

# Law Office of Leah B. Moody, LLC

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JUN 20 2019

June 4, 2019

The Honorable Daniel E. Shearouse  
The Supreme Court of South Carolina  
Post Office Box 11330  
Columbia, South Carolina 29221

S.C. SUPREME COURT

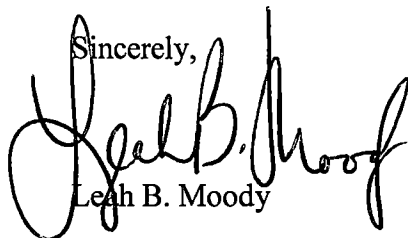
**RE: Maurice McCreary, #345340, vs. State of South Carolina**  
**C.A. No.: 2017-CP-40-0869**

Dear Mr. Shearouse:

The Richland County Court of Common Pleas appointed my office to represent **Maurice McCreary** in his Post-Conviction Relief action. Please find enclosed for filing the original and two (2) copies of the Notice of Appeal and Proof of Service in the above-referenced case. Please return the clocked copies to me in the enclosed self-addressed, stamped envelope. Also enclosed is a copy of the Order Dismissing the Post-Conviction Relief Application.

Thank you for your assistance with this matter.

Sincerely,



Leah B. Moody

LBM/bd

Enclosures

cc Maurice McCreary  
Lindsey McCallister, Esquire, SC Attorney General's Office  
The Honorable Jeanette McBride, Clerk of Court, Richland County  
Sharon Graham, SCCID

**IN THE STATE OF SOUTH CAROLINA  
In The Court of Appeals**

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**JUN 20 2019**

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**APPEAL FROM RICHLAND COUNTY  
Court of Common Pleas**

**S.C. SUPREME COURT**

**The Honorable Clifton Newman, Presiding in Richland County**

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**Case No. 2017-CP-40-0869**

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**Maurice A. McCreary, #345340, ..... Appellant,**

**v.**

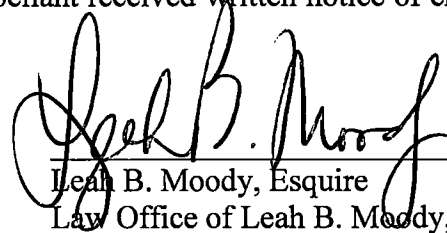
**State of South Carolina, ..... Respondent.**

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**NOTICE OF APPEAL**

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Maurice McCreary appeals the order of the Honorable Clifton Newman, dated May 6, 2019, and mailed on May 23, 2019. Appellant received written notice of entry of the final order on May 29, 2019.

  
\_\_\_\_\_  
Leah B. Moody, Esquire  
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235 E. Main Street, Suite 115  
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Rock Hill, South Carolina 29731

Other Counsel of record:  
Lindsey A. McCallister, SC Attorney General's Office  
Attorney for Respondent  
Rembert C. Dennis Building  
Post Office Box 11549  
Columbia, South Carolina 29211-1549  
(803) 734-3970

IN THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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JUN 20 2019

S.C. SUPREME COURT

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APPEAL FROM RICHLAND COUNTY  
Court of Common Pleas

The Honorable Clifton Newman, Presiding in Richland County

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Case No. 2017-CP-40-0869

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Maurice A. McCreary, #345340, ..... Appellant,

v.

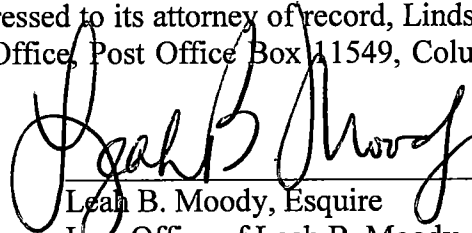
State of South Carolina, ..... Respondent.

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PROOF OF SERVICE

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I certify that I have served the Notice of Appeal on Lindsey A. McCallister, Esquire, SC Attorney General's Office, by depositing a copy of it in the United States Mail, postage prepaid, on June 18, 2019, addressed to its attorney of record, Lindsey A. McCallister, Esquire, SC Attorney General's Office, Post Office Box 11549, Columbia, South Carolina, 29211-1549.



