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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Charleston County

Honorable Michael G. Nettles, Circuit Court Judge

ANTONIO O. SIMMONS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2023-001091

APPENDIX

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STATE OF SOUTH CAROLINA)
) TRANSCRIPT OF RECORD
 -vs-)
) March 20, 2018
 ANTONIO SIMMONS,)
) Charleston, South Carolina
 Defendant.)

B E F O R E:

The Honorable R. Markley Dennis, Judge.

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

David Osborne, Assistant Solicitor
Attorney for the State

Michael Apicella, Esquire
Attorney for the Defendant

Reported By:

Amanda Kelly Haffenden, RPR, CRR
Circuit Court Reporter for the
Ninth Judicial Circuit

E X H I B I T S

<u>COURT'S</u>	<u>DESCRIPTION</u>	<u>MARKED</u>	<u>ADMITTED</u>
1	Doctor Report	12	--
2	Doctor Reports	12	--

1 (March 20, 2018.)

2 (1:38 p.m., in open court, defendant and
3 counsel present.)

4 THE COURT: Good afternoon, Mr. Simmons.
5 You're here with your attorney, Mr. Apicella; is that
6 correct?

7 THE DEFENDANT: Yes.

8 THE COURT: It's my understanding we were
9 going to have a hearing, but you've had a chance to talk
10 with the examining doctor, and you agree with his
11 conclusion that he is competent?

12 MR. APICELLA: Well, yes, Your Honor.

13 THE COURT: I mean, he's been able to talk
14 with him and you're able to communicate?

15 MR. APICELLA: I have. We have just been
16 downstairs. I first met with Mr. Simmons, and my expert,
17 Dr. Mulbry, met with him, and, after that, Dr. Gottlieb,
18 I was present for that also, and I also got the
19 opportunity to speak with Mr. Simmons. The last I spoke
20 to him was yesterday. I've spoken to him many times.

21 THE COURT: And he understands what this
22 process was about?

23 MR. APICELLA: Well, Your Honor, yesterday I
24 wasn't sure. I thought perhaps he was off his meds and
25 wasn't competent. I communicated that to the State. I

1 think Dr. Godfrey got that message also, but today he's
2 different than he was yesterday. He appears --
3 Dr. Mulbry, my expert, says that he's competent, and
4 based upon my conversations with him, he appears to be
5 competent.

6 THE COURT: And so we're here then. The
7 purpose of this is to determine -- there's been a plea
8 offer?

9 MR. OSBORNE: There has, Your Honor. He's
10 been charged with ten counts of armed robbery, ten counts
11 of possession of a weapon during the commission of a
12 violent crime. The offer is a negotiated range to plead
13 to five armed robberies, dismiss everything else, and the
14 range will be 17 to 28 years.

15 THE COURT: Seventeen to twenty eight?

16 MR. OSBORNE: Yes, Your Honor.

17 THE COURT: And that will be concurrent,
18 concurrent sentences?

19 MR. OSBORNE: Yes, Your Honor.

20 THE COURT: And that's just the armed
21 robberies and not the guns.

22 MR. OSBORNE: Yes, Your Honor.

23 THE COURT: And he's facing how many?

24 MR. OSBORNE: Ten.

25 THE COURT: Ten. He's pleading to half of

1 them, and are they -- they are arising out of the same --
2 is there a series in a row, or is there periods of time
3 in between?

4 MR. OSBORNE: There is a period of time in
5 between, from December the 10th until March the 30th,
6 from 2014 to 2015, and I have discussed that with Mr.
7 Apicella. So in all candor to the Court, my initial
8 thought on this was to try to pick a couple, try them,
9 get a conviction, see what the sentence was, and then
10 serve him with LWOP, and go from there.

11 THE COURT: Because armed robbery would be
12 most serious. If he was convicted of two, then it would
13 be life without parole.

14 MR. OSBORNE: That's correct, Your Honor.

15 THE COURT: And is that your understanding,
16 Mr. Apicella?

17 MR. APICELLA: Yes, Your Honor. If I could
18 just elaborate on that, just for sake of the record.

19 Mr. Simmons was previously represented by the
20 public defender's office. They were in this situation a
21 few years ago. The offer then was a range of between 20
22 and 25. State was free to argue for the maximum.
23 Defense was free to argue for the minimum, and that was
24 rejected, and the judge at that time, after interacting
25 with Mr. Simmons, thought there might be mental issues

1 and thought that new counsel would be appointed, yours
2 truly should investigate that.

3 We did. He was found to be incompetent. Now
4 he's found to be competent, and my negotiations with
5 Mr. Osborne have been ongoing since I came into the case,
6 and he's been very candid from day one, saying that his
7 intent was to try to lock up Mr. Simmons for the rest of
8 his life, convict him on two of them and then move for
9 LWOP, and Mr. Simmons has heard that from me, many, many
10 times.

11 The plea bargain has now changed, based upon
12 my efforts to try to get a lower sentence for Mr.
13 Simmons. Mr. Osborne has agreed to come down in the
14 range to 17, but in his position, which we agreed was to
15 go up three years on the maximum, so --

16 THE COURT: The beauty of what I'm hearing,
17 what I heard, is that five -- 25 to 30 was original?

18 MR. OSBORNE: Twenty to twenty-five.

19 THE COURT: Twenty to twenty-five.

20 MR. APICELLA: So the 25 has gone up to 28.

21 THE COURT: Yeah, but 20 down to 17, and this
22 is, Judge, and that would be a negotiated sentence, but
23 the most important part -- and, Mr. Simmons I'm talking
24 about this so that you'll hear me say this too, because
25 before I took this job -- and I'm not trying to tell you

1 what you need to do at all. I'm just talking to you and
2 just discussing it as I would have discussed to a client
3 I had who was charged with what you're charged with.

4 You're charged with ten different counts of
5 armed robbery, which, as I know your lawyer has explained
6 to you, has a minimum sentence. The best you could hope
7 for is ten. The most that could be imposed would be, for
8 one charge, would be 30. They all are the same as far as
9 nonparolable. They all are the same as far as carrying a
10 most serious designation, which means that's -- I call
11 it, basically, a major strike, because if you get two of
12 those, then there's nothing anybody can do.

13 The only sentence -- and I've had to
14 unfortunately do that -- and I say that sincerely,
15 unfortunately had to impose a life without parole three
16 times in my 24 years. I didn't enjoy doing that. You
17 know why? Because if I would have had the discretion to
18 impose the sentence, I wouldn't sentence the person to
19 life.

20 It just wasn't an appropriate punishment, in
21 my opinion, but I took an oath to uphold the law, and
22 that's what the law says. There's no option. If you're
23 convicted of two -- and, basically what I'm hearing, you
24 got ten times. If you win eight times, you still lose.

25 Did he have a record before this?

1 MR. OSBORNE: He does.

2 THE COURT: Any robberies?

3 MR. OSBORNE: Well, we had to dismiss two
4 before, but as far as convictions, nothing that would
5 enhance him.

6 THE COURT: But, I mean, does he have --
7 showing a propensity to take -- or propensity for
8 violence?

9 MR. OSBORNE: Malicious injury to property,
10 larceny, simple assault.

11 THE COURT: Those are showing a tendency
12 that, if I'm a sentencing judge, just a straight-up
13 sentence without any parameters, I'm going to factor
14 those in, and then the multiple ones are really what are
15 going to be over a period of time.

16 Was he out on bond at the time he committed
17 the others?

18 MR. OSBORNE: No, he was not. When it came
19 together, it all came together at one point in time. I
20 will point out one other thing, though. I don't believe
21 we have any witness here for the case, and I'm not so
22 sure if that would remain the same during trial.

23 MR. APICELLA: We do have a mitigation record
24 and a psychiatric report from Dr. Mulbry.

25 THE COURT: I appreciate him being here. I

1 appreciate all that he does for this community in many
2 ways, and I respect him implicitly. When he says the
3 person is, I'm comfortable and very confident that person
4 is absolutely competent, because I know this gentleman.
5 He's a consummate professional, and I'm proud to be a
6 part of a community where we cross paths from time to
7 time, and I know you feel the same way about it.

8 MR. APICELLA: We have used him on more cases
9 than I can count.

10 THE COURT: He doesn't always say what we
11 want him to say, and sometimes I'm sure the State would
12 feel the same way, but the bottom line is, he's going to
13 be true to his profession and true to his honest belief
14 about things, and you can't ask more from a professional,
15 that's for sure.

16 What does your client indicate --

17 MR. APICELLA: As I know -- I don't know.
18 Well, I want you to do this. I want you to take a moment
19 and talk to him, because what we want to do, Mr. Simmons,
20 is we need to plan, and this is for my benefit. I'm what
21 they -- every circuit has in General Sessions, criminal
22 court, has what they call an administrative judge, and in
23 addition to being a trial judge, I also have to be the
24 administrative judge, which means I have to manage the
25 docket. I have to control what cases are scheduled, when

1 they're scheduled, and these are old cases, as I recall.

2 MR. OSBORNE: They are some of the oldest on
3 our list.

4 THE COURT: And under the old system --
5 heretofore, and I'm not faulting the solicitors anywhere,
6 but the solicitor used to control the docket. They call
7 the cases they wanted to call. Well, January 2017, I
8 took over this job, and one of the things the chief
9 justice asked me to do is implement a system that
10 basically is consistent with a decision by the Supreme
11 Court several years ago that says the solicitor doesn't
12 need to be in charge of managing the docket. That needs
13 to be the Court.

14 So I've taken that, and the order that I
15 prepared is being modified, but not this part. You go to
16 the oldest cases first, and some cases, not yours, but we
17 have some that are being treated and they are in
18 treatment now. We're not calling those cases, but if the
19 case is otherwise ready to go, then it's the case that
20 comes up first, and I will tell you now, whatever you
21 decide -- again, I respect that you're as innocent of
22 these charges, in my eyes, as I am, I'm a little guilty
23 than you and you know more than I do right now. That
24 only changes when a jury, after the State proves your
25 guilt beyond a reasonable doubt, says so, they agree that

1 they've established that, or you plead guilty.

2 Then you're changing your status of how I see
3 you, and I respect the right -- and I even say this
4 sometimes. You may be able, in your mind -- and I don't
5 want your answer to this question. I want you to talk
6 with your lawyer, because I had clients that told me,
7 when I represented them in the confines of that
8 conversation, I did it, but what can you do to help me?

9 And we tried to work out the best deal we
10 could, but, you know, what I think I did have to do one,
11 maybe two trials in my career, where I knew they said
12 that. Can't let them testify to something that would be
13 a lie, but I could make the State prove their case. We
14 can't perpetrate a fraud, but you don't have to say a
15 word, and you may be totally guilty, and if the State
16 can't prove you guilty, that's it.

17 It's just what I told this jury when we
18 started. In a criminal case, and you know this, guilty
19 means the State proved every element of that crime beyond
20 a reasonable doubt. Not guilty doesn't mean you're
21 innocent, and that's what a lot of people try to say.
22 Not guilty means innocent. No, no. It can, but what it
23 means is this: The State was unable to prove every
24 element of the crime beyond a reasonable doubt, and if
25 that be the case, you walk, but in this situation, they

1 have ten times, ten shots at that, and if they're
2 successful on two of them, we'll know what's going to
3 happen. Okay?

4 So I want you to talk with him, Mr. Apicella.
5 See what he wants to do, because before he leaves today,
6 I want to put on the record that he's either going to
7 accept the offer or he's going to reject the offer.
8 Okay?

9 MR. APICELLA: Thank you.

10 THE COURT: Thank you, sir. Take a minute
11 and talk with your lawyer.

12 (Brief recess.)

13 (Court's Exhibit 1 marked for
14 identification.)

15 MR. OSBORNE: If I may, I have the evaluation
16 of Dr. Godfrey, who is here in court, on April the 28th
17 when he was found not competent, but likely. Also, her
18 evaluation report on October 16 where he was found
19 competent, and also the criminal responsibility report
20 where he was found to be criminally responsible on
21 November the 3rd.

22 THE COURT: Let's mark it as a package. I've
23 had Dr. Mulbry's report marked Court's Exhibit 1, so
24 we'll mark those collectively as Court's Exhibit 2.

25 (Court's Exhibit 2 marked for

1 identification.)

2 MR. APICELLA: And, Your Honor, one thing I
3 should have mentioned and we didn't, there's also a
4 violation of probation.

5 THE COURT: Well, good. We'll take care of
6 that too. He's on probation for what?

7 MR. APICELLA: For a lottery ticket case and
8 use of firearms. It involved --

9 THE COURT: No problem.

10 MR. APICELLA: -- damaging a showerhead while
11 he was incarcerated.

12 THE COURT: No problem. I'll take care of
13 that. All right.

14 Good afternoon, Mr. Simmons. All right, sir.
15 After our discussion you talked with your lawyer further;
16 is that correct?

17 THE DEFENDANT: Yes, sir.

18 THE COURT: And according to this, I have
19 five sentencing sheets that you've signed, and it's
20 indicated to me that you want to accept the negotiated
21 offer that the State has made to you.

22 THE DEFENDANT: Yes, sir.

23 THE COURT: And, basically, so that I
24 understand it, because it will deal with whether I accept
25 it or not, the active time that I would impose would be

1 between 17 and 28 years.

2 MR. OSBORNE: That's correct, Your Honor.

3 THE COURT: But it's important to me that it
4 deals with the active time, because I'm accepting this,
5 and I just need to make sure of this because it allows me
6 to do something in structuring the sentence that wouldn't
7 necessarily require him to do any more active time, but
8 it will afford the opportunity for that, should
9 something -- and I want to make a part of this community
10 supervision, because as you've been aware, Mr. Simmons,
11 that while these sentences will be concurrent and I will
12 not impose any more active time than 28 years or less
13 than 18 years, you understand that?

14 THE DEFENDANT: Yes, sir.

15 THE COURT: And whatever time I impose, your
16 lawyer has explained that you will have to serve 85
17 percent of that, correct?

18 THE DEFENDANT: Yes, sir.

19 THE COURT: And let's just, for the sake of
20 discussion -- I'm not telling you I'm going to sentence
21 you to 20 years. It's easier for me to do the math for
22 20 years than it is another number, but if I were to
23 sentence you to 20 years' active time, then you would
24 have to do 17 years before you would be able to be
25 released.

1 Do you understand that?

2 THE DEFENDANT: Yes, sir.

3 THE COURT: And the remaining three years you
4 would serve what we call community supervision, but it's
5 really probation for two years. If you successfully
6 complete that, you're done.

7 You understand that?

8 THE DEFENDANT: Yes, sir.

9 THE COURT: So while you had an active time
10 of three years, if you were to complete the two-year
11 sentence, you'd never have to do the remaining one year.

12 Do you understand that?

13 THE DEFENDANT: Yes, sir.

14 THE COURT: But if you violate it, a judge
15 can return you one year at a time until you finish either
16 on supervision or serving the three-year remaining
17 sentence.

18 Do you understand that?

19 THE DEFENDANT: Yes, sir.

20 THE COURT: And you want me to accept the
21 negotiated sentence; is that right?

22 THE DEFENDANT: Yes, sir.

23 THE COURT: And that would be a concurrent
24 sentence of no more than 28, no less than 18 on these
25 seven -- 17, excuse me, 17 years on these five; is that

1 right?

2 THE DEFENDANT: Yes, sir.

3 THE COURT: Okay. Do you think the
4 negotiated sentence is in your best interest, given the
5 circumstances?

6 THE DEFENDANT: Yes, sir.

7 THE COURT: What you're avoiding -- and I
8 know you've talked about this and thought about this, and
9 I explained to you my honest -- and that was truly my
10 feeling. There wouldn't be anything I could do. I mean,
11 if I wanted to say if you were convicted on the third
12 one, the second one, and I said, well, I'll give him the
13 maximum 30, I couldn't do that. I'd have to give you
14 life.

15 Do you understand that?

16 THE DEFENDANT: Yes, sir.

17 THE COURT: But this avoids that. Do you
18 understand that?

19 THE DEFENDANT: Yes.

20 THE COURT: And that's a major benefit, do
21 you agree?

22 THE DEFENDANT: Yes.

23 THE COURT: You are satisfied with your
24 lawyer?

25 THE DEFENDANT: Yes, sir.

1 THE COURT: And you hesitated, and let me say
2 this to you: I was just telling -- I'm fortunate to have
3 this lady sitting with me this week here. Hired her to
4 keep me straight. She's one of our new judges and she
5 was just elected, and as a new judge, you have to sit
6 with another judge for -- is it four now? They increased
7 it. Probably that's why they said I'm an example of why
8 they needed to do four. I should have done four and only
9 did three, but be that as it may, I was talking to her
10 about these situations and telling her that, you know,
11 this is a tough -- she's been a judge on the magistrate
12 side, and sentencing is really tough.

13 She practiced law for a good while, just like
14 I did, and the beauty of practicing law and the beauty of
15 being privileged to do what your lawyer, Mr. Apicella,
16 has done is represent people like you accused of crimes,
17 is you get to talk to them, and it helps me understand
18 some of your thought process because I can promise you,
19 you hesitated.

20 Some of my clients didn't like what I told
21 them either, and they get upset about it, and I
22 appreciate that. I understand that, but I would tell
23 them, you don't want somebody to pat you on the back and
24 said everything is okay and it's not. In a setting where
25 the only people that know about whatever he told you or

1 you told him is the two of you, and that's the beauty of
2 attorney-client privileges.

3 So I know that you don't necessarily agree
4 with everything he said, but, as I told my clients, if I
5 didn't tell you what I honestly feel, then you've wasted
6 your time with me. I haven't done what I'm supposed to
7 do and tell you my honest opinion, and, yeah, they didn't
8 like it sometimes, but the bottom line is, it's their
9 call, but we are called upon to tell you how you would
10 honestly feel, but you're satisfied with Mr. Apicella's
11 job?

12 THE DEFENDANT: Yes, sir.

13 THE COURT: Well, it's obvious, and I
14 appreciate the solicitor's willingness to do some things,
15 and be open to that, and certainly Mr. Apicella has
16 lowered your exposure, in one sense, by lowering the
17 minimum sentence at the base, so he has done a great
18 service for you.

