

Bernard McFadden, 199135
Kershaw CI / 0132
4848 Goldmine Hwy
Kershaw, S.C. 29067

RECEIVED

11/11/2016

NOV 17 2016

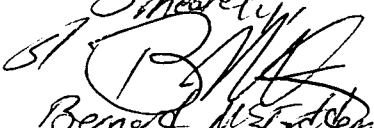
S.C. SUPREME COURT

RE: McFadden vs. State, (ACR) Case # 2011-CP-43-01952

Dear Clerk:

Enclosed, please find McFadden's Notice of Intent to Appeal with Judge James' Orders and Declaration in Support of Motion to Proceed In Forma Pauperis for filing in your office.

Thanking you in advance,

Sincerely,

Bernard McFadden,

* Deposit for mailing also documented on SCDC Form 10-04 dated 11/11/2016.

State of South Carolina
County of Richland

In South Carolina Supreme Court
Case # _____

Bernard McFadden, 199135,
Appellant,

vs.

State of South Carolina,
Respondent.

Declaration In Support of Motion
To Proceed In Forma Pauperis

RECEIVED

NOV 17 2016

S.C. SUPREME COURT

1) I, Bernard McFadden, 199135, am the petitioner in the above entitled case. In support of my motion to proceed without being required to prepay fees or costs or give security therefore, I state that because of my poverty, I am unable to pay costs of said proceedings or give security therefore, and that I believe I am entitled to redress for violation of my 6th and 14th Amendment rights under U.S. Constitution.

2) I declare under penalty of perjury this 10th day of November 2016, that the foregoing is true and correct.

Bernard McFadden, 199135

Wershaw C.I. / 0132

4848 Goldmine Hwy.

Wershaw, S.C. 29067

Sworn And Subscribed Before Me

This 10th day of November 2016

Charles R. East

Notary Public of South Carolina

My commission expires Jan 27 2025

A)

See Simmons vs. State, 788 S2d 220, — (S.C. 2016) (Extraordinary action of remanding (PER) warranted where trial counsel failed to adequately challenge the State DNA evidence.) (See also photograph #5 attached to (PER) application showing blood droplet is nothing more than a Q-tip.)

State of South Carolina
County of Sumter

In South Carolina Supreme Court
Case # _____

Bernard McFadden, 199135,
Applicant,

vs.

State of South Carolina,
Respondent.

Notice of Intent To Appeal

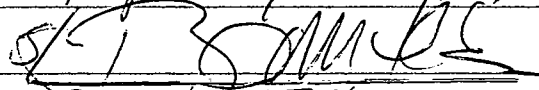
RECEIVED

NOV 17 2016

S.C. SUPREME COURT

Please take notice that the Applicant Bernard McFadden does hereby appeal the Hon. Judge George C. James' 10/11/2016 Order of Dismissal received 10/28/2016; and Judge James' 11/04/2016 Order Denying Motions For Reconsideration And For Hearing On Funds Received 11/05/2016 this 11th day of November 2016 in McFadden vs. State, Case # 2011-CP-43-01952.

Respectfully Submitted,



Bernard McFadden, 199135

Kershaw CI/ 082

4548 Goldmine Hwy.

Kershaw, S.C. 29067

Date: 11/11/2016

Bernard McFadden, 199135

11/10/2016

Kershaw CI/ 032

4848 Goldmine Hwy.

Kershaw, S.C. 29067

Margaret Sullivan, Sumter County

3rd Circuit Court Reporter, 504

Henderson Street, Sumter, S.C. 29150

RE: My 4/14/2015 (PCR) Hearing Transcript Before Judge George
C. James, Jr., At The Sumter County Courthouse In McFadden
VS. State, Case # 2011-CP-43-01952

Dear Mrs. Sullivan:

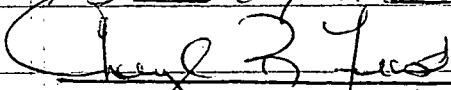
Please be advised that I am ordered to proceed pro-se and
do hereby request that the tapes of any transcribed transcript
be maintained to allow me time to review it for accuracy -
not Mr. Fulton Comwell.