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Leah B. Moody, Esquire  
Law Office of Leah B. Moody, LLC  
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June 18, 2019

Cc Maurice A. McCreary  
Lindsey McCallister, Esquire, SC Attorney General's Office  
The Honorable Jeanette McBride, Clerk of Court, Richland County  
Sharon A. Graham, SCCID

STATE OF SOUTH CAROLINA )  
 COUNTY OF RICHLAND )  
 Maurice A. McCreary, #345340 )  
 Applicant, )  
 v. )  
 State of South Carolina, )  
 Respondent. )

IN THE COURT OF COMMON PLEAS  
 FOR THE FIFTH JUDICIAL CIRCUIT

2017-CP-40-0863  
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**ORDER OF DISMISSAL**

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 JEREMY W. MOORE  
 CLERK OF COURT

This matter comes before the Court by way of an action for post-conviction relief (PCR) commenced February 13, 2017, by Maurice A. McCreary (Applicant). The State made its return September 14, 2017, requesting an evidentiary hearing. In its return, the State also moved for a more definite statement. An evidentiary hearing into the matter was held December 12, 2017.

At the PCR hearing, Applicant was present and represented by Leah B. Moody. Assistant Attorney General Jessica E. Kinard represented the State. Applicant and his plea counsel, Jennifer C. Davis, testified at the hearing. After a review of the record and the evidence presented, the Court finds Applicant has failed to meet his requisite burden of proof and denies relief and dismisses the action with prejudice.

**FACTS & PROCEDURAL HISTORY**

During the early morning hours of December 16, 2011, Applicant approached Thomas Harp, brandished a pistol, and asked Harp, "What you got? What you got?" (Plea Tr. 15-17). Applicant took Harp's money and demanded that Harp walk away. Applicant fired at Harp as Harp walked away. Applicant then fled. (Plea Tr. 17). Thereafter, Harp called 911 and reported the incident. (Plea Tr. 17). Law enforcement responded.

Investigator Warren Cavanaugh with the sheriff's department's K-9 unit responded along with his police dog, Fargo. (Plea Tr. 18). Investigator Oxendine was also present and provided

back up for Cavanaugh and Fargo as they searched. (Plea Tr. 19). Cavanaugh and Fargo began to search for Applicant. (Plea Tr. 18). Fargo eventually picked up Applicant's sent-trail and began tracking Applicant. Cavanaugh found disbursed dollar bills, varying in value, along the sent-trail. The scent-trail led towards an abandoned house. (Plea Tr. 18).

Cavanaugh and Fargo approached the abandoned house when Fargo alerted towards Applicant. (Plea Tr. 18–19). Applicant was hiding behind a fence outside the house. When Fargo alerted towards his location, Applicant fled. (Plea Tr. 19). Cavanaugh, Oxendine, and Fargo pursued Applicant. (Plea Tr. 20). Applicant approached a six-foot fence, scaled the fence, and continued to flee; however, Applicant fired two shots towards his pursuers as they approached the fence. (Plea Tr. 20). These gun shots were the basis of Applicant's first two attempted murder charges.

Oxendine injured his knee scaling the fence, and could no longer pursue Applicant. Cavanaugh and Fargo waited for other law enforcement to arrive at their location before recommencing their pursuit. (Plea Tr. 20–21). Shortly thereafter, Marvin Willis of the city police department and Deputy Trobathian Johnson responded to provide back up for Cavanaugh and Fargo. (Plea Tr. 21).

Fargo located Applicant's scent-trail, which led through the woods back to the road in front of the abandoned house. Fargo tracked Applicant's scent to an intersection where a city police cruiser was parked as a perimeter unit. On the other side of the intersection was a field. Fargo tracked the scent through the intersection, past the cruiser, towards the field. (Plea Tr. 21–22). Shortly after passing the cruiser, Fargo alerted towards Applicant—who was hiding in a “brushy mound area” of the field—and then latched onto Applicant. Simultaneously, Cavanaugh, Willis,

Johnson, and Officer Eric Walker used the police cruiser for cover. Applicant attempted to flee, but Fargo remained latched onto him. (Plea Tr. 22). Applicant shot Fargo.

Thereafter, Applicant fired on Cavanaugh, Willis, Johnson, and Walker who were by the cruiser. (Plea Tr. 22). After firing several shots, Applicant fled further into the field. (Plea Tr. 22-23). After being shot, Fargo returned to Cavanaugh who checked Fargo for injuries. Shortly thereafter, Applicant fired another flurry of shots towards the officers. Applicant escaped into the brush at the back of the field. (Plea Tr. 23). Fargo died from his injuries. (Plea Tr. 24).

As a result of Applicant's escape, the county's special response team was deployed to find Applicant. In addition to the special response team, between 150-200 officers from various local and State agencies searched in a joint effort to locate Applicant. (Plea Tr. 24). Law enforcement eventually found Applicant asleep in a shed near the incident location. Law enforcement also found a gun in the shed. The gun matched shell casings discovered at different areas of the pursuit. (Plea Tr. 25).