19 Do you agree with that?

20 THE DEFENDANT: Yes, sir.

21 THE COURT: Are you under the influence of
22 any alcohol or medication today other than any prescribed
23 medication?

24 THE DEFENDANT: No, sir.

25 THE COURT: Have you taken any medication

1 today?

2 THE DEFENDANT: Last night.

3 THE COURT: Did you take the amount as
4 prescribed? And the reason I ask you this, one of the
5 reason things I noticed in Dr. Mulbry's report is your
6 condition is certainly something that, as he says, is
7 treatable with medication, but when you're not on your
8 meds, there's a problem, as it's indicated.

9 But you're taking your medication as
10 prescribed; is that true?

11 THE DEFENDANT: Yes, sir.

12 THE COURT: Okay. And it helps you?

13 THE DEFENDANT: Yes, sir.

14 THE COURT: It does. Okay. Good.

15 Put the full extent of the negotiated plea is
16 on the record now, Solicitor.

17 MR. OSBORNE: Thank you, Your Honor. I would
18 like to thank Dr. Emily Godfrey.

19 THE COURT: Yes, thank you, Dr. Godfrey.

20 MR. OSBORNE: She met with the defendant on
21 three different occasions, and she also met with him
22 today, and she too was prepared, if necessary, to testify
23 that she found the defendant competent after speaking
24 with him today.

25 The facts on this case, Your Honor, are

1 between the dates of December the 10th of 2013 and March
2 the 30th of 2014. Charleston County sheriff's office as
3 well as CPD investigated a series of armed robberies, all
4 to businesses in the James Island and West Ashley area.
5 The robberies were believed to be committed by the same
6 individuals based on the MO, as well as the clothing, the
7 mask, and the gloves, and the same combination of the
8 weapons used in each robbery, and I'll just go through
9 each robbery, and then I'll talk about how they tied it
10 in to the defendant.

11 The first incident that he's pleading to ends
12 in warrant number 1854. That occurred on January the
13 12th of 2014. It was about 11:40 p.m. The defendant and
14 another individual entered a Circle K at 2407 Ashley
15 River Road. Defendant was armed with a pistol. He
16 demanded money and took money from the cashier from the
17 register.

18 The second incident is an armed robbery
19 ending in warrant number 276. That occurred the next
20 day, on January 13th of 2014 at 10:38 p.m. Defendant and
21 another subject entered a Kangaroo at 107 Main Street.
22 Defendant was armed with a handgun, took money and
23 cigarettes.

24 The next incident ends in warrant number 193.
25 That occurred on March 13, 2014, and that was at 2:20 in

1 the morning. Again, the defendant and another subject
2 entered McDonald's at 2007 Magwood. He at this time was
3 armed with a Tec-9 type of weapon. He demanded and took
4 money from the register and safe.

5 The fourth incident ends in 229. That
6 occurred on March the 23rd of 2014 at about 9:50 p.m. The
7 defendant and another subject enter a CVS at 1739 Maybank
8 Highway. He was armed again at this time with a Tec-9.
9 Took money from register and safe. The last incident
10 ends in warrant number 231. That was on the same date
11 and the same shopping center. About 20 minutes later,
12 the defendant entered the Barberito's at 1739 Maybank,
13 again with a Tec-9, took money from the register and the
14 safe.

15 While the detectives were investigating it on
16 January 17th, 2014, they had the occasion to speak to the
17 defendant on an unrelated matter. They obtained his
18 cellphone number. They searched -- got a search warrant
19 for the phone records. They tracked the defendant to the
20 majority of the robberies, put his cellphone in that area
21 during the time frame.

22 On March the 31st, detectives conducted a
23 trash pull on the defendant's home. They found Latex
24 gloves and a partially burnt mask, which appeared to
25 match one of the robberies. On April 6th of 2014, the

1 defendant was pulled over in a traffic stop. The
2 defendant stayed with the car. Two unknown subjects fled
3 and were running from the police, and on April the 11th,
4 the defendant was interviewed post-Miranda. He ended up
5 confessing to two of the robberies, one on January 12th
6 and one on January the 13th.

7 And, lastly, with the robbery on March the
8 13th, detectives executed a warrant on the defendant's
9 home, and they found a pair of shoes in there that
10 matched the shoe prints from the McDonald's robbery.
11 Once the defendant was arrested, he had a co-defendant.
12 He was also arrested. No other robberies of this nature
13 have occurred.

14 And I think you can tell, Your Honor,
15 individually they might have caused somewhat of a
16 difficulty to prosecute, and that's why we were going to
17 go for multiple ones at one time, which is primarily the
18 reason why we agreed on this plea offer.

19 THE COURT: So some of them weren't so easy
20 to prosecute?

21 MR. OSBORNE: Not until he confessed to them.

22 THE COURT: Mr. Apicella, you have
23 investigated this matter on behalf of your client; is
24 that correct?

25 MR. APICELLA: I have, Your Honor.

1 THE COURT: And you shared fully the result
2 of that investigation with him?

3 MR. APICELLA: Yes, sir.

4 THE COURT: Basically, your investigation and
5 your discussions confirmed what the solicitor has stated.

6 MR. APICELLA: Yes, sir.

7 THE COURT: He had requested -- once you
8 appointed to, as I understand from your recitation, this
9 was after he had declined the previous offer; is that
10 correct?

11 MR. APICELLA: That is correct, Your Honor.

12 THE COURT: And asked that you do something
13 that's not always easy to do, and that is to have it
14 reopened for consideration; is that true?

15 MR. APICELLA: It is true.

16 THE COURT: And you were able to do that and
17 accomplish that?

18 MR. APICELLA: I was, Judge. I have to say
19 that the State, I thought, behaved admirably in
20 consenting to that. I agree with that and thank
21 Mr. Osborne for his reasonableness in that, but your
22 persistence in asking -- because, as I told the lawyer
23 who asked me something yesterday, I said I'm not going to
24 do it. He said don't be offended. And I said, offended?
25 How do you know if you're going to get it if you don't

1 ask? So you did, and you were able to retain a result.

2 First of all, based on the evidence that you
3 have shared with your client, do you concur with his
4 decision to enter the guilty plea in each case?

5 MR. APICELLA: I do, Your Honor.

6 THE COURT: And based on your discussions
7 about some other things that we've already talked about
8 on the record, and you've talked with him, I'm sure, at
9 length about this, the risk of a possible life without
10 parole, this negotiated sentence is clearly in his best
11 interest?

12 MR. APICELLA: Clearly.

13 THE COURT: In his best interest?

14 MR. APICELLA: Yes, Your Honor.

15 THE COURT: And you support the findings of
16 both psychiatrists who have indicated he is competent; is
17 that correct?

18 MR. APICELLA: I do, Your Honor. I was
19 present for interviews this morning, before we came to
20 court. I was fully prepared to contest the finding if
21 the need arose. I have Dr. Mulbry here, and I also have
22 our investigator who investigated the case and was going
23 to testify.

24 THE COURT: Well, you've seen him in good and
25 bad times.

1 MR. APICELLA: Yes.

2 THE COURT: And today he's in much better
3 condition and shape and understanding and being able to
4 comprehend than some of the times you've seen him.

5 MR. APICELLA: Yes, sir. He is competent
6 today.

7 THE COURT: Mr. Simmons -- and you've advised
8 him fully of the rights he will be relinquishing if I
9 accept the negotiated sentence?

10 MR. APICELLA: I have, Judge.

11 THE COURT: And he understands fully that and
12 the consequences of his decision?

13 MR. APICELLA: Yes, Your Honor.

14 THE COURT: Mr. Simmons, is all that true,
15 sir?

16 THE DEFENDANT: Yes, sir.

17 THE COURT: The statements and facts as
18 stated by the solicitor, are those accurate?

19 THE DEFENDANT: Not all of it.

20 THE COURT: Well, did you commit the
21 robberies that you're going to plead to?

22 THE DEFENDANT: Yes, sir.

23 THE COURT: No question about that? There
24 may be aspects of it that you don't agree with, but
25 insofar as doing these crimes, you're guilty of doing

1 these crimes?

2 THE DEFENDANT: Yes, sir.

3 THE COURT: And no question?

4 THE DEFENDANT: No, sir.

5 THE COURT: You understand that each of these
6 indictments -- and that's 20147111, 7123, 7142, 7145, and
7 7147, that each of those indictments charge you with the
8 offense of armed robbery.

9 Do you understand that?

10 THE DEFENDANT: Yes, sir.

11 THE COURT: And, furthermore, as your lawyer
12 and you and I have discussed, each of those charges carry
13 a potential sentence normally of up to 30 years in jail.

14 Do you understand that?

15 THE DEFENDANT: Yes, sir.

16 THE COURT: With a minimum sentence of ten
17 years in jail. Do you understand that?

18 THE DEFENDANT: Yes, sir.

19 THE COURT: And you also understand there are
20 some gun charges being dismissed that carry a potential
21 five-year sentence, a day-for-day five-year sentence.

22 Do you understand?

23 THE DEFENDANT: Yes, sir.

24 THE COURT: But those are being dropped. You
25 understand that?

1 THE DEFENDANT: Yes.

2 THE COURT: And the other five armed
3 robberies are being dropped?

4 MR. OSBORNE: Yes, Your Honor.

5 THE COURT: And you understand that?

6 THE DEFENDANT: Yes, sir.

7 THE COURT: And you understand the terms of
8 violent offense, what that means?

9 THE DEFENDANT: Yes, sir.

10 THE COURT: And really doesn't have a lot of
11 significance with a nonparolable offense because you're
12 going to serve a minimum of 85 percent of any sentence I
13 impose.

14 Do you understand that?

15 THE DEFENDANT: Yes, sir.

16 THE COURT: But it's a most serious offense,
17 and you understand that?

18 THE DEFENDANT: Yes, sir.

19 THE COURT: And, of course, while you're
20 avoiding a life without parole, you're also setting up --
21 if you were to commit a serious offense or a most serious
22 offense, they would be able to notice you with life
23 without parole after you get out.

24 Do you understand that?

25 THE DEFENDANT: Yes, sir.

1 THE COURT: You understand you're not going
2 to have a jury trial?

3 THE DEFENDANT: Yes, sir.

4 THE COURT: On any of these?

5 THE DEFENDANT: Yes, sir.

6 THE COURT: Therefore you're not going to
7 have a right to confront witnesses against you, and you
8 have given up the right to remain silent. Do you
9 understand that?

10 THE DEFENDANT: Yes, sir.

11 THE COURT: And that's an important right,
12 because as your lawyer has said, and what I told this
13 jury, persons accused of committing offenses don't have
14 to say a word.

15 Do you understand that?

16 THE DEFENDANT: Yes, sir.

17 THE COURT: You don't have to prove your
18 innocence, and you sure don't have to put any evidence
19 in, so giving up that right is pretty significant and
20 important. Do you realize that?

21 THE DEFENDANT: Yes, sir.

22 THE COURT: But that's what you choose to do?

23 THE DEFENDANT: Yes, sir.

24 THE COURT: Any threats? Did anybody
25 threaten you in any way, sir, to get to you plead guilty?

1 THE DEFENDANT: No, sir.

2 THE COURT: Other than the promises which
3 we've talked about, the promise of no less than 18, no
4 more than 28 years --

5 MR. APICELLA: 17 years.

6 THE COURT: I keep saying that. You may know
7 where I'm going.

8 THE DEFENDANT: Could I ask my lawyer a
9 question, please?

10 THE COURT: Mr. Simmons, I want you to talk
11 to your lawyer and, I want you to be comfortable with
12 what you're doing, because let me tell you something:
13 That little discussion I had with you, that's something
14 that -- I say this not infrequently. I probably say it
15 when I'm doing guilty pleas, I would say on average at
16 least once a term, sometimes more than that.

17 I see people start looking, and one thing
18 I've learned in this job, and I learned it when I was a
19 lawyer and just learned it in life: You can listen to
20 what somebody tells you, but you can watch their body
21 language and their facial expressions. That speaks a lot
22 louder than people's words, and I'm watching yours, and I
23 see some concern on your face, some worry, and I will
24 tell you this: You have to convince me that you're
25 guilty, because otherwise I'm not accepting it because I

1 believe these rights that we talked about, real quickly,
2 are probably some of the most significant rights we have
3 as citizens in this country, and I don't take them
4 lightly, and I don't expect people to take them lightly.

5 I know there are benefits. As I said, I
6 practiced law for 21 years. There's a cost benefit
7 analysis in everything we do, and I'm not talking about
8 dollars and sense, I'm talking about time, that what
9 you're facing here and what I hold in my hand, I don't
10 know whether a jury would believe your confession or not.
11 That would be up to a jury, but there are two of them,
12 and if he fails on those, he's got eight other shots to
13 do, and all he's got to do is get two convictions and
14 that's it. It's over. Done.

15 All that aside, you have every right to make
16 the State prove you ten times, and if you work through
17 ten of them, you go. You walk, but if you don't, the
18 judge can give you -- I can structure a sentence on one
19 conviction with a gun, if I ran the armed robbery
20 consecutive to the gun charge, you'd have to serve the
21 five years before you start earning any credits. You've
22 got to do it day-for-day, so you would have to do -- that
23 is 29 years that you would actually serve.

24 There are ways to structure this thing to
25 make it a life sentence without it being a life sentence,

1 but all of that to say to you, I'm responding to your
2 reaction. I'm reluctant to accept your plea unless
3 that's something you tell me you want to do.

4 THE DEFENDANT: Yes, sir.

5 THE COURT: Yes, sir, what? You want to
6 withdraw your plea?

7 MR. APICELLA: May I, Judge?

8 THE COURT: I don't what the concern was.
9 What is his concern?

10 MR. APICELLA: Allow me to elaborate, if I
11 may. He's concerned about the violation of probation.

12 THE COURT: I'm getting ready to do that,
13 because all he's got to do is accept the plea and that
14 will take care of that.

15 MR. APICELLA: I know, Judge, but to you and
16 I and those involved --

17 THE COURT: What is his concern?

18 MR. APICELLA: His concern is part of the
19 original finding of incompetency has to do with his
20 obsession about the fact that he was illegally on
21 probation.

22 THE COURT: Well, he's not going to be on
23 probation anymore.

24 MR. APICELLA: I have investigated that ad
25 nauseam. He was legally on probation.

1 THE COURT: You know what? If the probation
2 doesn't exist anymore, then what does it matter?

3 MR. APICELLA: Exactly, Judge.

4 THE COURT: You agree with that?

5 THE DEFENDANT: Right.

6 THE COURT: I mean, probation is gone. It
7 doesn't matter whether you were legally or illegally,
8 it's over. Do you agree?

9 THE DEFENDANT: Yeah.

10 THE COURT: It's going to be over, okay?
11 Terminate probation.

12 MR. APICELLA: Thank you. That was his
13 concern.

14 THE COURT: He's on bond. I assume he's been
15 able to make any bond raising, so it doesn't matter about
16 that. This will take over, regardless.

17 So are you comfortable now?

18 THE DEFENDANT: Yes, sir.

19 THE COURT: That didn't make you suddenly say
20 I'm guilty just to convince me you want to be guilty.
21 You are guilty of these offenses?

22 THE DEFENDANT: Yes, sir.

23 THE COURT: Okay. You want me to accept the
24 plea?

25 THE DEFENDANT: Yes, sir.

1 THE COURT: Mr. Apicella, I'll be happy to
2 hear from you.

3 His plea has been freely, voluntarily,
4 knowingly, intelligently made, and I thank Dr. Godfrey
5 and Dr. Mulbry for their participation and assistance in
6 this, and I'm making -- I think the package that you
7 submitted, Solicitor, is Court's Exhibit 2, and the
8 package from Dr. Mulbry is Court's Exhibit 1. They are
9 part and parcel of this plea and significant reasons for
10 why I'm willing to accept the plea.

11 Mr. Apicella, I'll be happy to hear from you
12 as to what range I should impose, sir.

13 MR. APICELLA: Yes, Your Honor. Well, I
14 think we have to begin with the nature of the crimes and
15 the seriousness of them, and I think it's everyone's
16 worst nightmare to be a victim of an armed robbery. It's
17 a most serious offense in South Carolina for good reason,
18 as it is in every jurisdiction that I've ever practiced
19 in and that I know about. Armed robbery is an extremely
20 serious crime.

21 Given that, Judge, we submit there are some
22 significant mitigating circumstances involved with Mr.
23 Simmons that are detailed in Dr. Mulbry's report. Just
24 to summarize, Judge, he's been documented with
25 schizophrenia for a long, diagnosed with borderline

1 intellectual functioning, which seems to vary, depending
2 on the stage of his life and who's evaluating him, but
3 there's no question, at least from my interactions with
4 him and Dr. Mulbry's interaction with him, that he is
5 functioning at a borderline normal level, and that's part
6 of the problem. And his longstanding mental illness, the
7 schizophrenic syndrome, can be controlled with proper
8 medication. When he's taking his meds, he's fine.

9 Present in the court is his aunt
10 Ms. Peterson. I've spoken to her many times.
11 Dr. Godfrey has spoken to her. She was one of the
12 reasons why I believe Dr. Godfrey first found my client
13 incompetent back in April of 2017. She's now found that
14 he is competent, and we do agree with that, but it began
15 in first grade when he was left back, Judge. He was then
16 diagnosed with various disorders and was given
17 medication, didn't do well in school, is not a good
18 reader, although he can read. He's taught himself to
19 write. He's written many, many, many letters to me, to
20 judges, to Courts.

21 He has done his own legal research since he's
22 been in. Some of it has been very, very good; some I
23 disagree with, but he doesn't lack for effort, and he's
24 done everything he possibly can to educate himself on the
25 law in this case and how the law applies in this case,

1 but based upon his documented mental history, Judge, and
2 the fact that we do have prior findings of incompetence,
3 I would ask for you see a way to sentence him in the
4 lower range of this sentencing range, which is a
5 significant range, 17 to 28.