Be also advised that I am indigent and believe this requires
Respondent to provide funds to you for your service. This is my
effort to come to an agreement or to comply with payment for
furnishing the transcript found in S.C. Appellate Court Rule 207.

If any questions, please feel free to write me - not Mr. Comwell.

Sworn And Subscribed Before Me

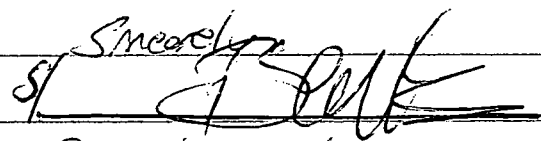
This 10th day of November, 2016



Notary Public For South Carolina

My Commission Expires Jan 27, 2025

p. 2 of 3

Sincerely,


Bernard McFadden, 199135

Applicant / Petitioner, pro se

Proof of Mailing
Case # 2011-CP-43-01952

The undersigned hereby certifies that a true copy of the attached matter has been mailed to the persons listed below by depositing a properly-addressed-stamped-envelope in the U.S. Mail this 10th day of November 2016; such matter being: "Notice Of Intent To Appeal Hon. Judge James' 10/16/2016 and 11/04/2016 Orders With Letter To Court Reporter Sullivan For 04/14/2015 (PCR) Hearing Transcript:"

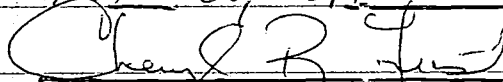
- 1) Margaret Sullivan, Sumter County 2) Julie A. Coleman, Asst. Atty. Gen.
3rd Cir. Court Reporter, 504 Henderson Street, Sumter, South Carolina 29150; Attorney General, P.O. Box 11549, Columbia, South Carolina 29911

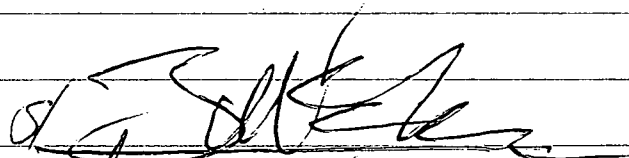
- 3) Daniel Shearouse, Clerk, S.C. Supreme Court, P.O. Box 11330, Columbia, South Carolina 29211; and 4) James C. Campbell, Clerk of Court, 215 N. March Street, Room 303, Sumter South Carolina 29150

(Enclosing Judge James's Orders)

Formal Deputies Motions are enclosed for Mr. Shearouse and Ms. Coleman, only.

Sworn And Subscribed Before Me
This 10 day of November 2016


Notary Public For South Carolina


Bernard McFadden, 199135

My commission expires June 27, 2025 Applicant / Petitioner, Pro-se
p. 3 of 3

STATE OF SOUTH CAROLINA
COUNTY OF SUMTER
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2011CP4301952

Bernard #199135 McFadden

RECORDED
2016 OCT 25 AM 10:47

South Carolina State of

CERTIFIED TRUE COPY
OF ORIGINAL FILED

JAMES C. CAMPBELL
CLERK OF COURT
SUMTER COUNTY, SOUTH CAROLINA

DEPUTY CLERK OF COURT
SUMTER COUNTY
SOUTH CAROLINA

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: Clerk of Court

Attorney for: Plaintiff Defendant

Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. See Page 2 for additional information.
- ACTION DISMISSED (CHECK REASON):**
 - Rule 12(b), SCRPC;
 - Rule 41(a), SCRPC (Vol. Nonsuit);
 - Rule 43(k), SCRPC (Settled);
 - Other: _____
- ACTION STRICKEN (CHECK REASON):**
 - Rule 40(j) SCRPC;
 - Bankruptcy;
 - Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
 - Other: _____
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
 - Affirmed;
 - Reversed;
 - Remanded;
 - Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order; (formal order to follow) Statement of Judgment by the Court:

ORDER INFORMATION

This order ends does not end the case.