Applicant was arrested and subsequently indicted by the Richland County Grand Jury in November 2012 for five counts of attempted murder (2012-GS-40-5997, -5998, -6000, -6003, and 6004) and one count of unlawful killing of a police dog (2012-GS-40-6001). Jennifer C. Davis and Mark Sawyer of the Fifth Circuit Public Defenders' Office represented Applicant. Deputy Solicitor Daniel R. Goldberg prosecuted the case.

On January 6, 2014, Applicant pled guilty as indicted to all charges before the Honorable Robert E. Hood. At the outset of the plea hearing, the State noted Applicant was pleading guilty "straight up." (Plea Tr. 3). Plea counsel affirmed she had explained to Applicant the nature of the charges, the possible penalties, and the Constitutional rights Applicant was giving up in pleading guilty. (Plea Tr. 3). Thereafter, the plea court conducted a thorough colloquy with Applicant.

(Plea Tr. 4–11). During its colloquy with Applicant, the plea court asked if there were negotiations in the case. The State responded it was dropping related armed robbery and attempted murder charges in exchange for the plea; however, “there [are] no negotiations or agreements as far as sentencing.” (Plea Tr. 11). Thereafter, Applicant affirmed he was knowingly and voluntarily pleading guilty. (Plea Tr. 11–13). The State then recited the factual basis for Applicant’s plea. (Plea Tr. 15–28). Applicant admitted to shooting at the police officers, and to shooting the police dog, Fargo. (Plea Tr. 28–29). The plea court accepted Applicant’s plea and transitioned the hearing to the sentencing phase. (Plea Tr. 29).

In mitigation, plea counsel asked the plea court to consider a range of ten to fifteen years imprisonment. (Plea Tr. 60). The State requested the Court sentence Applicant to consecutive sentences. (Plea Tr. 61). The plea court sentenced Applicant to an aggregate term of imprisonment of thirty-five years on all charges—thirty years concurrent on the five attempted murders, and five years consecutive for the unlawful killing of a police dog. Applicant filed multiple post-trial motions culminating in filing an appeal September 9, 2016. The court of appeals dismissed Applicant’s appeal December 2, 2016 for being untimely. *See State v. McCreary*, Appellate Case No. 2016-001846 (S.C. Ct. App. filed December 2, 2016). The case was remitted to the circuit court December 20, 2016. Applicant timely filed this PCR action February 13, 2017.

#### ALLEGATIONS

Applicant alleges he is unlawfully in custody due to ineffective assistance of counsel. Specifically, Applicant attacks the knowing and voluntary nature of his guilty plea alleging plea counsel was ineffective for failure to object to the State making a sentencing recommendation when Applicant pled guilty without recommendations or negotiations.

## DISCUSSION

The issue before the Court is whether Applicant's guilty plea was the result of ineffective assistance of counsel. To establish ineffective assistance of counsel, the PCR applicant must prove (1) counsel's performance fell below an objective standard of reasonableness, and (2) the applicant sustained prejudice as a result of counsel's deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687–88 (1984); *Cherry v. State*, 300 S.C. 115, 117–18, 386 S.E.2d 624, 625 (1989). "The test for effective assistance of counsel is whether the representation was within the range of competence demanded of attorneys in criminal cases." *Watson v. State*, 287 S.C. 356, 357, 338 S.E.2d 636, 637 (1985). In the context of a guilty plea, a defendant who entered a plea with the advice of counsel may only attack the voluntary and intelligent nature of the plea. *Roscoe v. State*, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001).

Applicant and plea counsel agreed at the PCR hearing that Applicant pled guilty with the advice of plea counsel. The Court finds Applicant pled guilty pursuant to the advice of plea counsel; therefore, the issue before the Court is whether Applicant's plea was knowing and voluntary. *See Roscoe, supra*.

Applicant alleges his plea was unknowing and involuntary because he thought he was pleading without negotiations or recommendations—straight-up. Specifically, Applicant alleges the plea agreement was violated when the State made a recommendation of concurrent time during the sentencing phase of his plea. The Court finds this allegation to be without merit.

