their oath:

That Nathaniel McMillian did in Lexington County, South Carolina on or about November 22, 2011 knowingly and willfully enter a dwelling, without consent and with the intent to commit a crime therein, and the burglary was committed by a person with a prior record of two or more convictions for burglary or housebreaking or a combination of both; to wit: Nathaniel McMillian did open a window of the dwelling of Lindsay Nelson, at [REDACTED] in the West Columbia area of Lexington County, in order to gain entry inside the dwelling, furthermore Nathaniel McMillian has two or more convictions for burglary as follows, Burglary – 2nd degree, conviction date of 3/21/07, and Burglary – 2nd degree, conviction date of 12/18/07, in violation of § 16-11-311 (A)(2) of the Code of Laws of South Carolina, 1976, as amended.

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


 ASSISTANT SOLICITOR

WITNESSES

West Columbia Police Department

S Neel

Law Enforcement Case #: 1129903


LSM

ARREST WARRANT NUMBER

J034831

ACTION OF GRAND JURY

TRUE BILL



Foreperson of Grand Jury
Date: 10/1/2012

VERDICT

Foreperson of Petit Jury
Date:

DOCKET NO. 2012GS3202552

The State of South Carolina

County of Lexington

COURT OF GENERAL SESSIONS

OCTOBER TERM 2012

THE STATE

vs.

Nathaniel Mcmillian

CDR #: 0160

Indictment for

Criminal Sexual Conduct - First Degree

§ 16-03-0652

DONALD V. MYERS, SOLICITOR

STATE OF SOUTH CAROLINA)
)
 COUNTY OF LEXINGTON)
)

INDICTMENT FOR
 Criminal Sexual Conduct - First Degree

§ 16-03-0652

At a Court of General Sessions, convened on October 2012, the Grand Jurors of Lexington County present upon their oath:

That **Nathaniel Mcmillian**, did in Lexington County, South Carolina on or about November 27, 2011, commit the offense of criminal sexual conduct in the first degree by engaging in sexual battery with the victim, Tiara Tucker, under any one or more of the following circumstances: (a) the Defendant used aggravated force to accomplish the sexual battery; or (b) the victim submitted to sexual battery by the Defendant under circumstances where the victim was also the victim of forcible confinement, kidnapping, robbery, or any other similar offense or act; in violation of Section 16-3-652, Code of Laws of South Carolina, (1976, as amended).

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

Suzanne Mayes
 ASSISTANT SOLICITOR

WITNESSES

West Columbia Police Department

S Neel

Law Enforcement Case #: 1129903

LSM

ARREST WARRANT NUMBER

J034832

ACTION OF GRAND JURY

TRIP BILL

Foreperson of Grand Jury
Date: 10/11/2012

VERDICT

Foreperson of Petit Jury
Date:

DOCKET NO. 2012GS3202553

The State of South Carolina

County of Lexington

COURT OF GENERAL SESSIONS

OCTOBER TERM 2012

THE STATE

vs.

Nathaniel Mcmillian

CDR #: 0139

Indictment for

Armed Robbery

§ 16-11-0330(A)

DONALD V. MYERS, SOLICITOR

STATE OF SOUTH CAROLINA)
)
 COUNTY OF LEXINGTON)
)

INDICTMENT FOR
 Armed Robbery
 § 16-11-0330(A)

At a Court of General Sessions, convened on October 2012, the Grand Jurors of Lexington County present upon their oath:

That **Nathaniel Mcmillian** did in Lexington County, South Carolina on or about November 27, 2011 knowingly and willfully while armed with a deadly weapon and/or having possession of an object which the victim reasonably believed to be a deadly weapon and/or alleging by actions or words that he was armed, to wit: a knife, did feloniously take from the person or presence of Tiara Tucker, by means of force, threats or intimidation, goods or monies being described as follows: approximately twenty (\$20.00) dollars with the intent to permanently deprive the owner of the use of such property or monies, in violation of Section 16-11-330 (A) 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.


 ASSISTANT SOLICITOR

WITNESSES

West Columbia Police Department

S Neel

Law Enforcement Case #: 1129903

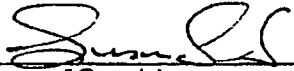
LSM

ARREST WARRANT NUMBER

J034833

ACTION OF GRAND JURY

TRUE BILL



Foreperson of Grand Jury

Date: 10/1/2012

VERDICT

Foreperson of Petit Jury

Date:

DOCKET NO. 2012GS3202559

The State of South Carolina

County of Lexington

COURT OF GENERAL SESSIONS

OCTOBER TERM 2012

THE STATE

vs.

Nathaniel Mcmillian

CDR #: 0549

Indictment for

Possession of Weapon During

Commission of Violent Crime

§ 16-23-0490

DONALD V. MYERS, SOLICITOR

STATE OF SOUTH CAROLINA)
)
COUNTY OF LEXINGTON)
)

INDICTMENT FOR
Possession of Weapon During Violent Crime
§ 16-23-0490

At a Court of General Sessions, convened on October 2012, the Grand Jurors of Lexington County present upon their oath:

That **Nathaniel McMillian** did in Lexington County, South Carolina on or about November 27, 2011 knowingly and willfully, visibly display a knife during the commission of a violent crime or attempt to commit a violent crime, to wit: Nathaniel McMillian possessed and visibly displayed a knife during the commission of an armed robbery committed against Tiara Tucker and/or criminal sexual conduct – first degree committed against Tiara Tucker, both offenses being classified as violent crimes under South Carolina law, such act in violation of § 16-23-490 of the Code of Laws of South Carolina, 1976, as amended.

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


ASSISTANT SOLICITOR