Additional Information for the Clerk: **See attached order.**

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

	2099	10/25/2016
Circuit Court Judge	Judge Code	Date

For Clerk of Court Office Use Only

This judgment was entered on , and a copy mailed first class or placed in the appropriate attorney's box on , to attorneys of record or to parties (when appearing pro se) as follows:

Bernard #199135 McFadden Fulton Casey Dale Cornwell
448 Deerwood Street Unit 9A Columbia, SC 29205

Alan McCrory Wilson PO Box 11549 Columbia, SC
29211-1549

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

James C. Campbell

Court Reporter

James C. Campbell - Clerk of Court

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.



RECORDED
2016 OCT 24 PM 4:04
JAMES C. CAMPBELL
CLERK OF COURT
SUMTER COUNTY, S.C.

ALAN WILSON
ATTORNEY GENERAL

October 21, 2016

The Honorable James C. Campbell
Clerk of Court, Sumter County
Sumter County Judicial Center
215 N. Harvin Street
Sumter, SC 29150

Re: Bernard McFadden, #199135 v. State of South Carolina
2011-CP-43-01952

Dear Mr. Campbell:

Enclosed please find the original **Order of Dismissal** signed by the Honorable George C. James, Jr., in the above-captioned case, for filing in your office.

Pursuant to Rule 71.1(f), of the South Carolina Rules of Civil Procedure, please "provide notice of entry of judgment and serve a copy of the order or judgment to the parties as provided in Rule 77(d), SCRCP."

In addition, please forward proof of service and a time stamped copy back to our office for our file.

Should you have any questions, please call me at (803) 734-9603.

Sincerely,

Julie A. Coleman
Assistant Attorney General

JAC/fvh

cc: Fulton C. D. Cornwell, Esquire

STATE OF SOUTH CAROLINA
COUNTY OF SUMTER

RECORDED

IN THE COURT OF COMMON PLEAS
THIRD JUDICIAL CIRCUIT

2016 OCT 24 PM 4:02

Bernard McFadden, #199135,

JAMES G. MITCHELL
CLERK OF COURT
SUMTER COUNTY, S.C.

2011-CP-43-01952

Applicant,

ORDER OF DISMISSAL

v.

State of South Carolina,

Respondent.

CERTIFIED TRUE COPY
OF ORIGINAL FILED

[Signature]
DEPUTY CLERK OF COURT
SUMTER COUNTY
SOUTH CAROLINA

This matter comes before the Court pursuant to an application for post-conviction relief (PCR) filed October 20, 2011. Respondent filed a Return on May 11, 2012, requesting an evidentiary hearing be convened on Applicant's ineffective assistance of counsel allegations. A hearing was held on April 14, 2015, at the Sumter County Courthouse. Applicant was present and represented by Fulton Casey D. Cornwell, Esquire. Assistant Attorney General Daniel Gourley of the South Carolina Attorney General's Office represented Respondent.

At the PCR hearing, Applicant testified on his own behalf. Also testifying was Applicant's plea counsel, Willie Brunson, Esquire. This Court had before it the Sumter County Clerk of Court records, the appellate records, Applicant's South Carolina Department of Corrections records, the PCR application, the Return, and the trial transcript.

I. PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Sumter County Clerk of Court. Applicant was true bill indicted at the February 2010 term of the Sumter County Grand Jury for Burglary (Violent) - Second Degree (2010-GS-43-0257). Applicant was represented by Willie Brunson, Esquire. Applicant

[Handwritten signature]

proceeded to a jury trial before the Honorable W. Jeffrey Young. Applicant was found guilty, and on November 19, 2010, Applicant was sentenced to fifteen years imprisonment.

A notice of appeal was filed December 15, 2010. An Order of Dismissal was entered on December 31, 2010 for failure of Appellant to timely serve Notice of Appeal on Opposing Counsel. The remittitur was sent on February 7, 2011.

In this action, Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of counsel;
 - a. Failure to object
 - b. Failure to move to limit witness testimony
 - c. Failure to investigate
 - d. Failure to present additional witness testimony at trial
 - e. Failure to properly cross-examine
2. Perjured testimony in violation of the 14th Amendment of the U.S. Constitution; and
3. Wrongly admitted prejudicial testimony in violation of the 14th Amendment of the U.S. Constitution and State v. Golf 525 S.E.2d 246 (S.C. 2000).