"[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." *Pittman v. State*, 337 S.C. 597, 599, 524 S.E.2d 623, 624 (1999). To prove prejudice, the applicant must show a reasonable probability he would not have

pled guilty and would have insisted on going to trial absent plea counsel's alleged deficiency. *Hill v. Lockhart*, 474 U.S. 52, 59 (1985). As discussed below, the Court finds plea counsel's representation was not deficient, and Applicant failed to establish prejudice from plea counsel's alleged deficiency. The Court finds Applicant knowingly and voluntarily entered his guilty plea; therefore, Applicant's guilty plea was not the result of ineffective assistance of counsel.

Applicant alleges plea counsel was ineffective in two aspects: (1) plea counsel failed to advise him the meaning of pleading without negotiations or recommendations; and (2) plea counsel should have received all discovery, specifically discovery involving the gun, before allowing Applicant to plead guilty. The Court finds these allegations are without merit and deals with them in turn.

**1. Failure to Advise**

Applicant alleges plea counsel was deficient for failing to advise the State could comment during sentencing even though Applicant was pleading without negotiations or recommendations. Applicant alleges he would not have pled guilty and would have proceeded to trial had he understood the State could comment during sentencing. The Court disagrees.

The Court finds plea counsel was not deficient in advising Applicant about the meaning of pleading without negotiations or recommendations. Applicant stated, "The way [plea counsel] made it seem was that [the decision] was solely up to the [plea court] to choose and decide what he wanted to decide." (PCR Tr. 27). Plea counsel's advice, and Applicant's understanding, was correct—the plea court did have the final decision in sentencing Applicant. Further, nothing in the record indicates the State ever offered to remain silent during sentencing. In fact, plea counsel testified to the contrary. Plea counsel credibly testified she explained to Applicant the State would comment during sentencing. (PCR Tr. 36). Plea counsel stated, "I did relay to [Applicant] . . . my

understanding the State's still gonna ask for somewhere around 25 to 35. . . . [I]n the end it's up to the [plea court] and this, you know, we would be asking for 10 to 15." (PCR Tr. 36). Based upon this credible testimony, the Court finds Applicant was aware the State would still comment during sentencing. Therefore, the Court finds plea counsel was not deficient for failing to advise Applicant the meaning of pleading without negotiations or recommendations.

The Court finds Applicant failed to prove he was prejudiced by plea counsel's alleged deficiency of failing to advise the State could comment during sentencing for two reasons: (1) Applicant stated he pled guilty to avoid life without parole (LWOP), and (2) the plea court sentenced Applicant to an aggregate thirty-five years imprisonment.

Applicant stated he pled guilty to avoid being exposed to LWOP. It is apparent from both Applicant and plea counsel's testimony, had Applicant not pled guilty, the State would serve Applicant LWOP notice. As mentioned above, Applicant stated, "I chose to accept [the straight-up plea offer] because . . . I also had the chance of getting [LWOP] papers, so that's what made me go towards the plea." (PCR Tr. 12) The Court finds this statement by Applicant, that he pled guilty to avoid LWOP, credible. Because Applicant pled guilty to avoid LWOP, he cannot establish prejudice.

Applicant further failed to prove prejudice because he the plea court did have the final decision on sentencing. As previously mentioned, plea counsel requested ten to fifteen years imprisonment (PCR Tr. 36) (Plea Tr. 60), and the State requested the sentences be run concurrent (Plea Tr. 61). However, the plea court followed neither request. The plea court sentenced Applicant to an aggregate thirty-five years imprisonment. Plea counsel's advice and Applicant's understanding were both correct—the plea court had the final decision of sentencing Applicant. As such, Applicant was not prejudiced by plea counsel's alleged deficiency because Applicant's

understanding was correct.

Based on the foregoing, the Court finds plea counsel was not ineffective for failure to advise Applicant the meaning of pleading without negotiations or recommendations. Applicant knowingly and voluntarily pled guilty. Therefore, the Court denies relief and dismisses this allegation with prejudice.

## **2. Discovery**

Applicant's second allegation originated as a claim that his right to Due Process was violated because he did not receive all discovery in his case. However, at the PCR hearing, PCR counsel clarified Applicant was only going forward on his claim of ineffective assistance of counsel which rendered his guilty plea unknowing and involuntary. During the hearing, some testimony touched on the issue of Applicant not receiving all discovery before he pled guilty. The Court addresses this allegation as an attack on the knowing and voluntary nature of Applicant's plea.

The Court begins discussion of this issue by addressing prejudice. Applicant stated, "I ended up pleading for the fact of I didn't know what I know now and I figured that at that time the plea would have been better than going to trial." (PCR Tr. 21). As previously mentioned, Applicant stated he pled guilty to avoid LWOP. (PCR Tr. 12). The Court finds Applicant pled guilty to avoid LWOP. As such, Applicant fails to prove he was prejudiced because his decision to plead guilty was based on his potential LWOP exposure.