6 Seventeen is not an insignificant sentence,
7 Judge, and you're well aware of how much time he does
8 have to do. I would ask you is, based upon Dr. Mulbry's
9 mitigating exam and also the fact that, as he stands
10 before you today, he accepts responsibility, accepts the
11 enormity of the wrong that he did, and factor that in and
12 sentence him to 17 years.

13 THE COURT: Thank you, sir.

14 Mr. Simmons, is there anything you wish to
15 add, sir?

16 THE DEFENDANT: Yes, sir.

17 THE COURT: Let me say, your response, both
18 facially and body language, when we're talking about
19 life, you were very well aware of that, about my assuming
20 control of the docket and the problems associated with
21 that. I notice your affirmation of that and agreement
22 with that, which shows and, again, demonstrates and
23 confirms for me that you do have an understanding of
24 what's going on, and I am grateful that you're able to
25 reach that point, and with medication -- I wish there

1 would be something that I could do that would rid you of
2 the medical issues, the mental issues that you've had to
3 deal with in your life.

4 I really wish I could, but we know there is
5 nothing, but the beauty of it is with the assistance of
6 wonderful physicians like Dr. Mulbry and Dr. Godfrey, you
7 could lead a productive life. It's not as great as maybe
8 some others that don't have to fight that every day, but
9 you can function and function well. I hope that.
10 Probably wishful thinking on my part. One of my dreams
11 is that this state and every state in the United States
12 recognizes that people who have mental illness deserve to
13 be treated in some form or fashion -- whether they're out
14 or whether they're in prison, they are human beings, and
15 when we put somebody behind bars and just throw them in a
16 cell, shame on us. We ought to be -- that's just --
17 we're going to answer to for that, I think, one day, we
18 really are, and it's just my personal belief, and I hope
19 and pray that this state and other states will wake up
20 and provide assistance and treatment for persons with
21 your situation.

22 I hope they will. Please, if they do become
23 available, take advantage of those things, because you
24 know why? Because you deserve it. Okay? You deserve to
25 be treated as anybody is treated. You make some mistakes

1 and you're going to be punished, but if we can give you
2 some help, we ought to do that.

3 THE DEFENDANT: Thank you.

4 THE COURT: Sentence of the Court is this:
5 Solicitor, you are being extremely fair, and I will do it
6 because of what I find in that package. I think this man
7 is, unfortunately, the victim of himself and his
8 condition and the tendency of all of us who have had a
9 medical condition that we won't take our meds as
10 prescribed, and there are consequences for that, and I'm
11 not sure -- when we look at all the complete package, I'm
12 not sure that he has everything there that will assist
13 him in making a very prudent decision. Sometimes, Lord
14 knows I don't deal with his disorder, but I'm going to
15 structure something so that I think society will be
16 protected, and I'm delighted that we have this
17 opportunity.

18 On one of the indictments -- I don't think I
19 have to do it on all of them. Indictment 2014-1711 will
20 be the controlling one. I'm sentencing you to 30 years
21 but suspending that to 18. Now, what does that mean? It
22 means simply this: As for that charge, you will serve
23 15.3 years' time, and then you will be released, and part
24 of the community -- I've written in, and I know I can't
25 control it, community supervision program, he must take

1 all meds as prescribed. I'm sure that will be a
2 condition, but I'm writing that in there specifically,
3 and any treatment and counselling that is deemed
4 necessary.

5 If you don't do that, it's a violation, and
6 if it's a violation, I don't know who's going to do * it
7 because I'm going to be statutory and senile before you
8 get out, but you will have the remaining what, I totalled
9 at -- that would leave about three years, just rounded
10 off, not quite three, but you have 15 -- you'd have 15
11 more that you've got to do because you've got till 30,
12 and that means that you'll have 15 times that they can
13 send you back to jail if you don't complete the two-year
14 supervision.

15 So you understand that, Mr. Apicella?

16 MR. APICELLA: Yes, Your Honor, but did you
17 mean to say 28 years rather than 30?

18 THE COURT: No. That's why I asked you:
19 Active time, I'm giving you what you want, your active
20 time. I didn't exceed 28 years. He only has exposure
21 time now. That's in his control. I don't have anything
22 to do with that. He'll serve 15. That's the only way
23 I'll accept that, because I've got the right to go to the
24 maximum on one, and he's going to serve 18 years.

25 If he does his two-year program, he'll never

1 serve the remaining year. If he abides by these
2 conditions -- listen to this, Mr. Simmons. If you get --
3 in 15 years -- you're how old today?

4 THE DEFENDANT: 35.

5 THE COURT: You'll be 50, thereabout, a
6 little older. If you get out and within the next two
7 years you go to counselling, you take your meds, you
8 don't violate any law, you are finished. You're done.
9 You won't ever have to serve that remaining portion.

10 If you don't, year one, you come out and you
11 don't take your meds or you don't go to counselling,
12 Judge can say, okay. He violated his community
13 supervision. One year and you go back. You come out,
14 you start the two years all over again, and you keep
15 doing that, and it could be up to 15 times, but that's
16 not -- that's the active sentence he's doing, not me.

17 It's in his control. So no, I think I've
18 complied with the negotiated sentence in every respect
19 because all you talked about was how much active time
20 he's going to serve today, and how much time has he
21 served? How much has he already served?

22 MR. APICELLA: 15.3, sir.

23 THE COURT: No, sir. He's been in jail for
24 how long?

25 MR. APICELLA: Four years.

1 THE COURT: Since January of what?

2 MR. OSBORNE: 2016.

3 THE COURT: Credit for time served since
4 January -- what date in January?

5 MR. OSBORNE: I'm sorry. April 11, 2014 is
6 when he was arrested.

7 THE COURT: I'll credit time served since
8 April 11th, 2014. The sentence on the remaining
9 indictments is 18 years. They're concurrent. Credit for
10 time served since April 11, 2014.

11 Good luck to you, sir. Thank you.

12 - - -

13 (Whereupon, at 2:39 p.m., the proceedings
14 were concluded.)

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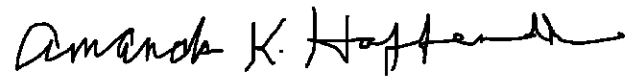
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25

I, the undersigned, Amanda Kelly Haffenden, RPR, CRR, Circuit Court Reporter for the Ninth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of record of all the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Circuit Court for Charleston County, South Carolina, on the 20th of March 2018.

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

September 3, 2018



Circuit Court Reporter

BCS20140403819

WITNESSES

Charleston City Police Department

AGENCY CASE NUMBER

1403896

ARREST WARRANT NUMBER

2014A10109000193

DATE OF ARREST

April 11, 2014

ACTION OF GRAND JURY

TALE BILL

DEC 15 2014

For person of Grand Jury

Date: *April 11, 2014*

VERDICT

For person of Petit Jury

Date:

INDICT

DOCKET NO. 2014GS1007111

The State of South Carolina

County of Charleston

FILED

12/11/2014 8:51:59 AM

JULIE J. ARMSTRONG

CLERK OF COURT

COURT OF GENERAL SESSIONS

December Term 2014

THE STATE

vs.

ANTONIO ORLANDO SIMMONS

DOB: [REDACTED]

B/M

Indictment for

Armed Robbery

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

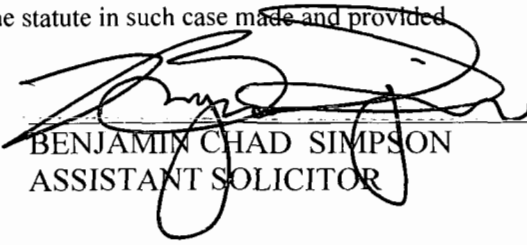
INDICTMENT

At a Court of General Sessions, convened on December 1, 2014 the Grand Jurors of Charleston County present upon their oath:

Armed Robbery

That on or about March 13, 2014, in Charleston County, South Carolina, the Defendant, Antonio Orlando Simmons, by use of force, threats or intimidation and while armed with a deadly weapon, or while alleging, either by action or words, he was armed while using a representation of a deadly weapon or any object which a person present during the commission of the robbery reasonably believed to be a deadly weapon, did take and carry away goods and/or monies from the person or immediate presence of Shada Simmons with the intent to permanently deprive the victim of possession thereof, in violation of §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



BENJAMIN CHAD SIMPSON
ASSISTANT SOLICITOR

BCS20140504756

WITNESSES

Charleston City Police Department

AGENCY CASE NUMBER

1400654

ARREST WARRANT NUMBER

2014A1010900276

DATE OF ARREST

May 9, 2014

ACTION OF GRAND JURY

TRUE BILL

Foreperson of Grand Jury Date: *Amber Dubs* DEC 1 - 2014

VERDICT

Foreperson of Petit Jury Date:

INDICT

DOCKET NO. 2014GS1007123

The State of South Carolina

County of Charleston

COURT OF GENERAL SESSIONS

December Term 2014

THE STATE

vs.

ANTONIO ORLANDO SIMMONS

DOB: [REDACTED] B/M

Indictment for

Armed Robbery

FILED

12/11/2014 8:52:00 AM

JULIE J. ARMSTRONG

CLERK OF COURT

STATE OF SOUTH CAROLINA)
)
 COUNTY OF CHARLESTON)

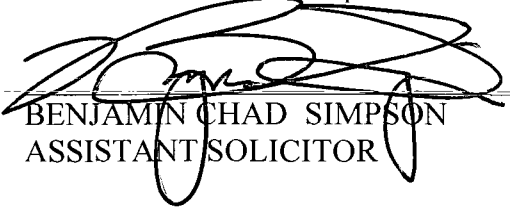
INDICTMENT

At a Court of General Sessions, convened on December 1, 2014 the Grand Jurors of Charleston County present upon their oath:

Armed Robbery

That on or about May 13, 2014, in Charleston County, South Carolina, the Defendant, Antonio Orlando Simmons, by use of force, threats or intimidation and while armed with a deadly weapon, or while alleging, either by action or words, he was armed while using a representation of a deadly weapon or any object which a person present during the commission of the robbery reasonably believed to be a deadly weapon, did take and carry away goods and/or monies from the person or immediate presence of Robin Herndon with the intent to permanently deprive the victim of possession thereof, in violation of § 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.


 BENJAMIN CHAD SIMPSON
 ASSISTANT SOLICITOR

BCS20140404114

WITNESSES

Charleston City Police Department

AGENCY CASE NUMBER

1404541

ARREST WARRANT NUMBER

2014A1010900232

DATE OF ARREST

April 23, 2014

ACTION OF GRAND JURY

TRUE BILL

For person of Grand Jury

Date: *April 23, 2014*

DEC 1 - 2014

VERDICT

For person of Petit Jury

Date:

INDICT

DOCKET NO. 2014GS1007142

The State of South Carolina

County of Charleston

COURT OF GENERAL SESSIONS

December Term 2014

THE STATE

vs.

ANTONIO ORLANDO SIMMONS

DOB: [REDACTED]
B/M

Indictment for

Armed Robbery

FILED

12/11/2014 8:52:00 AM

JULIE J. ARMSTRONG

CLERK OF COURT

STATE OF SOUTH CAROLINA)
)
 COUNTY OF CHARLESTON)

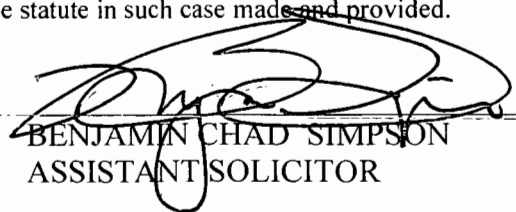
INDICTMENT

At a Court of General Sessions, convened on December 1, 2014 the Grand Jurors of Charleston County present upon their oath:

Armed Robbery

That on or about March 23, 2014, in Charleston County, South Carolina, the Defendant, Antonio Orlando Simmons, by use of force, threats or intimidation and while armed with a deadly weapon, or while alleging, either by action or words, he was armed while using a representation of a deadly weapon or any object which a person present during the commission of the robbery reasonably believed to be a deadly weapon, did take and carry away goods and/or monies from the person or immediate presence of Patrick Hollifield with the intent to permanently deprive the victim of possession thereof, in violation of §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.


 BENJAMIN CHAD SIMPSON
 ASSISTANT SOLICITOR

BCS20140403806

WITNESSES

Charleston County Sheriff Office

AGENCY CASE NUMBER

2014001096B

ARREST WARRANT NUMBER

2014A1010201854

DATE OF ARREST

April 11, 2014

ACTION OF GRAND JURY

TRUE BILL

Foreperson of Grand Jury DEC 1 - 2014

Date: Cynthia Davis

VERDICT

Foreperson of Petit Jury

Date:

INDICT

DOCKET NO. 2014GS1007145

The State of South Carolina

County of Charleston

FILED

12/11/2014 8:52:00 AM

JULIE J. ARMSTRONG

CLERK OF COURT

COURT OF GENERAL SESSIONS

December Term 2014

THE STATE

vs.

ANTONIO ORLANDO SIMMONS

DOB: [REDACTED]

B/M

Indictment for

Armed Robbery

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

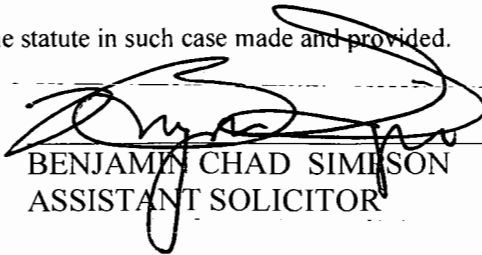
INDICTMENT

At a Court of General Sessions, convened on December 1, 2014 the Grand Jurors of Charleston County present upon their oath:

Armed Robbery

That on or about January 12, 2014, in Charleston County, South Carolina, the Defendant, Antonio Orlando Simmons, by use of force, threats or intimidation and while armed with a deadly weapon, or while alleging, either by action or words, he was armed while using a representation of a deadly weapon or any object which a person present during the commission of the robbery reasonably believed to be a deadly weapon, did take and carry away goods and/or monies from the person or immediate presence of Alicia Wasson with the intent to permanently deprive the victim of possession thereof, in violation of §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.



BENJAMIN CHAD SIMSON
ASSISTANT SOLICITOR

BCS20140404113

WITNESSES

Charleston City Police Department

AGENCY CASE NUMBER

1404539

ARREST WARRANT NUMBER

2014A1010900229

DATE OF ARREST

April 23, 2014

ACTION OF GRAND JURY

TRIE BILL

Foreperson of Grand Jury DEC 1 - 2014

Date: *C. M. H. A. H.*

VERDICT

Foreperson of Petit Jury Date:

INDICT

DOCKET NO. 2014GS1007147

The State of South Carolina

County of Charleston

COURT OF GENERAL SESSIONS

December Term 2014

THE STATE

vs.

ANTONIO ORLANDO SIMMONS

DOB: [REDACTED]

B/M

Indictment for

Armed Robbery

FILED

12/11/2014 8:52:00 AM

JULIE J. ARMSTRONG

CLERK OF COURT

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

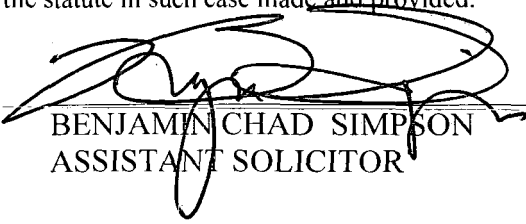
INDICTMENT

At a Court of General Sessions, convened on December 1, 2014 the Grand Jurors of Charleston County present upon their oath:

Armed Robbery

That on or about March 23, 2014, in Charleston County, South Carolina, the Defendant, Antonio Orlando Simmons, by use of force, threats or intimidation and while armed with a deadly weapon, or while alleging, either by action or words, he was armed while using a representation of a deadly weapon or any object which a person present during the commission of the robbery reasonably believed to be a deadly weapon, did take and carry away goods and/or monies from the person or immediate presence of Samiran Behesht with the intent to permanently deprive the victim of possession thereof, in violation of §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.



BENJAMIN CHAD SIMPSON
ASSISTANT SOLICITOR

COUNTY OF CHARLESTON

STATE VS.

ANTONIO ORLANDO SIMMONS

AKA:

Race: Black/African American

Sex: M

DOB: [REDACTED]

SS#: [REDACTED]

Address: [REDACTED] Bohicket Rd

City, State, Zip: Johns Island, SC 29455-3306

DL# [REDACTED]

SID# SC01329192

*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐

In disposition of the said indictment comes now the Defendant who was

TO: Armed RobberyIn violation of § 16-11-0330(A) of the S.C. Code of Laws, bearing CDR Code # 0139☐ NON-VIOLENT☒ VIOLENT☐ SERIOUS☒ MOST SERIOUS☐ Mandatory GPS☐ §17-25-45(CSC w/minor 1st or Lewd Act)The charge is: ☒ As indicted,☐ Lesser Included Offense,☐ Defendant Waives Presentment to Grand Jury.

(def.'s initials)

The plea is: ☐ Without Negotiations or Recommendation,☒ Negotiated Sentence,☐ Recommendation by the State.

ATTEST:

David L. Osborne, Assistant Solicitor

101325
SC Bar #Antonio Simmons
Defendant

Attorney for Defendant

101106
SC Bar #

WHEREFORE, the Defendant is committed to the ☐ State Department of Corrections ☐ County Detention Center, for a determinate term of 30 days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years and/or to pay a fine of \$ _____; provided that upon the service of 18 days/months/years and or payment of \$ _____ plus costs and assessments as applicable*; the balance is suspended with probation for _____ months/years and subject to South Carolina Department of Probation, Parole and Pardon Service standard conditions of probation, which are incorporated by reference.