III. APPLICABLE LAW

In a post-conviction relief action, Applicant bears the burden of proving the allegations in the application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable



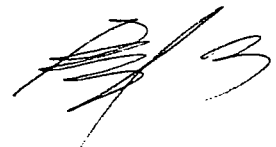
professional judgment. Strickland, 466 U.S. 668. Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. Id. at 117, 386 S.E.2d at 625. First, Applicant must prove counsel's performance was deficient. Id. Under this prong, courts measure an attorney's performance by its "reasonableness under prevailing professional norms." Id. (citing Strickland, 466 U.S. at 688). Second, any deficient performance must have prejudiced Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 117-18, 386 S.E.2d at 625.

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, this Court has reviewed the Clerk of Court records regarding the subject convictions, the trial transcript, Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, and the legal arguments made by the attorneys. Pursuant to S.C. Code Ann. § 17-27-80 (2003), this Court makes the following findings of fact based upon all of the probative evidence presented.

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



Ineffective Assistance of Counsel

Applicant asserts several allegations of ineffective assistance of counsel. Based on the following analysis, this Court finds that these allegations are meritless and should be dismissed.

Failure to call Catherine Myers Anderson as a witness

At the evidentiary hearing, Applicant testified that Catherine Myers Anderson is an ex-girlfriend who should have been called as a witness at trial.

Keeping in mind that the subject burglary occurred in 2009, Applicant maintains she should have been called to testify at trial in an attempt to establish that in 2002, Detective Irene Culick of the Sumter Police Department tampered with evidence in another burglary investigation for which Applicant was investigated. That burglary was very similar in nature to the burglary leading to the instant conviction, i.e., a broken convenience store window and stolen cigarettes. Applicant maintains that Catherine Anderson would have testified that she knew tobacco products removed from a mobile home by Detective Culick during the 2002 investigation were neither truly missing from the 2002 crime scene, nor were they sought in a search warrant.

Trial Counsel testified at the PCR hearing that Applicant wanted to introduce evidence of this 2002 burglary investigation and that it was Applicant's belief that Ms. Anderson's testimony would allow him to establish that Detective Culick had planted evidence at the 2009 crime scene. Her motive for doing so, according to Applicant, was that Detective Culick was not happy about not being able to prove Applicant had committed the 2002 burglary and that Detective Culick had motive to frame Applicant for the subject burglary. Trial Counsel testified that he disagreed with this strategy.



Trial Counsel testified that Applicant wanted to argue that Detective Culick planted Applicant's blood at the scene as part of the framing of Applicant. Instead, Trial Counsel advanced the theory at trial that Derrick McDonald, who gave Applicant a ride home after Applicant showed up bloodied on his doorstep, planted Applicant's blood at the scene after Mr. McDonald burglarized the store. This theory, though somewhat speculative, at least has some modicum of plausibility when compared to the theory Applicant wanted to advance.

This Court concludes that the theory that Detective Culick planted his blood was unavailing, because even if Detective Culick had motive to plant blood, there is no evidence as to where she may have gotten the blood to plant in the first place. The first officer on scene, Patrolman David Capell, arrived at 12:37 a.m. He called his supervisor, Sgt. Stubbs, who arrived next. Culick arrived after 1:00 a.m. Capell testified that before Culick arrived, he entered the store to clear the building and observed Newport cigarette packs scattered on the floor and lottery tickets that had been ripped off the display stand. When Detective Culick arrived, Capell assisted her in processing the scene; his role was limited to holding a bag for her to place evidence in. Capell also spoke with witness Derrick McDonald who told him that he had given a ride to a man who said his name was Bernard (who turned out to be Applicant) and that the man was bleeding and had given him Newport cigarettes in exchange for the ride. For a jury to seriously consider that Culick planted Applicant's blood at the scene, the jury would have to believe that Detective Culick was called to the scene, had Applicant's blood with her already, and decided to plant it inside the store after she arrived, and that she did this because seven years earlier, she had not been able to prove Applicant committed another convenience store burglary.

