

**Summary of SC88959, *State of Missouri v. Vincent McFadden***

Appeal from the St. Louis County circuit court, Judge John A. Ross  
Argued and submitted Feb. 15, 2012; opinion issued May 23, 2012

**Attorneys:** McFadden was represented by Janet M. Thompson of the public defender's office in Columbia, (573) 882-9855; the state was represented by Timothy A. Blackwell of the attorney general's office in Jefferson City, (573) 751-3321.

*This summary is not part of the opinion of the Court. It has been prepared by the communications counsel for the convenience of the reader. It neither has been reviewed nor approved by the Supreme Court and should not be quoted or cited.*

**Overview:** A man seeks review of his death sentence. In a unanimous decision written by Judge George W. Draper III, the Supreme Court of Missouri affirms the judgment. All 14 of the man's points on appeal are denied. The trial court correctly sentenced McFadden to death for his first-degree murder conviction and life imprisonment for his armed criminal action conviction.

**Facts:** Vincent McFadden was convicted of first-degree murder and armed criminal action for the shooting death of Todd Franklin. Franklin died in his neighbor's driveway after being shot at least three times. McFadden was sentenced to the death penalty for the murder conviction and life imprisonment for the armed criminal action conviction. McFadden's first conviction for the murder was reversed after evidence of discrimination in jury selection was presented on appeal. He again was convicted and sentenced to death on remand. McFadden appeals.

**AFFIRMED.**

**Court en banc holds:** (1) The trial court did not err in limiting the testimony of his witness, Michael Douglas, during the guilt and penalty phases of the trial. A trial court has broad discretion to admit or exclude evidence. Reversal due to an evidentiary error requires a showing of prejudice. The jury had evidence before it of Douglas' guilty plea related to Franklin's death and inconsistent testimony. McFadden did not demonstrate any prejudice.

(2) The trial court did not err in allowing the state's evidence supporting the theory he killed Franklin because of Franklin's testimony in another case. He contends that the jury in his first conviction rejected the aggravating circumstance and that to allow it to be introduced a second time constituted double jeopardy. The Court previously has rejected this theory, holding that only if a jury fails to find that any aggravating circumstances supports the death sentence can those circumstances form a basis of judgment for acquittal.

(3) The trial court did not abuse its discretion in allowing a potential juror to be struck (removed) from the jury. The juror expressed hesitation at several questions regarding possible verdicts and stated he may hold the state to a higher burden of proof than the law requires. Broad discretion is granted to the trial courts to determine the qualifications of prospective jurors. No abuse of discretion is found here.

(4) The trial court did not err in allowing an African-American potential juror to be struck. McFadden successfully challenged the strike of three other African-American potential jurors,

but as to this particular potential juror, he failed to provide evidence that the state's reasons for striking the potential juror were pretextual or racially motivated.

(5) The trial court did not err in allowing into evidence or failing to declare a mistrial due to testimony that implied McFadden had committed other uncharged crimes. McFadden failed to raise a timely objection to this specific evidence at trial to preserve the point, so it can only be reviewed for plain error. The evidence was admissible; no plain error exists.

(6) The trial court did not submit improperly a particular instruction to the jury. McFadden contends that it did not meet the requirements of the Missouri approved criminal jury instructions and that his prior convictions should have been listed collectively instead of individually. This Court, however, previously has held that prior convictions may be listed separately to prevent jury confusion. The jury only needed to find one statutory aggravator to recommend the death sentence, and here it found five.

(7) The trial court did not err in submitting the "depravity of mind" aggravating circumstance to the jury. McFadden claims this allowed the jurors to consider Douglas' conduct when determining its recommended sentence. The instructions, however, directed the jury to consider only McFadden's conduct.

(8) The trial court did not err in sentencing McFadden to death in accordance with the jury's recommendation. The jury found five aggravating factors – supporting its finding of depravity of mind – when it only needed to find one, and the limiting construction regarding the aggravating circumstance followed the language in the Missouri approved criminal jury instructions.

(9) The trial court did not allow McFadden's right to be free of double jeopardy when it submitted an instruction regarding depravity of mind on remand after the jury in the first trial did not find depravity of mind. There were no acquittals in the first trial, so double jeopardy protection did not attach.

(10) The trial court did not err in not requiring the jury to find the serious and assaultive nature of each of McFadden's prior convictions in the aggravating circumstances. As this Court has held multiple times, the determination of whether a prior offense is a "serious assaultive" offense is a question of law for the court to decide.

(11) The trial court did not err in submitting to the jury the instructions regarding mitigating circumstances and unanimity. This Court and the United States Supreme Court have rejected the argument that these instructions improperly shift the burden of proof. The state is required to prove every element of the offense charged or the existence of aggravating circumstances. Shifting the burden of proof to the defendant regarding mitigating circumstances does not violate any constitutional rights. McFadden suffered no manifest injustice.

(12) McFadden failed to prove his claims that several statements made by the state at trial amount to prosecutorial misconduct. He failed to object in a timely manner at trial to almost all of these statements, thereby failing to preserve his claims. For these, because McFadden failed to show the statements had a decisive effect on the outcome of his trial or amounted to manifest

injustice, he has failed to prove plain error. As to the others, McFadden did not show the trial court abused its discretion. The trial court did not err in not intervening during jury selection or declaring a mistrial on its own motion.

(13) The trial court did not err in admitting, during the sentencing phase of his trial, the recording and transcript of a telephone conversation made from the jail. The trial court is granted broad discretion in admitting recordings and only will be overturned if clear abuse of discretion is found. Here, McFadden failed to specify which element he believed lacked foundation. In fact, there was adequate foundation for the court to admit the tape recording. The tape recording contained McFadden's admissions that fit an exception to the evidentiary rules and, therefore, was not inadmissible hearsay.

(14) The trial court did not err in overruling McFadden's pretrial motions made pursuant to *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Ring v. Arizona*, 536 U.S. 584 (2002), and sentencing him to death. The argument that the aggravating circumstances were additional elements of first-degree murder that have to be pleaded in the charging document has been rejected multiple times by this Court.

(15) Under its independent proportionality review of similar cases in which both death and life imprisonment were imposed, this Court holds that McFadden's death sentence was not based on passion, prejudice or any other arbitrary factor. Further, the evidence supports the aggravating circumstances the jury found. The death sentence here was neither excessive nor disproportionate.