The Court also finds plea counsel was not ineffective in relation to Applicant's discovery allegation. Plea counsel credibly testified that as she and Applicant were preparing for trial, she filed three motions to compel discovery. (PCR Tr. 40). She testified the issue regarding discovery in Applicant's case was centered on the State's expert's ballistics report. (PCR Tr. 40). Plea

counsel further testified she had her own expert to discuss this issue. (PCR Tr. 39). The Court finds Applicant's confusion regarding discovery arose from plea counsel's discussions of their strategy had the case gone to trial. The discovery plea counsel planned on attacking at trial had nothing to do with Applicant's guilty plea.

Applicant pled guilty to avoid LWOP. Plea counsel was certainly not deficient for discussing her defense strategy with Applicant had the case gone to trial. Therefore, the Court finds plea counsel was not ineffective and Applicant knowingly and voluntarily pled guilty. Therefore, the Court denies relief and dismisses this allegation with prejudice.

### CONCLUSION

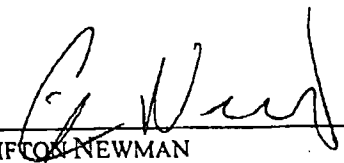
Based on the foregoing, this Court finds Applicant has failed to establish any constitutional violations or deprivations that would require the Court to grant relief. Therefore, the allegations are denied and dismissed with prejudice.

Applicant must file and serve a notice of appeal within thirty days from the receipt of this order by counsel of record to secure the appropriate appellate review. *See* Rule 203, SCACR. Pursuant to *Austin v. State*, an applicant has a right to assistance of counsel in seeking review of the denial of PCR. 305 S.C. 453, 409 S.E.2d 395 (1991). Further, Rule 71.1(g), SCRCP, provides if the applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on the applicant's behalf. Applicant is directed to Rule 243, SCACR, for appropriate procedures for appeal.

### **IT IS THEREFORE ORDERED:**

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

AND IT IS SO ORDERED this 6<sup>th</sup> day of May, 2019.

  
\_\_\_\_\_  
CLIFFORD NEWMAN  
Presiding Judge  
Fifth Judicial Circuit

Calverts, South Carolina



ALAN WILSON  
ATTORNEY GENERAL

March 20, 2019

The Honorable Jeanette W. McBride  
Clerk of Court, Richland County  
Post Office Box 2766  
Columbia, South Carolina 29202-2766

**RE: Maurice A. McCreary, #345340 vs. State of South Carolina**  
**2017-CP-40-0865**

Dear Ms. McBride:

Enclosed please find the original **Order of Dismissal** signed by the Honorable Clifton Newman, for filing in your office. 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) 734-3737.

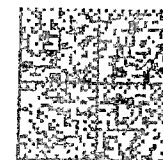
Sincerely,

Lindsey A. McCallister  
Assistant Attorney General

LAM/can  
Enclosure(s)

Cc: Leah Moody, Esquire

Jeanette W. McBride  
CLERK OF COURT  
RICHLAND COUNTY  
P.O. Box 2766  
Columbia, SC 29202-2766

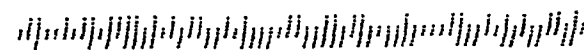
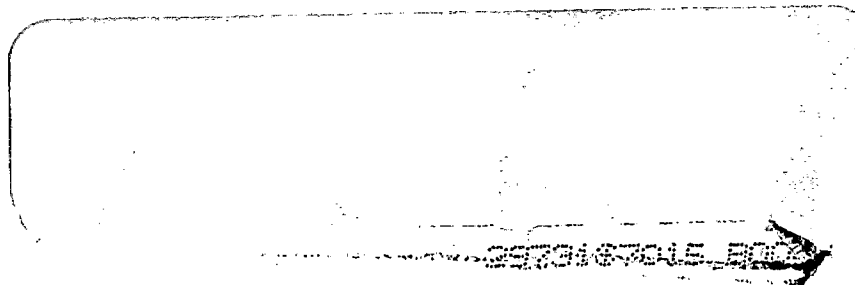


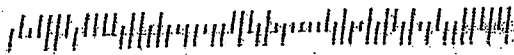
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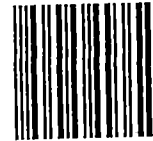




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The Honorable Daniel E. Shearhouse  
 The Supreme Court of South Carolina  
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