The trial transcript reveals that Ms. Anderson was actually called to the stand but then told Trial Counsel that she was related by marriage to a juror. Trial Counsel advised the court of

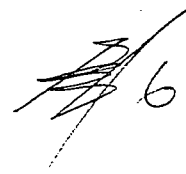
this development. The trial judge excused the jury and there was a colloquy between the solicitor, Trial Counsel, and the court about what to do. The transcript reveals that after the trial judge indicated he would excuse the juror and seat an alternate, Trial Counsel advised the trial judge that he would not call Ms. Anderson as a witness. Trial Counsel testified at the PCR hearing that after the trial judge indicated he would remove the subject juror, he and Applicant conferred briefly, and Applicant told him that Ms. Anderson's testimony wasn't necessary; therefore, she was not called to testify. This Court finds Trial Counsel's testimony credible on this point and concludes that any claim of ineffective assistance of counsel is therefore not viable.

Even if Applicant did not tell counsel that Ms. Anderson's testimony was not necessary, this Court concludes that it was certainly valid trial strategy not to call Ms. Anderson as a witness for the purpose of opening the door to the 2002 burglary investigation. Such a strategy would not have been at all beneficial to Applicant, especially since there has been no evidence presented to establish or even remotely infer that Detective Culick tampered with evidence or otherwise acted improperly in 2002 or 2009.

Ms. Anderson was not called to testify at the PCR hearing, so the court cannot speculate as to what she would have testified to. Even if she had testified at the hearing, her testimony, according to Applicant, would have supposedly allowed him to establish that Detective Culick removed tobacco products from the 2002 scene and had some type of motivation to frame Applicant seven years later. Applicant's demand for relief on this ground is denied.

Failure to call Mike Simpson as a witness

Mike Simpson was identified as a pressure washer who arrived at the burglary scene to pressure wash the parking lot or building and discovered the broken front glass of the store. He



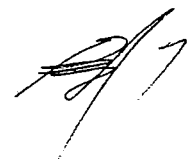
called law enforcement. Applicant claims that Mr. Simpson was at a bond proceeding and overheard lead detective Robbie Richburg urge the magistrate to increase Applicant's bond from \$10,000.00 to \$50,000.00. Applicant claims this would demonstrate the bias, bad faith, and harassment on the part of law enforcement. He claims that Detective Richburg should have been impeached with this information, or that it could have been used to dismiss the indictment, or to suppress evidence. Since Mr. Simpson was not called to testify at the PCR proceeding, any relief on this ground is denied. Further, the totality of the circumstances establishes that even if Trial Counsel was ineffective for failing to call this witness, this testimony would not have resulted in a different outcome. Therefore, this allegation must be dismissed.

Failure to call Brian Gibson and Jessie Donald as witnesses

Applicant claims these witnesses would have testified that these two individuals would have contradicted McDonald's testimony that there were flashing blue lights outside the store. These witnesses were not called to testify at the PCR hearing and the Court cannot speculate what their testimony might have been. Therefore, Applicant has failed to meet his burden of proof and these allegations are denied and dismissed.

Failure to elicit certain testimony from Albertus Lewis

Albertus Lewis did testify at trial and stated that on the night of the subject burglary in 2009, a lady called the house and asked if he knew Applicant. He did not know what time the woman called. He also testified that Applicant had a bike and that he had fallen off it before (one of Applicant's defenses is that he did not sustain his cuts and abrasions when breaking through the convenience store glass, but rather from falling off his bike). Applicant claims that Trial Counsel should have elicited testimony from Mr. Lewis that the female who called the house sounded like a white female and said something to the effect that "We [or they] got your



blood.” However, this statement would have obviously been hearsay because it was offered to prove the truth of the matter asserted, and there is no hearsay exception that would allow the statement into evidence.

Applicant also maintains that Trial Counsel should have asked Lewis if Applicant had stayed at the residence every night after the crime or whether the police came to the residence days after the crime in an effort to establish that he had not been evasive. Even if this testimony should have been elicited, this Court concludes that it would not have likely made a difference in the outcome of the trial. Therefore, this allegation also fails to meet the prejudice prong of the Strickland test and must be denied.