☒ CONCURRENT or ☐ CONSECUTIVE to sentence on: _____☒ The Defendant is to be given credit for time served pursuant to S.C. Code §24-13-40 to be calculated and applied by the State Department of Corrections. April 11, 2014☐ The Defendant is to be placed on Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

Pursuant to 18 U.S.C. Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing

Total: \$ _____ plus 20% fee: \$ _____

Payment Terms: _____

☐ Set by SCDPPPS _____

Recipient: _____

*Fine: _____ \$ _____

§14-1-206 (Assessments 107.5%) \$ _____

§14-1-211 (A)(1)(Conv. Surcharge) \$100 \$ 100.00

§14-1-211 (A)(2)(DUI Surcharge) \$100 \$ _____

§56-5-2995 (DUI Assessment) \$12 \$ _____

§56-1-286 (DUI Breath Test) \$25 \$ _____

Proviso 61.6 (Public Def/Prob) \$500 \$ _____

§14-1-212 (Law Enforce. Funding) \$25 \$ 25.00

§14-1-213 (Drug Court Surcharge) \$150 \$ _____

§50-21-114 (BUI Breath Test Fee) \$50 \$ _____

§56-5-2942(J) (Vehicle Assessment) \$40/ea \$ _____

3% to County (if paid in installments) \$ \$ 3.75TOTAL \$ 128.75Clerk of Court/Deputy Clerk: CallahanCourt Reporter: Amadea Haffner

INDICTMENT/CASE#: 2014GS1007111

A/W: 2014A1010900193

Date of Offense: 03/13/2014

S.C. Code §: 16-11-0330(A)

CDR Code #: 0139

SENTENCE SHEET

☐ CONVICTED OF or☒ PLEADS☐ Mandatory GPS☐ §17-25-45(CSC w/minor 1st or Lewd Act)☐ Defendant Waives Presentment to Grand Jury.

(def.'s initials)

☒ Negotiated Sentence,☐ Recommendation by the State.

Attorney for Defendant

101106
SC Bar #☐ Ordered PTUP _____

_____ days/hours Public Service Employment

Obtain GED ☐

Attend Voc. Rehab. Or Job Corp. _____

May serve W/F beginning _____

Substance Abuse Counseling ☐Random Drug/Alcohol Testing ☐

Fine may be pd. in equal consecutive weekly/monthly

pmts. of \$ _____ Beginning _____

\$ _____ Paid to Public Defender Fund

Other: during C/S he must take all meds as required and comply with any treatment or counseling deemed necessary☒ Appointed PD or appointed other counsel,

§47.12 requires \$500 be paid to Clerk

during probation.

Presiding Judge: R. MaibeyJudge Code: 2060Sentence Date: 3/20/18

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

STATE VS.

ANTONIO ORLANDO SIMMONS

AKA:

Race: Black/African AmericanSex: MDOB: [REDACTED]SS#: [REDACTED]Address: Bohicket RdCity, State, Zip: Johns Island, SC 29455-3306DL# [REDACTED]SID# SC01329192*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐

In disposition of the said indictment comes now the Defendant who was

☐ CONVICTED OF or☒ PLEADSTO: Armed RobberyIn violation of § 16-11-0330(A) of the S.C. Code of Laws, bearing CDR Code # 0139☐ NON-VIOLENT☒ VIOLENT☐ SERIOUS☒ MOST SERIOUS☐ Mandatory GPS☐ §17-25-45(CSC w/minor 1st or Lewd Act)The charge is: ☒ As indicted,☐ Lesser Included Offense,☐ Defendant Waives Presentment to Grand Jury.

(def.'s initials)

The plea is: ☐ Without Negotiations or Recommendation,☒ Negotiated Sentence,☐ Recommendation by the State.

ATTEST:

David L. Osborne, Assistant Solicitor 101325 SC Bar #

Antonio Simmons Defendant

Attorney for Defendant 101106 SC Bar #

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections ☐ County Detention Center, for a determinate term of 18 days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years and/or to pay a fine of \$ _____; provided that upon the service of _____ days/months/years and or payment of \$ _____; plus costs and assessments as applicable*; the balance is suspended with probation for _____ months/years and subject to South Carolina Department of Probation, Parole and Pardon Service standard conditions of probation, which are incorporated by reference.

☒ CONCURRENT or ☐ CONSECUTIVE to sentence on: _____☒ The Defendant is to be given credit for time served pursuant to S.C. Code §24-13-40 to be calculated and applied by the State Department of Corrections. April 11, 2014☐ The Defendant is to be placed on Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

Pursuant to 18 U.S.C. Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐ RESTITUTION:☐ Deferred☐ Def. Waives Hearing☐ Ordered

PTUP

Total: \$ _____ plus 20% fee: \$ _____

_____ days/hours Public Service Employment

Payment Terms: _____

Obtain GED ☐☐ Set by SCDPPPS _____

Attend Voc. Rehab. Or Job Corp. _____

Recipient: _____

May serve W/E beginning _____

*Fine: _____

Substance Abuse Counseling ☐

§14-1-206 (Assessments 107.5%)

\$ _____

Random Drug/Alcohol Testing ☐

§14-1-211 (A)(1)(Conv. Surcharge)

\$100

\$ 100.00

Fine may be pd. in equal consecutive weekly/monthly

§14-1-211 (A)(2)(DUI Surcharge)

\$100

\$ _____

pmts. of \$ _____ Beginning _____

§56-5-2995 (DUI Assessment)

\$12

\$ _____

\$ _____ Paid to Public Defender Fund

§56-1-286 (DUI Breath Test)

\$25

\$ _____

Other: _____

Proviso 61.6 (Public Def/Prob)

\$500

\$ _____

§14-1-212 (Law Enforce. Funding)

\$25

\$ 25.00

§14-1-213 (Drug Court Surcharge)

\$150

\$ _____

§50-21-114 (BUI Breath Test Fee)

\$50

\$ _____

§56-5-2942(J) (Vehicle Assessment)

\$40/ea

\$ _____

3% to County (if paid in installments)

\$

\$ 375

TOTAL

\$ 128.75

☒ Appointed PD or appointed other counsel, \$47.12 requires \$500 be paid to Clerk during probation.

Clerk of Court/Deputy Clerk: CalleyCourt Reporter: Amade HaffnerPresiding Judge: P. M. [Signature]Judge Code: 2062Sentence Date: 3/20/18

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

STATE VS.

ANTONIO ORLANDO SIMMONS

AKA:

Race: Black/African American

Sex: M

DOB: [REDACTED]

SS#: [REDACTED]

Address: Bohicket Rd

City, State, Zip: Johns Island, SC 29455-3306

DL# [REDACTED]

SID# SC01329192

*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐

In disposition of the said indictment comes now the Defendant who was

☐ CONVICTED OF or☒ PLEADS

TO: Armed Robbery

In violation of § 16-11-0330(A) of the S.C. Code of Laws, bearing CDR Code # 0139

☐ NON-VIOLENT☒ VIOLENT☐ SERIOUS☒ MOST SERIOUS☐ Mandatory GPS☐ §17-25-45(CSC w/minor 1st or Lewd Act)

The charge is:

☒ As indicted,☐ Lesser Included Offense,☐ Defendant Waives Presentment to Grand Jury.

(def.'s initials)

The plea is:

☐ Without Negotiations or Recommendation,☒ Negotiated Sentence,☐ Recommendation by the State.

ATTEST:

David L. Osborne, Assistant Solicitor

101325
SC Bar #Antonio Simmons
Defendant[Signature]
Attorney for Defendant101106
SC Bar #

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections ☐ County Detention Center, for a determinate term of 18 days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years and/or to pay a fine of \$ _____; provided that upon the service of _____ days/months/years and or payment of \$ _____; plus costs and assessments as applicable*; the balance is suspended with probation for _____ months/years and subject to South Carolina Department of Probation, Parole and Pardon Service standard conditions of probation, which are incorporated by reference.

☒ CONCURRENT or ☐ CONSECUTIVE to sentence on: _____☒ The Defendant is to be given credit for time served pursuant to S.C. Code §24-13-40 to be calculated and applied by the State Department of Corrections.☐ The Defendant is to be placed on Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

Pursuant to 18 U.S.C. Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐ RESTITUTION:☐ Deferred☐ Def. Waives Hearing☐ Ordered

PTUP

Total: \$ _____ plus 20% fee: \$ _____

_____ days/hours Public Service Employment

Payment Terms: _____

Obtain GED ☐☐ Set by SCDPPPS _____

Attend Voc. Rehab. Or Job Corp. _____

May serve W/E beginning _____

Substance Abuse Counseling ☐Random Drug/Alcohol Testing ☐

Fine may be pd. in equal consecutive weekly/monthly

pmts. of \$ _____ Beginning _____

\$ _____ Paid to Public Defender Fund

Other: _____

Recipient: _____

*Fine: _____

\$ _____

§14-1-206 (Assessments 107.5%)

\$ _____

§14-1-211 (A)(1)(Conv. Surcharge)

\$100

\$ 100.00

§14-1-211 (A)(2)(DUI Surcharge)

\$100

\$ _____

§56-5-2995 (DUI Assessment)

\$12

\$ _____

§56-1-286 (DUI Breath Test)

\$25

\$ _____

Proviso 61.6 (Public Def/Prob)

\$500

\$ _____

§14-1-212 (Law Enforce. Funding)

\$25

\$ 25.00

§14-1-213 (Drug Court Surcharge)

\$150

\$ _____

§50-21-114 (BUI Breath Test Fee)

\$50

\$ _____

§56-5-2942(J) (Vehicle Assessment)

\$40/ea

\$ _____

3% to County (if paid in installments)

\$

\$ 3.75

TOTAL

\$ 128.75

Clerk of Court/Deputy Clerk: [Signature]

Court Reporter: A. Ruffin

Presiding Judge: [Signature]

Judge Code: 2060

Sentence Date: 3/20/18

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

STATE VS.

ANTONIO ORLANDO SIMMONS

AKA:

Race: Black/African AmericanSex: MDOB: [REDACTED]SS#: [REDACTED]Address: Bohicket RdCity, State, Zip: Johns Island, SC 29455-3306DL# [REDACTED]SID# SC01329192*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐

In disposition of the said indictment comes now the Defendant who was

☐ CONVICTED OF or☒ PLEADSTO: Armed RobberyIn violation of § 16-11-0330(A) of the S.C. Code of Laws, bearing CDR Code # 0139☐ NON-VIOLENT☒ VIOLENT☐ SERIOUS☒ MOST SERIOUS☐ Mandatory GPS☐ §17-25-45(CSC w/minor 1st or Lewd Act)The charge is: ☒ As indicted, ☐ Lesser Included Offense,☐ Defendant Waives Presentment to Grand Jury, (def.'s initials)The plea is: ☐ Without Negotiations or Recommendation,☒ Negotiated Sentence,☐ Recommendation by the State.

ATTEST:

David L. Osborne, Assistant Solicitor 101325
SC Bar #Antonio Simmons
Defendant[Signature] 101106
Attorney for Defendant SC Bar #

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections ☐ County Detention Center, for a determinate term of 18 days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years and/or to pay a fine of \$ _____; provided that upon the service of _____ days/months/years and or payment of \$ _____; plus costs and assessments as applicable*; the balance is suspended with probation for _____ months/years and subject to South Carolina Department of Probation, Parole and Pardon Service standard conditions of probation, which are incorporated by reference.

☒ CONCURRENT or ☐ CONSECUTIVE to sentence on: _____☒ The Defendant is to be given credit for time served pursuant to S.C. Code §24-13-40 to be calculated and applied by the State Department of Corrections. April 11, 2014☐ The Defendant is to be placed on Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

Pursuant to 18 U.S.C. Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing☐ Ordered

PTUP

Total: \$ _____ plus 20% fee: \$ _____

_____ days/hours Public Service Employment

Payment Terms: _____

Obtain GED ☐☐ Set by SCDPPPS _____

Attend Voc. Rehab. Or Job Corp. _____

Recipient: _____

May serve W/E beginning _____

*Fine: _____ \$ _____

Substance Abuse Counseling ☐

§14-1-206 (Assessments 107.5%) \$ _____

Random Drug/Alcohol Testing ☐§14-1-211 (A)(1)(Conv. Surcharge) \$100 \$ 100.00

Fine may be pd. in equal consecutive weekly/monthly

§14-1-211 (A)(2)(DUI Surcharge) \$100 \$ _____

pmts. of \$ _____ Beginning _____

§56-5-2995 (DUI Assessment) \$12 \$ _____

\$ _____ Paid to Public Defender Fund

§56-1-286 (DUI Breath Test) \$25 \$ _____

Other: _____

Proviso 61.6 (Public Def/Prob) \$500 \$ _____

§14-1-212 (Law Enforce. Funding) \$25 \$ 25.00

§14-1-213 (Drug Court Surcharge) \$150 \$ _____

§50-21-114 (BUI Breath Test Fee) \$50 \$ _____

§56-5-2942(J) (Vehicle Assessment) \$40/ea \$ _____

3% to County (if paid in installments) \$ \$ 3.75TOTAL \$ 128.75

☒ Appointed PD or appointed other counsel, \$47.12 requires \$500 be paid to Clerk during probation.

Clerk of Court/Deputy Clerk: [Signature]
Court Reporter: A. Haffendy

Presiding Judge: [Signature]
Judge Code: 2060
Sentence Date: 3/20/18

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

STATE VS.

ANTONIO ORLANDO SIMMONS

AKA:

Race: Black/African American

Sex: M

DOB: [REDACTED]

SS#: [REDACTED]

Address: Bohicket Rd

City, State, Zip: Johns Island, SC 29455-3306

DL# [REDACTED]

SID# SC01329192

*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐

In disposition of the said indictment comes now the Defendant who was

☐ CONVICTED OF or☒ PLEADSTO: Armed RobberyIn violation of § 16-11-0330(A) of the S.C. Code of Laws, bearing CDR Code # 0139☐ NON-VIOLENT☒ VIOLENT☐ SERIOUS☒ MOST SERIOUS☐ Mandatory GPS☐ §17-25-45(CSC w/minor 1st or Lewd Act)

The charge is:

☒ As indicted,☐ Lesser Included Offense,☐ Defendant Waives Presentment to Grand Jury.

(def.'s initials)

The plea is:

☐ Without Negotiations or Recommendation,☒ Negotiated Sentence,☐ Recommendation by the State.

ATTEST:

David L. Osborne, Assistant Solicitor

101325
SC Bar #Antonio Simmons
Defendant

Attorney for Defendant

101106
SC Bar #

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections ☐ County Detention Center, for a determinate term of 18 days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years and/or to pay a fine of \$ _____; provided that upon the service of _____ days/months/years and or payment of \$ _____, plus costs and assessments as applicable*; the balance is suspended with probation for _____ months/years and subject to South Carolina Department of Probation, Parole and Pardon Service standard conditions of probation, which are incorporated by reference.

☒ CONCURRENT or ☐ CONSECUTIVE to sentence on: _____☒ The Defendant is to be given credit for time served pursuant to S.C. Code §24-13-40 to be calculated and applied by the State Department of Corrections.☐ The Defendant is to be placed on Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

Pursuant to 18 U.S.C. Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐ RESTITUTION:☐ Deferred☐ Def. Waives Hearing☐ Ordered

PTUP

Total: \$ _____ plus 20% fee: \$ _____

_____ days/hours Public Service Employment

Payment Terms: _____

Obtain GED ☐☐ Set by SCDPPPS

Attend Voc. Rehab. Or Job Corp. _____

May serve W/E beginning _____

Substance Abuse Counseling ☐Random Drug/Alcohol Testing ☐

Fine may be pd. in equal consecutive weekly/monthly

pmts. of \$ _____ Beginning _____

\$ _____ Paid to Public Defender Fund

Other: _____

Recipient: _____

*Fine:

\$

§14-1-206 (Assessments 107.5%)

\$

§14-1-211 (A)(1)(Conv. Surcharge)

\$100

\$

§14-1-211 (A)(2)(DUI Surcharge)

\$100

\$

§56-5-2995 (DUI Assessment)

\$12

\$

§56-1-286 (DUI Breath Test)

\$25

\$

Proviso 61.6 (Public Def/Prob)

\$500

\$

§14-1-212 (Law Enforce. Funding)

\$25

\$

§14-1-213 (Drug Court Surcharge)

\$150

\$

§50-21-114 (BUI Breath Test Fee)

\$50

\$

§56-5-2942(J) (Vehicle Assessment)

\$40/ea

\$

3% to County (if paid in installments)

\$

\$

TOTAL

\$

☒ Appointed PD or appointed other counsel,
\$47.12 requires \$500 be paid to Clerk
during probation.

Presiding Judge:

Judge Code:

Sentence Date:

Clerk of Court/Deputy Clerk:

Court Reporter:

FORM 5

STATE OF SOUTH CAROLINA)

County of CHARLESTON)

2018-CP-10-4505

IN THE COURT OF COMMON PLEAS

ANTONIO O. SIMMONS, 279418)

Full name and prison number (if any) of Applicant)

v.)

State of South Carolina)

APPLICATION FOR

POST-CONVICTION RELIEF

INSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention BROAD RIVER CORRECTION Institution
4460 BROAD RIVER ROAD, COLA., S.C. 29210
2. Name and location of Court which imposed sentence Charleston County
Court of GENERAL SESSIONS 100 BROAD ST., #106 CHARLESTON, S.C. 29401-2258
3. Name(s) of co-defendant(s) (if any) _____
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
(a) 2014-GS-100-7111 - Armed Robbery

- (b) 2014-GS-100-7123 - Armed Robbery / 2014-GS-100-7145 - Armed Robbery
- (c) 2014-GS-100-7142 - Armed Robbery / 2014-GS-100-7147 - Armed Robbery
5. The date upon which sentence was imposed and the terms of the sentence:
- (a) MARCH 20, 2018
- (b) " " "
- (c) " " "
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty _____
- (b) after a plea of not guilty _____
- (c) after a plea of nolo contendere _____
7. Did you appeal from the judgment of conviction or the imposition of sentence?