Failure to elicit certain testimony from Ethel Lewis

Ethel Lewis testified at trial that Applicant lived with her and her son Albertus and that an unidentified female called the house the night of the subject burglary. She testified that she saw Applicant after the night of the burglary and that he had no cuts on him. She stated that Applicant’s common mode of transportation was a bicycle and that he had fallen off his bike numerous times due to the chain popping. She stated that he made money raking yards and cutting grass and that he also worked for Ramrod Construction. She stated on cross-examination that she and Applicant had a romantic relationship. She also stated on cross that both the McDonald home (where Applicant showed up bloodied) and the convenience store where the burglary occurred are both a pretty fair distance from where she and Applicant lived.

Applicant claims that Trial Counsel should have asked Ms. Lewis what else Applicant did other than raking yards and cutting grass. Applicant also claims Trial Counsel should have elicited testimony from her that he spent the night at home every night after the burglary to establish he was not being evasive.



There is absolutely no evidence that the failure to elicit this testimony prejudiced Applicant in any way. Any claim for relief on this ground is denied.

Failure to properly cross-examine Detective Culick

Applicant's Exhibit #1 introduced at the PCR hearing discusses several supposed shortcomings in Trial Counsel's examination of Detective Culick. This Court has already concluded that Applicant's chosen theory that Detective Culick planted his blood at the scene, even if advanced at trial, would not have changed the outcome of this trial. Trial Counsel extensively cross-examined Culick. The questions in Exhibit #1 that Applicant now maintains Trial Counsel should have asked Detective Culick would not have likely changed the outcome of this trial. Therefore, this allegation is denied and dismissed.

Failure to properly cross-examine Lt. Truman Duggin

Lt. Duggin is the crime scene investigation supervisor for the Sumter P.D. He testified that he received items of evidence in this case, including a swab of blood collected from the scene, a pack of Newport cigarettes, a bag of glass, lottery tickets, a first aid kit, a bottle of rubbing alcohol, and seven packs of Newports obtained by Officer Capell from Mr. McDonald. A SLED DNA expert testified the blood from the store was a DNA match to a buccal swab taken from Applicant.

Applicant argues that Trial Counsel should have asked Duggin why he unsealed sealed evidence bags to obtain a sample of blood for SLED when a sample had already been taken from the floor of the store by Detective Culick. Since Duggin did not testify at the PCR hearing, the court cannot speculate what the answer to this question might have been, and any claim for relief on this ground must be denied.

A handwritten signature in black ink, appearing to be "B/S/9", located in the bottom right corner of the page.

Failure to impeach Detective Richburg and Derrick McDonald with prior inconsistent statements, or object to or appeal trial court's limitation on cross-examination

This Court has reviewed Applicant's Exhibit #1 and the trial transcript and discerns that there was no deficient performance and no prejudice arising from this alleged failure. Applicant references certain prior statements of witnesses that he claims are inconsistent; however, the court does not have any of these statements, with the exception of Detective Richburg's affidavit. Any appellate issue arising from this scenario can be explored within the belated appeal.

Evidence regarding Applicant's prior burglary convictions

Applicant claims he did not testify at trial because the trial judge ruled that it would allow the State to impeach him with his 1995 burglary conviction. Applicant was released from confinement within ten years of the date of trial; however, Applicant claims that he had records to prove that his sentence start date and max-out date for that offense was incorrectly recorded by SCDC and that he should have been released more than ten years prior to trial. He claims that Trial Counsel did not properly pursue the issue of remoteness (which would have markedly changed the admissibility analysis conducted by the trial judge), nor did Trial Counsel properly argue the prejudicial effect to Applicant in light of the fact that the prior conviction was for burglary. See Rule 609, SCRE.

The trial court employed the five-factor balancing test enunciated in State v. Colf, 337 S.C. 622, 525 S.E.2d 246 (2000) and, despite the fact that Applicant was on trial for burglary, determined the prior burglary conviction would be admitted if Applicant testified, presumably finding that the probative value of the conviction outweighed its prejudicial effect to Applicant. Applicant did not testify and claims that he decided not to testify because the prior conviction was going to be admitted into evidence.