8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
- i. _____
- ii. _____
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. _____
- ii. _____
- iii. _____
- (c) the date of each such result:
- i. _____
- ii. _____
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. _____
- ii. _____
- iii. _____
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) _____

- (b) _____
- (c) _____
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:
- (a) VIOLATION OF DUE PROCESS OF LAW
- (b) PROSECUTOR MISCONDUCT / INEFFECTIVE ASSISTANCE OF COUNSEL
- (c) VIOLATION OF EQUAL PROTECTION OF LAW
11. State concisely and in the same order the facts which support each of the grounds set out in (10):
- (a) DETECTIVE GIVE FALSE TESTIMONY, NO SEARCH WARRANT TO ADDRESS
- (b) ALLOWING THE DETECTIVE TO GIVE FALSE TESTIMONY, TAMPERING WITH
- (c) EVIDENCE, ATTORNEY DID NOT PROTECT HIS CLIENT RIGHTS TO UNLAWFUL CONVICTION
12. Prior to this application have you filed with respect to this conviction:
- (a) any petition in a State Court under South Carolina Law? N/A
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? N/A
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? N/A
- (d) any other petitions, motions or applications in this or any other Court? N/A
13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:
- (a) the specific nature thereof:
- i. _____
- ii. _____
- iii. _____
- iv. _____
- (b) the name and location of the Court in which each was filed:
- i. _____
- ii. _____
- iii. _____

iv. _____

(c) the disposition thereof:

i. _____

ii. _____

iii. _____

iv. _____

(d) the date of each such disposition:

i. _____

ii. _____

iii. _____

iv. _____

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

i. _____

ii. _____

iii. _____

iv. _____

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

No

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

(a) which grounds have been presented:

i. _____

ii. _____

iii. _____

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

i. _____

ii. _____

iii. _____

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) SEE AMENDMENT
- (b) LEAVE OPEN to AMEND
- (c) _____
17. Were you represented by an attorney at any time during the course of:
- (a) your arraignment and plea? YES
- (b) your trial, if any? _____
- (c) your sentencing? YES
- (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? _____
- (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? _____
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. Christina PARNALL, public defender
- John M. Apicella, public defender
- ii. _____
- iii. _____
- (b) the proceedings at which each such attorney represented you:
- i. Preliminary Hearing
- Guilty plea
- ii. _____
- iii. _____

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

NEW TRIAL / VACATE PLEA

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

NO

Revised 3/2003

STATE OF SOUTH CAROLINA)

County of Richland)

VERIFICATION

I, ~~Antonio Simmons~~ Antonio Simmons, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

Antonio Simmons

SWORN to and subscribed before me this 27th
day of August, 2018.

Kemal Mitchell (L.S.)
Notary Public

My Commission Expires: May 23, 2028

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

I, Antonio Simmons, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

- (1) I am the applicant in this action and I believe I am entitled to redress.
- (2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.

Antonio Simmons
Applicant

SWORN or affirmed to and subscribed before me this
27th day of August, 2018.

Kenold Mitchell
Notary Public

My Commission Expires: May 23, 2028

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON	)	NINTH JUDICIAL CIRCUIT
	)	
Antonio Simmons #279418,	)	Case No.: 2018-CP-10-4505
	)	
Applicant,	)	
	)	RETURN AND MOTION FOR A
	)	MORE DEFINITE STATEMENT
v.	)	
	)	
State of South Carolina,	)	
	)	
Respondent.	)	
_____	)	

The State (Respondent), making its Return to the application for Post-Conviction Relief (PCR) filed on September 18, 2018, would respectfully show this Court:

I. Procedural History

Antonio Simmons (Applicant) is presently confined pursuant to orders of the Charleston County Clerk of Court. In December 2014, the Charleston County Grand Jury indicted Applicant for five counts of Armed Robbery (2014-GS-10-07111/2014-GS-10-07123/2014-GS-1007142/2014-GS-10-07145/2014-GS-10-07147).

Michael Apicella, Esquire represented Applicant. Assistant Solicitor David Osborne, Esquire prosecuted the case. On March 20, 2018, Applicant pleaded guilty as indicted to all charges before the Honorable R. Markley Dennis. Judge Dennis sentenced Applicant to a negotiated 28 years suspended on the service of 18 years on indictment 2014-GS-10-01711 and the other indictments were dismissed as part of the plea. Applicant did not appeal his conviction or sentence.

II. Current Application

In his application for post-conviction relief, Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. Due Process Violations
2. Prosecutorial Misconduct
3. Ineffective Assistance of Counsel
4. Violation of Equal Protection Law

In relief sought, Applicant is seeking: “New trial/Vacate plea.”

Attached to this Return and incorporated by reference are the records of the Charleston County Clerk of Court regarding the subject convictions, the plea transcript, and the application. Respondent reserves the right to amend this Return upon receipt of any relevant materials. Applicant alleges he received ineffective assistance of counsel. Nevertheless, Respondent contends Applicant's counsel rendered adequate assistance and provided representation within the range of competence required by attorneys in criminal cases. See Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

I. Due Process Violations

Applicant alleges a denial of due process of law. Applicant's allegation claims infringement of his rights as afforded to him under the United States Constitution. However, Applicant fails to set forth with specificity the grounds upon which these constitutional violations are based. The Uniform Post-Conviction Procedure Act requires that Applicant must “...specifically set forth the grounds upon which the application is based.” S.C. Code § 17-27-50 (2003). In an application for post-conviction relief, it is incumbent upon Applicant to make a prima facie showing which would entitle him to relief before an evidentiary hearing will be scheduled and held. Welch v. MacDougall, 246 S.C. 258, 143 S.E.2d 455 (1965); Blandshaw v. State, 245 S.C. 385, 140 S.E.2d 784 (1965). Because Applicant has failed to make a prima facie showing that his constitutional right to due process was violated, Respondent submits this allegation should be summarily dismissed for failing to specifically set forth the grounds upon which the application is based and relief is sought.

II. Prosecutorial Misconduct

Applicant also alleges prosecutorial misconduct. Prosecutorial misconduct is not an issue for post-conviction relief. Rather, this allegation is a direct appeal issue that is procedurally barred by S.C. Code Ann. § 17-27-20(b) (2003). Post-conviction relief is not a substitute for an appeal. Simmons v. State, 264 S.C. 417, 423, 215 S.E.2d 883, 885 (1974). A post-conviction relief application cannot assert any issues that could have been raised at trial or on appeal. Drayton v. Evatt, 312 S.C. 4, 8, 430 S.E.2d 517, 520 (1993). Applicant could have raised this issue on appeal. The failure to do so has waived this allegation as grounds for relief. Regardless, it is applicant's burden to prove actual prosecutorial misconduct. Alabama v. Smith, 490 U.S. 794, 109 S. Ct. 2201 (1989). Respondent submits, notwithstanding the procedural bar, Applicant cannot meet this burden. For these reasons, Respondent submits that this allegation should be summarily dismissed.

III. Ineffective Assistance of Counsel

In a post-conviction relief proceeding, the applicant bears the burden of proving the allegations in his or her application. See Butler, 286 S.C. at 442, 334 S.E.2d at 814. Where ineffective assistance of counsel is alleged 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, 686 (1984); Butler, 286 S.C. at 442, 334 S.E.2d at 814.

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. See Strickland, 466 U.S. at 669. Applicant must overcome this presumption in order to receive relief. See Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989).

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. First, Applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, (citing Strickland, 466 U.S. at 688). Second, counsel's deficient performance must have prejudiced Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. With respect to plea counsel, Applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pleaded guilty and would have insisted on going to trial. See Hill v. Lockhart, 474 U.S. 52, 52 (1985).

Respondent submits Applicant cannot satisfy either requirement of the Strickland test. However, where an application for post-conviction relief alleges specific instances of ineffective assistance of counsel which are not conclusively refuted by the record, a question of fact is raised which can only be resolved by an evidentiary hearing. See Sharper v. State, 279 S.C. 264, 265, 305 S.E.2d 247, 248 (1983). Because Applicant's claims of ineffective assistance of counsel are not conclusively refuted by the record, then Respondent would request an evidentiary hearing to fully resolve this issue.

IV. Any Future Amendments

Applicant must specify any claims he intends to raise at the PCR evidentiary hearing. Any claims not specifically laid out in this PCR application or in amendments will be opposed by the State at an evidentiary hearing pursuant to §§ 17-27-10 to -160 of the South Carolina Code of

Laws and Rule 71.1 of the South Carolina Rules of Civil Procedure. See also Rules 15(a)-(b), SCRPC. All claims should be made well in advance of the evidentiary hearing. Because Applicant has been appointed an attorney, the attorney, and not Applicant, is the only individual authorized to file amendments to this application. See Rule 11, SCRPC. Pro se filings will not be considered at the PCR hearing. Respondent reserves the right to request that any amendments withheld until the last minute be stricken because of undue prejudice to Respondent. See Rule 15(a), SCRPC.

V. Motion for More Definite Statement

Respondent also hereby moves for a more definite statement. Applicant has failed to set forth any facts to "support each ground" or to explain with any specificity whatsoever the facts upon which his claims are based. The Uniform Post-Conviction Procedure Act requires the Applicant to "*specifically set forth the grounds upon which the application is based.*" S.C. Code Ann. § 17-27-50 (1985) (emphasis added). Respondent respectfully submits that it is incumbent upon Applicant, through counsel, to amend his application to set forth specific facts upon which his allegations are based so that Respondent may adequately prepare for an evidentiary hearing. Therefore, Respondent requests that Applicant be required to amend his application to set forth specifically the grounds on which his claims are based.

VI. Response to Any and All Other Allegations

Each and every allegation contained within the application not expressly admitted, qualified, or explained in this Return is hereby denied.

VII. Request for an Evidentiary Hearing

WHEREFORE, Respondent requests that an evidentiary hearing be held on the claims of ineffective assistance of plea counsel that are not refuted by the plea transcript.

Respectfully submitted,

ALAN WILSON
Attorney General

W. JEFFREY YOUNG
Chief Deputy Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General

BENJAMIN HUNTER LIMBAUGH
Assistant Attorney General

By: Benjamin Limbaugh
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
Telephone: (803) 734-3737

January 10, 2019

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

Antonio Simmons, #279418

Applicant,

v.

State of South Carolina

Respondent,

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT

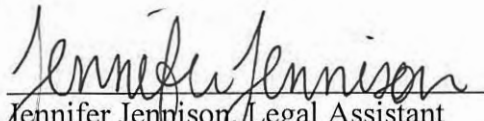
Case No.: 2018-CP-10-4505

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 and Motion for a More Definite Statement** in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Christopher L. Murphy, Esquire
Murphy Law Offices, LLC
234 Seven Farms Drive, Suite 128
Charleston, SC 29492

DATED this 10th day of January, 2019.


Jennifer Jennison, Legal Assistant
For Respondent

STATE OF SOUTH CAROLINA	)	THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	DOCKET NO. 2018-CP-10-4505
	)	
	)	
ANTONIO SIMMONS	)	
	)	
Applicant	)	
	)	
vs.	)	
	)	
STATE OF SOUTH CAROLINA	)	
	)	
Respondent	)	
	)	
	)	
	)	
	)	TRANSCRIPT OF RECORD

July 23, 2019
Charleston, South Carolina

B E F O R E:

THE HONORABLE MICHAEL G. NETTLES, JUDGE

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

CHRISTOPHER L. MURPHY, ESQ.
Attorney for the Applicant

JACOB A. ISENBERG, ESQ.
Attorney for the Respondent

JOYCE C. RUEGER,
Certified Verbatim Reporter-Master
Circuit Court Reporter

[Certified Transcript Provided for: SCCID, Appellate Defense]

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PROCEEDINGS

THE COURT: Your Honor, the State would call the case of Antonio Simmons verses the State of South Carolina and request to approach the bench with the packet ---

THE COURT: --- yes.

[Whereupon, Mr. Isenberg proffers documents to the Court]

[Whereupon, Mr. Simmons enters the courtroom]

THE COURT: Mr. Isenberg, you're recognized.

MR. ISENBERG: Your Honor, this is the State of South Carolina verses Antonio Simmons, case number 2018-CP-10-4505. Antonio Simmons, the Applicant, is presently confined pursuant to the orders of the Charleston County Clerk of Court.

In December of 2014 the Charleston County Grand Jury indicted him for five counts of armed robbery. Michael [sic] Apicella represented him and the Assistant Solicitor, David Osborne prosecuted the case.

On March 20th, 2018 he pled guilty as indicted to all charges before the Honorable Markley Dennis. Judge Dennis sentenced him to a negotiated sentence of 28 years suspended on the service of 18 on indictment 2014-GS-10-01711 for armed robbery. And the other indictments were dismissed as part of the plea. He did not appeal his

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July 23, 2019

1 conviction or his sentence. In his current application
2 he alleges due process violations, prosecutorial
3 misconduct, ineffective assistance of counsel in
4 violation of equal protection under the law.

5 He requests that there be a new trial and to vacate
6 his current plea agreement. And with that, Your Honor,
7 we will let the PCR counsel make their opening statement.

8 THE COURT: Mr. Murphy, you're recognized.

9 MR. MURPHY: Thank you, Your Honor. May it please
10 the Court? I think ---

11 THE COURT: --- the first thing before we get
12 started I want you to set forth for the record each
13 ground that you plan on pursuing here today.

14 MR. MURPHY: Yes, Your Honor. Factually if I just
15 may? He was charged -- he was originally indicted it's
16 my understanding of ten counts of armed robbery and ten
17 counts of possession of a weapon during a violent crime.
18 He ultimately pled to warrant number 2014-1711 and the
19 rest of those charges, the nine remaining charges were
20 dismissed is what I believe happened according to the
21 record.

22 He is here now claiming to have an involuntary
23 guilty plea as a result of his representation. So that
24 is what we are going to focus on is the involuntariness
25 of the guilty plea and that will be the sole issue that

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1 we will address today.

2 THE COURT: Okay.

3 MR. MURPHY: And I also would like to add Your
4 Honor he received a sentence of 30 years suspended on 18;
5 the service of 18 years. That according to the statute I
6 believe is an illegal sentence and he would be entitled
7 to resentencing under the law.

8 However, I have advised Mr. Simmons I think it's in
9 his best interest to withdraw his current application,
10 waive any rights to appeal or attack that illegal
11 sentence and continue to serve his time.

12 The worst thing that could happen to him is he gets
13 sent back and has to face the remaining nine charges and
14 facing LWOP sentence. So, I have advised him to withdraw
15 his application. I really think he should but he does
16 not want to.

17 THE COURT: All right. Mr. Simmons, I'm going to
18 ask you to stand where you are, raise your right hand as
19 the clerk administers the oath.

20 [Whereupon, Mr. Simmons stands]

21 [Whereupon, the witness is duly sworn by the Clerk
22 of Court]

23 THE COURT: Yes, sir. Your full name?

24 MR. SIMMONS: Antonio Simmons.

25 THE COURT: All right. You have heard the

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1 presentation of your lawyer and he has given you the
2 advice that it would -- he thinks it's in your best
3 interest not to pursue this post-conviction relief
4 matter.

5 One of the things that you need to understand is I
6 understand that there are ten outstanding counts of armed
7 robbery at least. I think earlier I think they mentioned
8 there might be some more.

9 MR. ISENBERG: Yes, Your Honor. There were ten
10 counts of armed robbery I believe and ten counts of
11 possession of a weapon during a violent crime originally
12 charged to this Applicant, which I do believe would be
13 back on the table if this PCR was grated.

14 THE COURT: Okay, very good. So, it was ten
15 substantive offenses with a weapons charge on each?

16 MR. ISENBERG: Yes, Your Honor.

17 THE COURT: All right. Mr. Simmons, you understand
18 that if you were successful in pursuing this civil action
19 and if I were to order that your plea is vacated for
20 whatever legal reason then you will be back and you'll
21 have to face all ten of these sentences.

22 And they can try you one right after the other; one
23 right after the other. And it could be that they once
24 you're convicted of that one you could get a 30 year
25 sentence just on the first one.

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1 MR. SIMMONS: Right.

2 THE COURT: If they pick their strongest case and
3 you're convicted you could get 30 years, which is more
4 that what you're doing now. And all of these charges are
5 subject to the two and three strike rule which means that
6 you would be subject to life without parole which is a
7 lot worse than what you got. Do you understand all that?

8 MR. SIMMONS: Yes, sir. I understand all that.

9 THE COURT: All right. And you want to proceed
10 forward here today?

11 MR. SIMMONS: Yes, sir.

12 THE COURT: All right. Nobody has put any pressure
13 on you to pursue this relief?

14 MR. SIMMONS: No. I just want to bring everything
15 back.

16 THE COURT: All right. And you understand the
17 logic of what your lawyer has told you that you might end
18 up a whole lot worse; do you understand that?

19 MR. SIMMONS: Yes, sir. I understand all that.

20 THE COURT: All right. And that's what you want to
21 do?

22 MR. SIMMONS: Yes sir, as soon as possible.

23 THE COURT: All right. What is the Attorney
24 General's position about the illegal sentence? Do you
25 think that the suspended aspect of it can be cancelled or

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1 do you think he could be subjected if I were to rule, and
2 I think the parties consent that that was an illegal
3 sentence, do you think the ramifications of that would be
4 that the suspended aspect of it would be removed in that
5 the statute specifically says that armed robbery
6 sentences cannot be suspended, do you think that he could
7 be resentenced and receive a 30 year sentence?

8 Or do you think that the suspended part would have
9 to be removed? Can he get a worse sentence having
10 pursued the post-conviction relief on an illegal sentence
11 is my question.

12 MR. ISENBERG: Yes, Your Honor. Thank you. It's
13 the Attorney General's position that if the Applicant
14 were successful on an illegal sentence claim he would be
15 subject to resentencing. And that's the extent of it.
16 He would be resentenced at the discretion at whatever the
17 sentencing judge felt like he should be -- felt he should
18 be sentenced for on that particular day. It would be at
19 the full discretion of the plea judge.

20 THE COURT: All right.

21 MR. ISENBERG: So at that point the State and the
22 defense would present everything in front of the judge
23 again and a judge would have discretionary decision on
24 what kind of sentence he would like to give ---

25 THE COURT: --- for that one -- for that one

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1 offense to which he agreed to plead to?

2 MR. ISENBERG: Yes, Your Honor. Whatever the plea
3 agreement was and I believe to the best of my knowledge
4 it was ---

5 THE COURT: --- well, the plea agreement was the
6 agreement. The negotiated sentence was for a suspended
7 sentence ---

8 MR. MURPHY: --- right. And that's what I would
9 say, Judge. This is -- in State court it's a little bit
10 different than the federal system. The negotiated
11 sentence was a range of 17 to 28 years I believe ---

12 MR. ISENBERG: --- yeah ---

13 MR. MURPHY: --- and that is tied to the guilty
14 plea. And if he is resentencing then I think that would
15 entitle him to face the original charges all over again
16 because he can't make that decision -- he made the
17 decision based on a negotiation that was illegal.

18 MR. ISENBERG: Your Honor, the sentencing aspect of
19 a hearing and the plea aspect of a hearing are
20 bifurcated.

21 THE COURT: I understand that.

22 MR. ISENBERG: So, he would be entitled to the
23 sentencing portion of the hearing as if the plea had
24 already been accepted as voluntary and a substantial
25 factual basis for the plea. That part would not be re-

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1 litigated at the plea hearing. The judge would simply be
2 presented with whatever the plea agreement was and that
3 was on a sentencing range of ---

4 THE COURT: --- the plea agreement was what?

5 MR. ISENBERG: Seventeen to 28 year ---

6 THE COURT: --- but the ---

7 MR. ISENBERG: --- sentencing range ---

8 THE COURT: --- but the negotiation didn't have
9 anything -- any contemplation of a suspended sentence and
10 probation.

11 MR. ISENBERG: Correct, Your Honor. I don't ---

12 THE COURT: --- that was just something that Judge
13 Dennis thought was appropriate.

14 MR. MURPHY: That's the way the transcript reads.

15 THE COURT: Okay.

16 MR. ISENBERG: Correct, Your Honor. As I said it
17 would be as if that was already accepted and the judge
18 would merely sentence him to whatever he had discretion
19 to sentence him for at this sentencing hearing. Does
20 that make sense?

21 THE COURT: Yes. And is that your agreement -- I
22 mean is that your understanding and do you agree with
23 that?

24 MR. MURPHY: No, I don't. I think that he would be
25 entitled to a new sentence but because this was a

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1 negotiation and there is some overlaps with the sentence
2 and the negotiations whether he is going to plead guilty
3 or not or force the State to prove their burden of proof.
4 Basically, he took a good deal.

5 And I think that they are so intertwined at the
6 State court level that if he is going to get that new
7 sentence it would open up, subject him to all the charges
8 all over again.

9 THE COURT: Huh, I don't think so. But we will
10 proceed. Would you like to say something?

11 MR. LIMBAUGH: Your Honor, if I may? Ben Limbaugh
12 for the State. It's my understanding that he could get
13 granted a PCR and then the relief being that he got
14 resentenced it would just be resentenced on the charges
15 he was -- that he pled guilty to originally.
16 Resentencing would not open him up to all those other
17 charges because ---

18 THE COURT: --- I don't think so either.

19 MR. LIMBAUGH: Yes, sir.

20 THE COURT: You think essentially it would be
21 resentencing within the parameters of what the
22 negotiation was.

23 MR. LIMBAUGH: That's my understanding, Your Honor.

24 THE COURT: That's what I think it should be. But
25 the other issue that we are going to deal with is whether

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1 or not the plea itself was involuntary. That's what we
2 are going to have a hearing about today.

3 MR. ISENBERG: Correct, Your Honor. And the State
4 would request that the Applicant please enumerate his
5 allegations. If he just wants to go forward on the
6 involuntary plea then we would ask that he clarify that
7 because there are four allegations in his application ---

8 THE COURT: --- that's one thing that we're
9 absolutely going to have to do is to make a determination
10 of what grounds we're pursuing here today.

11 MR. ISENBERG: Yes, Your Honor, because the
12 involuntary plea is not within his original enumerated
13 allegations.

14 [Whereupon, Mr. Murphy confers with the Applicant]

15 THE COURT: All right Mr. Murphy, which ---

16 MR. MURPHY: --- thank you, Your Honor. We are
17 going to go forward on the ineffective assistance of
18 counsel, which was alleged specifically.

19 THE COURT: All right. Ineffective assistance.

20 MR. MURPHY: Yes. And specifically with regard to
21 that Mr. Simmons believes that his attorney should have
22 procured some transcripts which he didn't that would show
23 the ---

24 THE COURT: --- okay, we'll get into that. I just
25 want to know what grounds we're going to have to address

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1 in the order ---

2 MR. MURPHY: --- right. That would be it ---

3 THE COURT: --- the ineffective assistance of
4 counsel ---

5 MR. MURPHY: --- that's correct, yes.

6 MR. ISENBERG: Your Honor, if I may interject
7 there. Could the State request that the Applicant
8 clarify which counsel he would like to allege that
9 against? He had one attorney who was relieved from his
10 case initially.

11 [Whereupon, Mr. Murphy confers with the Applicant]

12 MR. MURPHY: It's John -- Mr. Apicella, John
13 Apicella.

14 THE COURT: So the ineffective assistance against
15 Mr. John?

16 MR. MURPHY: It's Apicella; I know I'm torturing
17 that name.

18 THE COURT: All right. Are you alleging that
19 because of the ineffective assistance of counsel the plea
20 was involuntary?

21 MR. MURPHY: That's correct, yes.

22 THE COURT: Okay. So ineffective assistance of
23 counsel and involuntariness -- the voluntariness of ---

24 MR. MURPHY: --- and that's all we're going forward
25 on.

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1 MR. ISENBERG: Thank you, Your Honor.

2 THE COURT: All right. Mr. Simmons, I'll remind
3 you that you are still under oath and ask you to stand.

4 [Whereupon, the Applicant complies]

5 THE COURT: You've discussed this matter with your
6 lawyer and those are the two grounds that you want to
7 pursue here today?

8 MR. SIMMONS: Yes, sir.

9 THE COURT: Very good. Do you have any additional
10 grounds that you'd like to pursue?

11 [Whereupon, Mr. Murphy confers with the Applicant]

12 MR. MURPHY: Yes. He just wants to go forward on
13 ineffective assistance.

14 THE COURT: Is that true, Mr. Simmons?

15 MR. SIMMONS: Yes, sir.

16 THE COURT: All right. Anything else that you
17 would like to pursue?

18 MR. SIMMONS: No, not that I know of.

19 THE COURT: Very good. All right. You may call
20 your first witness.

21 MR. MURPHY: Thank you, Your Honor. We would call
22 Mr. Simmons.

23

24

25

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Post-Conviction Relief-Antonio Simmons-Direct Examination by Mr. Murphy
July 23, 2019

1 THE COURT: Mr. Simmons, please come forward.

2 [Whereupon, the Applicant comes forward]

3 THE COURT: I'm going to ask you to place your left
4 hand on the Bible and raise your right hand as the clerk
5 administers the oath.

6 [Whereupon, the witness is duly sworn by the Clerk
7 of Court]

8 THE COURT: Mr. Simmons, I'm going to ask you to
9 have a seat in that witness chair right there. Pull up
10 real close to that microphone. I'm going to ask that you
11 speak loudly, clearly, and slowly in order that we can
12 hear everything that you have to say. And let's start
13 with your full name Mr. Simmons.

14 THE WITNESS: Antonio Orlando Simmons.

15 THE COURT: Very good, Mr. Simmons. Mr. Murphy,
16 you're recognized.

17 MR. MURPHY: Thank you.

18 - - - - -

19 ANTONIO SIMMONS,

20 Having been first duly sworn,

21 Was examined and testified as follows:

22 DIRECT EXAMINATION

23 BY MR. MURPHY:

24 Q. Mr. Simmons, you were represented or you were
25 originally charged with we talked about ten counts of

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Post-Conviction Relief-Antonio Simmons-Direct Examination by Mr. Murphy
July 23, 2019

1 armed robbery and ten counts of possession of a weapon
2 during the commission of a violent crime, correct?

3 A. Yes, sir.

4 Q. And you were represented by Mr. Apicella who is in
5 the courtroom today, correct ---

6 A. --- yes, sir.

7 Q. All right. Now, you understand that the purpose of
8 this PCR hearing is to determine what errors your
9 attorney made.

10 A. Yes, sir.

11 Q. And we are limited to those errors by your attorney
12 only, okay.

13 A. Yes, sir.

14 Q. So we have to focus on the issues, all right?

15 A. Yes, sir.

16 Q. All right. Now, we are talking -- you are alleging
17 your attorney was ineffective in representing you in
18 these charges, correct?

19 A. Yes, sir.

20 Q. And specifically I want you to tell the Court what
21 he did -- well, let me ask you this, let me strike that.
22 And because of that ineffective assistance you ended up
23 pleading guilty to some charges, correct?

24 A. Yes, sir.

25 Q. And did you want to plead guilty to those charges?

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1 A. No, sir. I was -- he had me lacking the knowledge
2 on certain things.

3 Q. Okay. Hold on ---

4 A. --- so no.

5 Q. Okay. So what you're alleging is that your attorney
6 did something incorrect that caused you to plead guilty.

7 A. Yes, sir.

8 Q. And if your attorney did what he was supposed to
9 have what would you have done?

10 A. The charges would have been thrown out and a lot of
11 stuff would have been inadmissible.

12 Q. All right. So, let's back up because you've got a
13 lot of charges here and it's going to get complicated
14 with the different allegations, okay.

15 So I'm going to try to make this as simple as
16 possible. Mr. Apicella was appointed to represent you,
17 correct?

18 A. Yes, sir.

19 Q. All right. And how many times did you meet with him
20 to go over the charges against you?

21 A. A few, a few times.

22 Q. All right. Did he -- did you have any trouble
23 communicating with him at all?

24 A. Yeah, it was like off and on certain things that he
25 could have let me know that he didn't inform me on. And

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1 if he had took the proper route and gone the proper way
2 about it I would have never plead to certain, to these
3 charges.

4 Q. All right. Now, you're saying that he didn't inform
5 you of I guess discovery or evidence that was existing
6 ---

7 A. --- right. Like one of them was the 14th Amendment.
8 It the 14th Amendment ---

9 Q. --- well, let's not get technical about amendments.

10 A. All right.

11 Q. Let's just talk about tell me specifically you said
12 that your attorney did not do a proper investigation.

13 A. Right. He did not investigate properly. If he had
14 investigated properly he would have had ---

15 MR. ISENBERG: --- objection, Your Honor,
16 relevance. This is ineffective assistance of counsel for
17 an involuntary plea. Failure to investigate does not ---

18 THE COURT: --- I think that -- if he didn't
19 investigate it he would not know what the case was about.
20 If he advises him to take a plea then that goes to the
21 voluntariness.

22 MR. MURPHY: That's correct.

23 MR. ISENBERG: Thank you, Your Honor.

24 Q. [Mr. Murphy] All right. So specifically what did
25 your attorney not investigate? And when we talk about

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1 investigation we're talking about facts.
2 A. Right, right.
3 Q. So tell me what didn't he investigate?
4 A. He is supposed to investigate to get some
5 transcripts that show that the State's charge was
6 violating a lot of my rights like my due process.
7 Q. Okay. You were originally -- you're saying that
8 there were some transcripts that existed prior to your
9 guilty plea?
10 A. Yeah. There was some transcripts that was hold back
11 that should have been, that should have been, that should
12 have been I guess seen I mean to know what was going on.
13 Q. Okay. And what was this transcript of, what
14 hearing?
15 A. It was the transcript that showed that the State had
16 recharged me, which is double jeopardy.
17 Q. Okay. So what I think you're saying is there were
18 some charges brought against you.
19 A. Right, that was ---
20 Q. --- those charges were dismissed.
21 A. Right.
22 Q. Okay. They weren't dismissed at a jury trial were
23 they?
24 A. They was dismissed by three different individuals.
25 One was a court order by Chief Judge Hughston, and the

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1 second was when they violated due process again was from
2 the Grand Jury.

3 Q. Okay. So you're saying ---

4 A. --- so the charges was dismissed three times by
5 three different individuals.

6 Q. So what you're saying is that some charges that were
7 originally dismissed at the preliminary stage were
8 brought back ---

9 A. --- back, right.

10 Q. All right. And what you think is that is double
11 jeopardy?

12 A. Right.

13 Q. Okay. And what your allegation is is that your
14 attorney did not pursue that double jeopardy claim.

15 A. Right.

16 Q. Okay. Now, is that the sole basis of what your
17 attorney did improperly?

18 A. Right. And it was one more. He had told me about
19 the 14th Amendment, that equal law protection protects
20 you from your rights being violated then I wouldn't have
21 never pleaded too.

22 Q. All right. But when you talk about the 14th
23 Amendment, and this is very broad, exactly what are you
24 saying to me? You got to put it in simple words for me.

25 A. All right. The equal law protection it protects you

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1 from your amendment being violated that the judge can't
2 go around because certain things the judge can allow or
3 he cannot allow. But equal law protection it protects
4 you from your rights being violated.

5 Q. All right. So what you're saying -- does this
6 relate back to the charges that were dismissed that were
7 re-filed against you?

8 A. Yes, sir.

9 Q. All right. And you don't think that that was proper
10 for the State to be able to refile some charges that were
11 dismissed, is that fair to say?

12 A. Yes, sir.

13 Q. But other than that do you have any other complaints
14 about your attorney?

15 A. No, sir.

16 Q. Now, you have asked -- you and I have talked a lot
17 on the telephone, correct?

18 A. Yes, sir.

19 Q. And you wanted me to make sure there was a public
20 defender by the name of Benjamin Lewis here, correct?

21 A. Yes, sir.

22 Q. And I brought Mr. Benjamin Lewis or at least a
23 person who claimed to be Benjamin Lewis into the room,
24 the booth back there with us ---

25 A. --- yes, sir.

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1 Q. And you did not recognize him, did you?

2 A. No, that's an imposter.

3 Q. All right. And you've never talked to Ben Lewis
4 over there [indicates] have you?

5 A. No.

6 Q. Okay. And you were evaluated -- do you remember
7 having a competency evaluation?

8 A. Yes, sir.

9 Q. And were you ever found incompetent or were you
10 found competent?

11 A. Competent.

12 Q. Okay. And this is your one shot at a PCR. Other
13 than those charges that were dismissed and brought back
14 to life so to say do you -- you don't have any other
15 complaints about Mr. Apicella?

16 A. No.

17 Q. Okay.

18 MR. MURPHY: That's all I have. Thank you.

19 THE COURT: Very good. Yes sir, you're recognized.

20 MR. ISENBERG: May it please the Court?

21 THE COURT: Yes.

22

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Antonio Simmons v State
Post-Conviction Relief-Antonio Simmons-Cross-Examination by Mr. Isenberg
July 23, 2019

1 CROSS-EXAMINATION

2 BY MR. ISENBERG:

3 Q. Good morning, Mr. Simmons.

4 A. Yes, sir.

5 Q. You pled -- your guilty plea only came with one

6 charge, correct?

7 A. [No response]

8 MR. ISENBERG: Sorry; I'll rephrase that, Your

9 Honor.

10 Q. [Mr. Isenberg] You pled to one charge, correct?

11 A. Yes, sir.

12 Q. And you had 19 charges dropped, correct?

13 A. Yes, sir.

14 Q. Okay. And you said that you wanted your lawyer to

15 get a transcript right?

16 A. Yes, sir.

17 Q. And you said that transcript violated your double

18 jeopardy rights, correct?

19 A. Right.

20 Q. And that transcript came from the Grand Jury stage,

21 correct?

22 A. Right.

23 MR. ISENBERG: No further questions, Your Honor.

24 MR. MURPHY: And if I may, Your Honor?

25

Antonio Simmons v State
Post-Conviction Relief-Antonio Simmons-Redirect Examination by Mr. Murphy
July 23, 2019

1 REDIRECT EXAMINATION

2 BY MR. MURPHY:

3 Q. You ended up doing what is called a negotiated plea,
4 do you recall that?

5 THE COURT: Let me ask counsel. I, you know
6 practiced law for 20 years and been on the bench for 14
7 and I've always assumed there is no transcript of the
8 state Grand Jury.

9 MR. MURPHY: That's my understanding as well,
10 Judge.

11 THE COURT: Okay. It's like a secret proceeding.

12 MR. MURPHY: Yes, that's correct.

13 THE COURT: A secret -- proceeding.

14 MR. MURPHY: Yes, sir.

15 Q. [Mr. Murphy] You did -- do you remember doing what
16 is called a negotiated plea?

17 A. On what charges?

18 Q. On the charges you pled guilty to. When you went
19 before Judge Dennis there was a negotiated plea. You
20 recall that?

21 A. No.

22 Q. Okay.

23 MR. MURPHY: That's all I have.

24 THE COURT: Very good. You may step down. Thank
25 you, sir.

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Post-Conviction Relief-Antonio Simmons-Redirect Examination by Mr. Murphy
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1 [Whereupon, the witness is excused and exits the
2 witness stand]

3 MR. MURPHY: And Your Honor, we would call Mr.
4 Apicella next, please.

5 MR. ISENBERG: Your Honor, the State would request
6 that subpoenaed witness Christina Parnall would be
7 dismissed. Her testimony would not be needed for this
8 case.

9 THE COURT: She is free to go.

10 MR. ISENBERG: Thank you, Your Honor.

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Antonio Simmons v State
Post-Conviction Relief-John Apicella-Direct Examination by Mr. Murphy
July 23, 2019

1 [Whereupon, Mr. Apicella comes forward]

2 THE COURT: Place your left hand on the Bible and
3 raise your right hand as the clerk administers the oath.

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

6 THE COURT: Have a seat in the witness chair. Pull
7 up real close to that microphone, speak loudly, clearly
8 and slowly and let's start with your full name please,
9 sir. And let's spell that last one for everybody.