In State v. Glenn, 285 S.C. 384, 330 S.E.2d 285 (1985), our Supreme Court held that “when the trial judge chooses to make a preliminary ruling on the admissibility of prior convictions to impeach a defendant and the defendant does not testify at trial, the claim of improper impeachment is not preserved for review.” This Court can find no appellate PCR cases in this state which address whether a PCR applicant can advance this ground if he did not testify at trial. In Legare v. State, 333 S.C. 275, 509 S.E.2d 472 (1998), the court cited Glenn but did not discuss its applicability to a PCR action. This Court can see no reason not to extend the rationale in Glenn to a PCR setting because the fact remains that Applicant must show prejudice; absent his trial testimony and the introduction of the burglary conviction to impeach his credibility, there is no showing of prejudice stemming from Trial Counsel’s failure to argue the prior conviction was too remote in time to be introduced. Therefore, this allegation is denied and dismissed with prejudice.

Failure to move to suppress evidence or indictment because of Detective Richburg’s “outrageously false” arrest warrant affidavit, etc.

This Court concludes this ground is categorically without merit and agrees with Trial Counsel that such motions would have been justly denied. Therefore, this allegation is dismissed.

Perjured and Wrongly Admitted Testimony

Applicant alleges that he is entitled to post-conviction relief based on two allegations of perjured testimony and wrongly admitted testimony in violation of the Fourteenth Amendment of the United States Constitution. This Court finds that these allegations should be dismissed for failure to state a claim cognizable under the Post-Conviction Procedure Act, S.C. Code Ann. § 17-27-10 to -160. An Applicant may commence a post-conviction relief action on the following grounds:



1. That the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this State;
2. That the court was without jurisdiction to impose sentence;
3. That the sentence exceeds the maximum authorized by law;
4. That there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;
5. That his sentence has expired, his probation, parole or conditional release [was] unlawfully revoked, or he is otherwise unlawfully held in custody or other restraint; or
6. That the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding or remedy; may institute, without paying a filing fee, a proceeding under this chapter to secure relief. Provided, however, that this section shall not be construed to permit collateral attack on the ground that the evidence was insufficient to support a conviction.

S.C. Code Ann. § 17-27-20 (1976).

This Court finds that Applicant failed to present any facts that, even if true, support a cognizable claim for post-conviction relief under any of the statutory grounds. The allegations presented by Applicant raise direct appeal issues that are procedurally barred by S.C. Code Ann. § 17-27- 20(b) (1985). Post-conviction relief is not a substitute for a direct appeal. Simmons v. State, 264 S.C. 417, 215 S.E.2d 883 (1974). A post-conviction relief application cannot assert any issues that could have been raised at trial or on direct appeal. Ashley v. State, 260 S.C. 436, 196 S.E.2d 501 (1973). Therefore, these allegations are meritless and should be denied and dismissed with prejudice.

Failure to File a Notice of Appeal

Applicant further alleges Counsel was ineffective in failing to perfect an appeal after he requested him to do so. Applicant was found guilty and sentenced on November 19, 2010. Trial Counsel filed a notice of appeal on December 15, 2010. The appeal was dismissed as untimely.



Applicant claims he asked Trial Counsel to appeal his conviction but that Trial Counsel did not do so until December 15, well after the ten-day time limit expired. Trial Counsel testified that at sentencing, the trial court advised Applicant he had ten days to appeal but that Applicant never told him he wanted to appeal. This Court concludes Applicant's testimony that he told Trial Counsel he wanted to file an appeal is credible, especially in light of the fact that Trial Counsel did file a notice of appeal, *albeit* too late.

“[C]ounsel has a constitutionally imposed duty to consult with the defendant about an appeal when there is reason to think either (1) that a rational defendant would want to appeal (for example, because there are nonfrivolous grounds for appeal), or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing.” Roe v. Flores-Ortega, 528 U.S. 470, 480, 120 S. Ct. 1029, 1036, 145 L. Ed. 2d 985 (2000). Therefore, Applicant is granted leave to file a belated appeal pursuant to White v. State, 263 S.C. 110, 108 S.E.2d 35 (1974).

All Other Allegations

As to any and all allegations that were raised in the application and not specifically addressed in this order, the Court finds Applicant failed to present any evidence regarding such allegations. Accordingly, the Court finds Applicant has abandoned any such allegations.

V. CONCLUSION

Other than the belated appeal issue, the Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Applicant failed to demonstrate Trial Counsel's performance was unreasonable under prevailing professional norms. Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625; Stalk v.



State, 383 S.C. 559, 563, 681 S.E.2d 592, 594 (2009). Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.


The Court notes Applicant must file and serve a notice of appeal within thirty (30) days from PCR counsel's receipt of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), Applicant has a right to appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides that if Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED THAT:

1. The application for Post-Conviction Relief is denied and dismissed with prejudice in regard to all allegations except a belated appeal pursuant to White v. State, 263 S.C. 110, 108 S.E.2d 35 (1974); and
2. Applicant shall remain in the custody of the South Carolina Department of Corrections to complete service of his sentence.

AND IT IS SO ORDERED this 11 day of October, 2016.

South, South Carolina



GEORGE C. JAMES, JR.
Presiding Judge
Third Judicial Circuit





State of South Carolina
Third Judicial Circuit

GEORGE C. JAMES, JR.
CIRCUIT COURT JUDGE

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November 4, 2016

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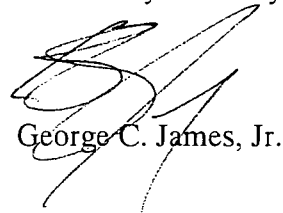
RE: Bernard McFadden, #199135 v State of South Carolina (2011-CP-43-01952)

Dear Ms. Coleman, Mr. Cornwell and Mr. McFadden:

Enclosed is a certified copy of an Order Denying Applicant's Motions for Reconsideration and for Hearing on Funds.

If you have any questions, please advise.

Yours very sincerely,



George C. James, Jr.

GCJjr:djf
Enclosures

RECORDED

STATE OF SOUTH CAROLINA
COUNTY OF SUMTER

2016 NOV -4 AM 10:02

IN THE COURT OF COMMON PLEAS
THIRD JUDICIAL CIRCUIT

Bernard McFadden, #199135,

JAMES C. WIDDELL
CLERK OF COURT
SUMTER COUNTY, S.C.

2011-CP-43-01952

Applicant,

v.

State of South Carolina,

Respondent.

**ORDER DENYING APPLICANT'S MOTIONS
FOR RECONSIDERATION AND FOR
HEARING ON FUNDS**

CERTIFIED TRUE COPY
OF ORIGINAL FILED

[Signature]
DEPUTY CLERK OF COURT
SUMTER COUNTY
SOUTH CAROLINA

This case is before the court on the applicant's "Motion for Reconsideration and Motion for Hearing on Funds for Blood Splatter Experts Pursuant to Rule 59 (e)". For the reasons set forth herein, the motion is denied, except as to clarification as to issue (1) raised by the applicant. The court will address the issues raised in the same numerical order set forth by the applicant.

1. The court stated in its order that the applicant was represented by counsel. However, the applicant correctly points out that he represented himself during the hearing. The order is amended to reflect the same.
2. Relief as to issue (2) is denied.
3. Relief as to issue (3) is denied.
4. Concerning issue (4), the court did consider leaving the record open to allow the applicant to procure the testimony of certain witnesses. However, the court concluded that there was no justification for doing so. Relief as to this issue is denied.
5. Relief as to issue (5) is denied.
6. Relief as to issue (6) is denied.
7. Relief as to issue (7) is denied.
8. Relief as to issue (8) is denied.

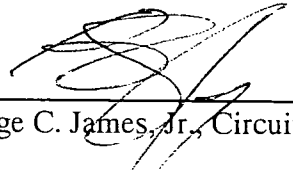
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9. Relief as to issue (9) is denied.

For the reasons set forth above, the applicant's motion is denied. Reference is craved to this court's order denying the application for relief but granting the applicant a belated appeal.

SO ORDERED.

November 4, 2016



George C. James, Jr., Circuit Judge



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Kershaw, S.C. 29067

Daniel Shearow, Clerk
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