10 THE WITNESS: John Apicella, A-P-I-C-E-L-L-A.

11 THE COURT: Very good. Thank you. Mr. Murphy?

12 MR. MURPHY: Thank you, Your Honor.

13 - - - - -

14 JOHN APICELLA,

15 Having been first duly sworn,

16 Was examined and testified as follows:

17 DIRECT EXAMINATION

18 BY MR. MURPHY:

19 Q. Mr. Apicella, could you tell the Court how you got
20 involved to represent Mr. Antonio Simmons?

21 A. Yes. I received a telephone call from someone in
22 the Public Defender's office telling me that I was going
23 to be appointed to this case to represent Christina
24 Parnall who had previously represented Mr. Simmons. And
25 I could have access to the file. It was an involved case

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1 with lots of charges. They alerted me to that fact and I
2 received the order of appointment from the Court in 2016
3 I think.

4 Q. Fair enough. In any case you came into the case a
5 little bit late.

6 A. Correct.

7 Q. Did you have enough time to get up to speed on the
8 case to adequately talk to Mr. Simmons?

9 A. Yes.

10 Q. And I don't think there is -- Mr. Simmons said that
11 you met with him on a few times, a few occasions.

12 A. I saw him many, many, many, many times. I actually
13 counted all the visits when he made complaints to the
14 disciplinary counsel twice and I seem to remember
15 something like 70 but it was a lot.

16 Q. I understand. And you were in the courtroom for Mr.
17 Simmons testimony just now.

18 A. I was.

19 Q. And you heard what he was claiming about transcripts
20 of charges that were dismissed.

21 A. Correct.

22 Q. Let me ask you this. First of all during your
23 representation did he go to court at all for any hearing
24 other than the guilty plea?

25 A. No.

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1 Q. Looking back do you know if he went to court at all
2 while Ms. Parnall was representing him?

3 A. I don't know.

4 Q. Okay. In terms of transcripts for other charges did
5 you ever talk to him about any transcripts of charges
6 that were dismissed against him?

7 A. We discussed this a lot.

8 Q. Okay. Tell us what your discussions were.

9 A. Well, he insisted that there was a transcript out
10 there showing that these charges were dismissed and
11 therefore he could not be recharged.

12 So, I went through the records, went to the Clerk's
13 Office and pulled all those cases. I spoke to his
14 previous public defenders one of whom was Mr. Lewis and
15 also Charles Cochran I think represented him way back
16 when. They couldn't really help.

17 I explained to him that in South Carolina
18 unfortunately there is no Grand Jury transcript. There
19 is no court reporter. In fact you don't even know who
20 the witnesses are. It's a problem in this state but back
21 then that's the way it was and that's the way it still
22 is.

23 Q. And my question and I had a hard time understanding
24 was he alleging that these were Grand Jury transcripts or
25 that they were just nol prossed at a preliminary hearing

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Post-Conviction Relief-John Apicella-Direct Examination by Mr. Murphy
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1 or could you shed some light on that?

2 A. It's difficult. My recollection is he thought that
3 there was a transcript that nothing happens in court;
4 cases are not dismissed unless there is a transcript
5 where you can read what somebody said.

6 And I explained to him that that's not what happens
7 in South Carolina. Moreover, if the charges even were
8 dismissed even at a preliminary hearing it's not final,
9 it's not -- it just means that the case is not going to
10 be presented to the Grand Jury or held for the Grand Jury
11 but the Solicitor can always present the case.

12 Q. Yes, sir. And my next question is you ended up
13 doing some negotiations with the Solicitor who is
14 handling this case, correct?

15 A. Yes.

16 Q. And tell us about those negotiations.

17 A. Well my understanding was the previous -- when Ms.
18 Parnall was relieved he -- that was at what I think was a
19 potential guilty plea. But anyway the offer back then I
20 think was 25 years.

21 So I had been talking to Mr. Osborne throughout this
22 case trying to come up with a number that my client could
23 live with and that he would be comfortable with.

24 I will say this I've had a number of cases with Mr.
25 Osborne. He was very candid with me from the first time

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Post-Conviction Relief-John Apicella-Direct Examination by Mr. Murphy
July 23, 2019

1 I talked to him about this case that his intent was if
2 the case could not be resolved by a plea he was going to
3 get Mr. Simmons sentenced to life without parole if he
4 could.

5 He had planned to pick the three strongest cases and
6 try them together. I told him I don't think any Court is
7 going to let you do that; you're going to have to try
8 them one at a time.

9 And he said fine; I'm willing to do that. I'll go
10 with my first case and if you beat that one I'll go with
11 my second and I'll do it until I get two.

12 Q. Yes, sir. Now you had obviously those discussions
13 with Mr. Simmons?

14 A. Many times.

15 Q. Now, I believe that you had Mr. Simmons evaluated
16 for competency, is that correct?

17 A. That's correct.

18 Q. And why did you do that?

19 A. Well, when I first met with Mr. Simmons and
20 discussed the case with him I suspected that he wasn't
21 all there, for want of a better description, some of the
22 things he told me didn't make sense.

23 Throughout the time that I represented him he was
24 insistent that he had retained a lawyer in Horry County
25 who had moved on his behalf and gotten an order from a

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Post-Conviction Relief-John Apicella-Direct Examination by Mr. Murphy
July 23, 2019

1 judge there to have him released from custody in
2 Charleston and the jail had violated his rights. He
3 should have been released; he shouldn't have been there.
4 And he really refused to come off that allegation.

5 So I had my investigator go up to Horry County and
6 pull every case that he could find that had any, that
7 could have possibly had anything to do with this and
8 there was nothing; no civil cases, no criminal cases, no
9 anything.

10 He could never name the lawyer. He insisted that
11 his aunt had those papers at home. We spoke to her and
12 she said there are no papers and Mr. Simmons has mental
13 problems at times and he hallucinates.

14 Q. And ultimately what was the finding of the doctors
15 that evaluated him?

16 A. That was Doctor Gottlieb [phonetic] I believe. She
17 found that he was incompetent, not competent and that he
18 would be sent to a hospital and hopefully restored to
19 competency.

20 Q. And did that ever happen?

21 A. Yes. I got, I was notified -- I actually was
22 notified by telephone when I was on vacation from Doctor
23 Gottlieb. She wanted me to know as soon as she had made
24 the decision. But that he was found to be incompetent.
25 And he was allegedly returned to competency in October of

Antonio Simmons v State
Post-Conviction Relief-John Apicella-Direct Examination by Mr. Murphy
July 23, 2019

1 2017.

2 Q. And after then he was facing these state charges
3 once he was returned to competency, is that correct?

4 A. Well yeah, he was always facing those charges.

5 Q. Right, no question. Now, in terms of a negotiated
6 plea let's go to the hearing. You had -- you and the
7 Solicitor had negotiated a plea in this case is that
8 correct? And I think the range was 17 to 28 years?

9 A. We did. We did. But the negotiations were he would
10 agree to go down below 20 but I would have to agree to go
11 up past 25 on equal amounts. So the numbers we agreed on
12 were 17 to 28.

13 Q. All right. And did you discuss that negotiated plea
14 with Mr. Simmons?

15 A. I did.

16 Q. Now, understanding what a negotiated plea was I
17 assume Mr. Simmons the only reason he agreed to that plea
18 was because there was a possibility of a 17 year
19 sentence, is that fair?

20 A. That's fair.

21 Q. And if that negotiated plea was -- well, if the
22 parameters were not present was Mr. Simmons did he want
23 to go to trial or did he want to plead guilty?

24 A. Well, before we got that the 17 to 28 offer he
25 insisted that he wanted to go to trial.

Antonio Simmons v State
Post-Conviction Relief-John Apicella-Direct Examination by Mr. Murphy
July 23, 2019

1 Q. And my understanding is once he had the possibility
2 of 17 then he said I'll plead guilty, is that fair?

3 A. That's fair.

4 MR. MURPHY: One moment, Your Honor.

5 [Whereupon, Mr. Murphy confers with the Applicant]

6 MR. MURPHY: That's all I have, Your Honor.

7 THE COURT: Anything on redirect -- or cross?

8 MR. ISENBERG: May it please the Court?

9 THE COURT: Yes.

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Antonio Simmons v State
Post-Conviction Relief-John Apicella-Cross-Examination by Mr. Isenberg
July 23, 2019

1 CROSS-EXAMINATION

2 BY MR. ISENBERG:

3 Q. You testified that your client was originally found
4 to be incompetent?

5 A. That's correct.

6 Q. But he was eventually found to be competent,
7 correct?

8 A. That's correct.

9 Q. By an appropriate expert?

10 A. Well, Doctor Gottlieb [phonetic] examined him when
11 he came back to Charleston in October of 2017. I was
12 present at that examination. And I noticed a difference.

13 Mr. Simmons appeared to understand everything that
14 was going on and answered all the questions
15 appropriately. Doctor -- I thought he was competent.
16 The doctor thought he was competent. My expert -- I got
17 an ex parte court order to retain Doctor L. W. Mulbry who
18 had met with Mr. Simmons previously.

19 He actually met with myself and Mr. Simmons at the
20 jail to observe how he interacted because I was concerned
21 as to whether or not he was competent or incompetent.

22 And based upon my consultations with Doctor Mulbry
23 that's when I made the application to have him examined
24 and have the competency hearing. The State moved along
25 with me so Judge Dennis ordered that hearing. When he

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Post-Conviction Relief-John Apicella-Cross-Examination by Mr. Isenberg
July 23, 2019

1 came back I believe Doctor Mulbry spoke with him again.
2 I spoke with him and he seemed to be competent. He
3 answered my questions and we were able to discuss the
4 issues in the case. He came off some of the other
5 allegations he had made.

6 But one of the things that he had insisted on
7 throughout the time I represented him was he wanted to
8 have a copy of every letter he ever sent to Ms. Parnall.
9 I had those copied and took them to the jail and then he
10 said he didn't want them but I insisted that he take
11 them.

12 Q. And was his competency the result of being put on a
13 proper medication ---

14 A. --- yes ---

15 Q. --- from your perspective ---

16 A. --- yes.

17 Q. Okay. And that was the perspective of Doctor Mulbry
18 as well?

19 A. Yes.

20 Q. And that all happened before the plea hearing,
21 correct?

22 A. Correct. I mean he was put on I guess a number of
23 medications but one of them was Depakote. It's a mood
24 stabilizing medication. And it appeared to slow him
25 down, which is the observation they made. I could see

Antonio Simmons v State
Post-Conviction Relief-John Apicella-Cross-Examination by Mr. Isenberg
July 23, 2019

1 that he was medicated but he appeared to be competent.

2 Q. Right.

3 A. And Doctor Mulbry also did a mitigation report for
4 me that we used at the sentencing.

5 Q. And just jumping ship here you testified that he
6 asked you to find a transcript, correct?

7 A. Yes.

8 Q. And that transcript was based upon double jeopardy
9 in his eyes, correct?

10 A. In his eyes, yes which I tried to explain that if
11 what he told me was true and that case was nolle prossed
12 by the Solicitor after a preliminary hearing or just
13 dismissed administratively that the case could be brought
14 back. But I didn't see any evidence that that case was
15 brought back.

16 Q. Right. You advised him that double jeopardy doesn't
17 attach at that stage of litigation.

18 A. Correct.

19 MR. ISENBERG: No further questions, Your Honor.

20 THE COURT: Very good.

21 MR. MURPHY: Nothing further, Your Honor.

22 THE COURT: You may step -- one question I do have,
23 which is kind of interesting.

24

25

Antonio Simmons v State
Post-Conviction Relief-John Apicella-Examination by the Court
July 23, 2019

EXAMINATION

BY THE COURT:

Q. In an effort to try to satisfy your client concerning this thing in Horry County there is no way in the world Horry County, if it took place, could ever dismiss a Charleston County case.

A. Exactly.

Q. But you did send an investigator there to look to see if there were any transcripts or any dismissals or any armed robberies in Horry County; that kind of thing?

A. I did.

Q. And I assume one of the things you want to do is to see whether or not there was a plea in Horry County that might have addressed the Charleston County case as maybe waiving venue or something like that?

A. Anything. Anything in Horry County that had anything to do with Mr. Simmons and there was nothing.

THE COURT: Very good. You may step down. Thank you.

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

Antonio Simmons v State
Post-Conviction Relief-Benjamin Lewis-Direct Examination by Mr. Murphy
July 23, 2019

1 MR. MURPHY: Your Honor, we would call Mr. Ben
2 Lewis.

3 THE COURT: Mr. Lewis, please come forward.

4 [Whereupon, Mr. Lewis comes forward]

5 THE COURT: Place your left hand on the Bible and
6 raise your right hand as the Clerk administers the oath.

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

9 THE COURT: Mr. Lewis, pull up real close to that
10 microphone speak loudly, clearly, and slowly and let's
11 start with your full name and spell the last.

12 THE WITNESS: Yes, Your Honor. My name is Benjamin
13 Carter Lewis, L-E-W-I-S.

14 - - - - -

15 BENJAMIN LEWIS,

16 Having been first duly sworn,

17 Was examined and testified as follows:

18 DIRECT EXAMINATION

19 BY MR. MURPHY:

20 Q. And Mr. Lewis, where are you employed?

21 A. The Charleston County Public Defender's Office.

22 Q. And how long have you been employed there?

23 A. I believe it is going to be 12 years on December
24 3rd.

25 Q. And has there been anybody else by the name of Ben

Antonio Simmons v State
Post-Conviction Relief-Benjamin Lewis-Direct Examination by Mr. Murphy
July 23, 2019

1 or Benjamin Lewis at the Public Defender's office?

2 A. Not in the last 12 years.

3 Q. All right. Now, do you know who Mr. Simmons is?

4 A. I do not. I mean I met him this morning.

5 Q. And tell the Court about your meeting with him this
6 morning.

7 A. I was placed under subpoena. When that happened I
8 checked to see if I had ever represented anyone named
9 Antonio Simmons. I saw that I had somebody that I had
10 represented on a property crime enhancement back in 2009,
11 different date of birth; not this client.

12 I was trying to sort of alleviate my need to be here
13 so I said let's go look at him, let him see me and let
14 him see if I'm the guy he wants to have under subpoena.

15 Q. Okay. And did you actually see him?

16 A. I did.

17 Q. And what was his response?

18 A. That's not the real Ben Lewis.

19 Q. All right. And you heard him testify that you were
20 an imposter.

21 A. I did.

22 Q. And is there -- do you know anything about anybody
23 that could have possibly resembled you or have a name
24 similar to you at the P.D.'s office?

25 A. So, no one with any name anywhere close to mine. I

Antonio Simmons v State
Post-Conviction Relief-Benjamin Lewis-Direct Examination by Mr. Murphy
July 23, 2019

1 was able to check Court Plus, which is our docketing
2 system and allows us to see who represented people in the
3 past. The person whose name came up was Charles Cochran.
4 He and I do not look alike. He has a red beard. I'm
5 heavy set and he's not.

6 The only other person that I could possibly consider
7 that sometimes gets mistaken for me in my office is Ted
8 Smith. I don't think he had any connection to this case.
9 The person that he believed to be Ben Lewis had grey
10 hair, was older, had a gruff voice and had a grey beard.

11 The only person I think in my office with a grey
12 beard would be my boss, Ashley Pennington, and I don't
13 find his voice particularly gruff.

14 MR. MURPHY: Thank you, Your Honor. That's all I
15 have.

16 THE COURT: Any questions?

17 MR. ISENBERG: May it please the Court?

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Antonio Simmons v State
Post-Conviction Relief-Benjamin Lewis-Cross-Examination by Mr. Isenberg
July 23, 2019

1 CROSS-EXAMINATION

2 BY MR. ISENBERG:

3 Q. Mr. Lewis, you're not an imposter are you?

4 A. No.

5 MR. ISENBERG: No further questions.

6 THE COURT: You may step down.

7 [Whereupon, the witness is excused and exits the
8 witness stand]

9 THE COURT: Anything further?

10 MR. MURPHY: We would recall Mr. Simmons very
11 briefly, Your Honor.

12 MR. ISENBERG: And Your Honor, we would ask that
13 Mr. Lewis be ---

14 THE COURT: --- he's free to leave. Yes, sir.

15 MR. ISENBERG: Thank you.

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

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Antonio Simmons v State
Post-Conviction Relief-Antonio Simmons (recalled)-Direct Examination by Mr.
Murphy
July 23, 2019

1 [Whereupon, Mr. Simmons comes forward]

2 THE COURT: I'll remind you that you are still
3 under oath.

4 THE WITNESS: I swear to tell and tell nothing but
5 the truth.

6 THE COURT: Good. Have a seat.

7 - - - - -

8 ANTONIO SIMMONS,

9 Having been previously duly sworn,

10 Was examined and testified as follows:

11 DIRECT EXAMINATION

12 BY MR. MURPHY:

13 Q. Now Mr. Simmons, you asked me to subpoena Ben Lewis
14 from the Public Defender's office, is that correct?

15 A. Yes, sir.

16 Q. And is that the Benjamin Lewis you're talking about?

17 A. No, sir.

18 Q. Okay. Are you telling the Court that there is
19 another person named Ben Lewis or that somebody else you
20 wanted me to subpoena?

21 A. Yes, sir. It was -- I had a public defender named
22 Benjamin Lewis but I wasn't quite sure what his last name
23 is. But he's heavy set, kind of a wrinkled old guy, wear
24 glasses, talk kind of slow, voice kind of raspy. But at
25 a preliminary hearing my aunt was at the preliminary

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1 hearing with him. They had us on video -- they had them
2 on video that could have showed the proof but after 365
3 days they say that everything be destroyed. So I was
4 trying to get the recording from the preliminary hearing
5 to show the facts.

6 Q. So what you're saying I just want to make sure
7 because this is I think helping some charges were
8 dismissed at a preliminary hearing?

9 A. Yes, sir.

10 Q. And then the State brought those charges back to
11 life?

12 A. Yes, sir. They recharged me and gave me a different
13 lawyer and a different Solicitor. The private
14 investigator became my lawyer, which is a conflict of
15 interest because the charges was apparently dropped.
16 That's why Benjamin Lewis was moved off my case.

17 But what the State did is they recharged me, they
18 recharged me which is double jeopardy and gave me another
19 lawyer and -- I mean gave me another Solicitor and gave
20 me another lawyer.

21 That made it a conflict of interest because the
22 person who became my lawyer was my private investigator
23 on that case because detectives had gave false
24 information and technically would have ---

25 MR. ISENBERG: --- objection, Your Honor. I think

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1 I've let this go far enough. He has no allegations
2 against a Benjamin Lewis. And as of right now he's just
3 rambling about false allegations from a detective. There
4 is no relevancy to this case from his testimony.

5 THE COURT: I'll allow him to finish what he was
6 saying. Let's wrap it up.

7 MR. MURPHY: Okay.

8 Q. [Mr. Murphy] So just to summarize Mr. Cochran was
9 the investigator, is that correct?

10 A. Yes, sir. On this old case right here ---

11 Q. --- I get it. Listen I understand. And what you
12 claimed is that he was later appointed to be your
13 attorney.

14 A. Right.

15 Q. And you think that was a conflict of interest?

16 A. Right.

17 Q. All right.

18 MR. MURPHY: That's all I have. Thank you.

19 THE COURT: Very good. You don't have any
20 questions, do you?

21 MR. ISENBERG: No, Your Honor.

22 THE COURT: You can step down. Thank you.

23 [Whereupon, the witness is excused and exits the
24 witness stand]

25

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1 MR. MURPHY: Your Honor, we would rest at that
2 point.

3 THE COURT: State, you're recognized.

4 MR. ISENBERG: Your Honor, the State would rest its
5 case as well and we would be ready to proceed with a
6 brief closing argument.

7 THE COURT: Okay. Very good. Let's hear from the
8 Applicant first. They have the burden of proof.

9 MR. MURPHY: Thank you, Your Honor.

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Antonio Simmons v State
Post-Conviction Relief Hearing-Closing Arguments-Remarks by Mr. Murphy
July 23, 2019

1 CLOSING ARGUMENTS

2 BY MR. MURPHY:

3 I'm in a very difficult position here, Your Honor.
4 We would put forth for the record pursuant to my client's
5 request ask you to grant him a new application based on
6 his testimony here.

7 He has alleged double jeopardy, which I do not think
8 applies. He's alleged a conflict of interest which I do
9 not think applies. But I do think there is some merit to
10 the reversal based on the negotiated plea. I think Mr.
11 Apicella's testimony was had he not had that 17 year
12 negotiated plea he would not have pled guilty. That led
13 him to pleading guilty and when he received that
14 suspended sentence that violated the statute.

15 And because it's so intertwined I think he would be
16 entitled to a trial on not only the case that he pled to
17 but it would also expose him to the other stuff. I
18 understand the Court disagrees with that but I think that
19 that has the most merit that he's claiming. That would
20 be all, Your Honor.

21 THE COURT: Yes, sir?

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Post-Conviction Relief Hearing-Closing Arguments-Remarks by Mr. Isenberg
July 23, 2019

CLOSING ARGUMENTS

BY MR. ISENBERG:

Your Honor, the Applicant has alleged that his plea was involuntary by way of ineffective assistance of counsel. He alleged that counsel failed to get him a transcript based upon double jeopardy. We found out from testimony that he believes that this transcript constituted double jeopardy from Grand Jury proceedings.

Counsel advised him that you cannot be given double jeopardy from Grand Jury proceedings, which means he wasn't deficient and that advice was accurate so there's no prejudice. He had a competency evaluation. He was found incompetent. They gave him medication. By way of experts and people observing him he was later found to be competent and then that's when he entered the plea.

As to the negotiated sentence counsel's testimony was that Applicant agreed after he was given that 17 year opportunity. The Solicitor said if you go down I want to go up. He went down three years 17 from 20 and then up from 25 to 28; three years.

After that the Applicant agreed to enter into that possibility of a 17 to 28 year sentence. That's accurate advice and that does not make his plea involuntary in any way.

He hasn't overcome any kind of burden to show that

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July 23, 2019

1 his plea was involuntary. So with that the State would
2 say that his application should be denied.

3 [Whereupon, the Court reviews documents]
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Antonio Simmons v State
Post-Conviction Relief Hearing-Ruling by the Court
July 23, 2019

RULING BY THE COURT

I specifically find that Mr. Apicella -- I'm going to ask that you take notes and I'm going to ask that your order reflect these findings of fact -- that Mr. Apicella was indeed effective in his representation of the defendant.

He met with him on numerous times. It was not specifically enumerated how many times that he had met. Apparently there must have been a grievance that was filed and he was required to calculate the number of times that he met with him. But it wasn't the type of thing where he met with him one time before the plea; then met him at the courthouse and that sort of thing. There were numerous times that he met with him.

He fully examined the issue of competency. He retained his own expert to investigate that particular issue. He also retained an expert to assist him in mitigation, which was actually the same expert.

There was a bunch of allegations about double jeopardy. I find that those have absolutely no merit to them. He says there is Grand Jury transcript. There is no other than the statewide Grand Jury, which this was not subject to, the county Grand Jury, the Charleston County Grand Jury has not, does not, and will not ever have a transcript. It is private proceeding; secret

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July 23, 2019

1 proceedings and we don't even know who it was actually
2 that testified. Nobody is entitled to that.

3 I specifically find there was no dismissal at the
4 preliminary hearing. I do note that defense counsel even
5 though Mr. Simmons' allegations about these matters being
6 dismissed through some tribunal in Horry County although
7 that was very fanciful he got an investigator to go there
8 to determine whether or not there was ever any judicial
9 proceedings that could have affected these charges.

10 I find that he was very effective in the manner in
11 which he represented him and was effective in negotiating
12 a very favorable plea agreement in view of the fact that
13 there were five separate armed robberies and five weapons
14 charges.

15 I'm going to ask that the Attorney General set forth
16 in the order the colloquy between Judge Dennis and the
17 defendant which sets forth that the plea was indeed
18 voluntary.

19 The allegations with regard to Mr. Apicella not
20 investigating the case are absolutely without merit. I
21 find Mr. Apicella's testimony to be credible and that of
22 Mr. Simmons to be not credible.

23 I do grant relief, this very specific relief that
24 allows Mr. Simmons to be resentenced. I do find that the
25 sentence that was given is indeed an illegal sentence and

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1 that he be allowed to be resentenced pursuant to the
2 negotiated plea with a range from 17 to 28 years. One of
3 the things that I want to ask counsel I think the statute
4 is clear that you can't give a suspended sentence on an
5 armed robbery.

6 But do you think that that provision contemplates
7 that you cannot suspend the minimum mandatory of ten
8 years or is it just that there cannot be a suspended
9 sentence at all?

10 MR. MURPHY: Your Honor, I have not looked at the
11 statute recently. But my recollection from years ago was
12 it was nothing below, you couldn't suspend anything below
13 that ten years. I think you're on with that. But I
14 don't know if there is any case law to support that.

15 THE COURT: All right. What does the Attorney
16 General have to say about that? It might be such that
17 that's what the legislative intent was since it's a
18 minimum mandatory you can't say ten years suspended upon
19 the service of five.

20 MR. ISENBERG: Yes, Your Honor. The Attorney
21 General would argue that the legislative intent was for
22 there to be no suspension under ---

23 THE COURT: --- so it has to be at least ten and
24 whatever you get you get the full amount ---

25 MR. ISENBERG: --- Yes, Your Honor.

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July 23, 2019

1 THE COURT: And it's a non-paroleable 85 percent
2 rule offense.

3 MR. ISENBERG: Yes, Your Honor. That was ---

4 THE COURT: --- and does not even contemplate a
5 suspended sentence because number one you're subject to
6 community service afterwards perhaps. And that does
7 cause problems because if you've got probation and
8 community service it causes a problem when you've got two
9 different supervisions going on. I don't know. What do
10 you think?

11 MR. ISENBERG: Your Honor, it would be our
12 contention that the sentence could not be suspended below
13 ten years so that the sentence gave down to him and in
14 light of that legislative intent respective of ours would
15 be illegal because he was sentenced to a suspended
16 sentence of 18 years instead of below the mandatory
17 minimum of ten years. So, on that note we would ask that
18 his sentence be deemed legal and he not be taken for
19 resentencing.

20 THE COURT: Well, that's different that what you
21 said previously.

22 MR. ISENBERG: Your Honor, I have to make the
23 argument that is beneficial to the State.

24 THE COURT: I thought you told me it was clear
25 that's what the law was it can't be suspended.

Antonio Simmons v State
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1 MR. ISENBERG: Your Honor, I think -- I would ---

2 THE COURT: --- that was my idea that it might have
3 been different. You agree with me that might be the
4 case?

5 MR. ISENBERG: Your Honor, yes. I will admit
6 before I did say that from my personal perspective I
7 think that potentially the sentence or the statute is
8 clear in that there is no part of it that should be
9 paroleable or suspended. But in light of Your Honor
10 enlightening me I would say that the Attorney General's
11 contention would be the legislative intent could ---

12 THE COURT: --- well, I've had another epiphany
13 that you can't have two different types of supervision
14 because when he gets out and doesn't report is that a
15 community supervision violation or a probation violation?

16 MR. ISENBERG: If the sentence is suspended I
17 believe it would be a community ---

18 THE COURT: --- but you're released on community
19 supervision so both of them are accurate. Both of them
20 are supervised by the Department of Probation and Parole.

21 [Whereupon, the Court reviews documents]

22 THE COURT: Lo and behold this is what the statute
23 says 16-11-330 it addresses this very issue: Must be in
24 prison for the mandatory minimum term of not less than
25 ten years or more than 30 years no part of which may be

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July 23, 2019

1 suspended or probation granted.

2 MR. ISENBERG: That's why ---

3 THE COURT: --- I think that's the language that is
4 clear. I mean how can that not be clear? I think the
5 reason is that its community supervision and they've
6 addressed it and I think that's clearly their intent
7 don't you think upon further reflection?

8 MR. ISENBERG: Yes, Your Honor. That is what I
9 think.

10 THE COURT: [Reading] A person convicted under
11 this subsection is not eligible for parole until the
12 person has served at least seven years of the sentence.

13 That seems like an aberration from the 85 percent
14 rule. Well, my law clerk has told me that this older
15 statute they didn't take out when they passed the 85
16 percent rule. My question to you Mr. Attorney General is
17 which do you think applies; the seven years or the 85
18 percent rule?

19 MR. ISENBERG: Eighty-five percent rule.

20 THE COURT: You think?

21 MR. ISENBERG: Yes, Your Honor.

22 THE COURT: You sure?

23 MR. ISENBERG: I mean based on all my research that
24 statute is a part of the non-paroleable offenses that are
25 subject to the 85 percent rule.

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1 THE COURT: Okay.

2 MR. ISENBERG: But ---

3 THE COURT: --- that's not even before us here
4 today. I was just asking as an academic matter which one
5 you thought applied.

6 MR. ISENBERG: I completely understand, Your Honor.
7 My belief is that armed robbery is an 85 percent rule
8 offense based upon it being non-paroleable.

9 THE COURT: Even though the legislature said you
10 could do it after seven?

11 MR. ISENBERG: The legislature got me.

12 THE COURT: Okay. Well, probably the later 85
13 percent rule would take precedent.

14 MR. ISENBERG: But Your Honor, it's the ---

15 THE COURT: --- that's not even an issue here
16 today. I do indeed find that the language of the
17 statute, and I'm going to ask that you put in the
18 language of the statute 16-11-330 that says that no part
19 of which may be suspended or probation granted.

20 And he's entitled to a resentencing and to get a
21 determinate sentence somewhere between 17 and 28.

22 MR. ISENBERG: Thank you, Your Honor.

23 THE COURT: He received an 18 year sentence? What
24 was his sentence?

25 MR. MURPHY: Twenty-eight suspended for 18 I

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1 believe.

2 MR. ISENBERG: Your Honor ---

3 THE COURT: --- and we all understand that if he
4 elects to go forward with the resentencing that he can
5 get up to 28. Do we all understand that?

6 MR. MURPHY: Yes.

7 THE COURT: Mr. Simmons, do you understand it?

8 MR. SIMMONS: Yes, sir.

9 THE COURT: And you still want to go forward with
10 that request for that particular relief?

11 MR. SIMMONS: Yes, sir.

12 THE COURT: All right.

13 MR. MURPHY: And the only thing I would ask to be
14 included in the order, and I'm trying to get judicial
15 economy here, if he's to be remanded back to Court for a
16 resentencing I think procedurally his sentence needs to
17 be given before he can decide whether or not to continue
18 with the PCR application.

19 What I'm trying to avoid is filing an appeal for
20 this ruling and then have to come back for a sentence and
21 then he gets to -- procedurally I think he gets to file a
22 PCR again is what I'm saying. But he doesn't know that
23 until he gets sentenced.

24 THE COURT: Well, that's a problem for another day.

25 MR. MURPHY: Okay. Well, to be safe I will file

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1 the appeal. I just don't want to waive anything on his
2 behalf, Your Honor.

3 THE COURT: Well, I think that would probably be in
4 his best interest to do that.

5 MR. MURPHY: Thank you, Judge.

6 MR. ISENBERG: Thank you, Your Honor.

7 THE COURT: Very good.

8 [Whereupon, counsel confer]

9 THE COURT: Might counsel approach the bench for a
10 moment?

11 [Whereupon, an off the record bench conference is
12 held]

13 THE COURT: Good luck to you, Mr. Simmons.

14 MR. MURPHY: Thank you, Judge.

15 MR. ISENBERG: Thank you, Your Honor.

16 *****END OF TRANSCRIPT OF RECORD*****
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C E R T I F I C A T E

I, the undersigned, Joyce C. Rueger, Official
Circuit Court Reporter for the Ninth Judicial Circuit of
the State of South Carolina, do hereby certify that the
foregoing is a true, accurate, and complete Transcript of
Record of the proceedings had and evidence introduced in
the trial of the captioned case, relative to appeal, in
the Court of Common Pleas for Charleston County, South
Carolina on the 23rd day of July, 2019.

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

June 19, 2021


Joyce C. Rueger, CVR-M
Court Reporter



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STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Antonio Simmons,
S.C.D.C. No. 279418,

Applicant,

v.

State of South Carolina,

Respondent.

) IN THE COURT OF COMMON PLEAS
) FOR THE NINTH JUDICIAL CIRCUIT

) Case No.: 2018-CP-10-4505

) **ORDER GRANTING RELIEF IN PART AND**
) **DISMISSAL IN PART**

FILED
2019 OCT -1 AM 10:00
JULIE J. ARMSTRONG
CLERK OF COURT

This matter comes before the Court by way of an application for post-conviction relief filed by Antonio Simmons ("Applicant") on September 18, 2018. Respondent made its return on or about January 10, 2019. The Court convened an evidentiary hearing into the matter on July 23, 2019, at the Charleston County Courthouse. Applicant was present at the hearing and represented by Christopher Murphy, Esquire. Jacob Isenberg, of the South Carolina Attorney General's Office, represented Respondent.

Applicant testified on his own behalf at the evidentiary hearing. Applicant's plea counsel, John Apicella, Esquire ("Counsel") also testified. The Court had before it Applicant's records from the South Carolina Department of Corrections, a copy of the original plea transcript, the records of the Horry County Clerk of Court regarding the subject convictions, and the pleadings. After a thorough review of the evidence and testimony in the record, the Court finds as follows Applicant's sentence shall be vacated and he shall be granted a new sentencing hearing. However, the Court also finds all other claims brought by Applicant shall be dismissed with prejudice.

I. PROCEDURAL HISTORY

Applicant is presently confined pursuant to orders of the Charleston County Clerk of Court. In December 2014, the Charleston County Grand Jury indicted Applicant for five counts of Armed Robbery (2014-GS-10-07111/2014-GS-10-07123/2014-GS-1007142/2014-GS-10-07145/2014-GS-10-07147).

Michael Apicella, Esquire represented Applicant. Assistant Solicitor David Osborne, Esquire prosecuted the case. On March 20, 2018, Applicant pleaded guilty as indicted to all charges before the Honorable R. Markley Dennis. Judge Dennis sentenced Applicant to a negotiated 28 years suspended on the service of 18 years on indictment 2014-GS-10-01711 and the other indictments were dismissed as part of the plea. Applicant did not appeal his conviction or sentence.

II. CURRENT ALLEGATIONS

In his post-conviction relief application, Applicant alleges he is being held unlawfully for the following reasons:

1. Due Process Violations
2. Prosecutorial Misconduct
3. Ineffective Assistance of Counsel
4. Violation of Equal Protection Law

Applicant requests relief as follows:

- Vacate plea follow by a new trial.

At the evidentiary hearing, Applicant proceeded forward on ineffective assistance of counsel based upon the following: 1) Failure to investigate; 2) Failure to review discovery; and 3) Failure to communicate; and 4) Failure to pursue a double jeopardy claim. Applicant also proceeded forward with a claim that he is serving an illegal sentence. Applicant requested to be resentenced to remedy the illegal sentence.

III. 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 records submitted to it by the parties and the legal arguments made by the attorneys. Pursuant to S.C. Code Ann. § 17-27-80, this Court makes the following findings based upon all of the probative evidence presented.

A. Ineffective Assistance of Counsel

Applicant's allegations of ineffective assistance of counsel are without merit. In a PCR action, Applicant bears the burden of proving the allegations in his 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 [it] cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686 (1984); Butler, 286 S.C. at 442, 334 S.E.2d at 814.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland. First, Applicant must prove that counsel's performance was deficient. Strickland, 466 U.S. at 686; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id.

(citing Strickland, 466 U.S. at 690). “When counsel focuses on some issues to the exclusion of others, there is a strong presumption that he [or she] did so for tactical reasons rather than through sheer neglect.” Yarborough v. Gentry, 540 U.S. 1, 5 (2003) (citing Strickland, 466 U.S. at 690). The Court, in determining deficiency, must affirmatively entertain the range of possible reasons counsel may have had for proceeding as they did. Cullen v. Pinholster, 563 U.S. 170, 196 (2011); Harrington v. Richter, 562 U.S. 86, 109-10 (2011). “[E]ven if an omission is inadvertent, relief is not automatic. The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight.” Yarborough at 6; see also Murphy v. Davis, 901 F.3d 578, 592 (5th Cir. 2018) (“[C]ounsel’s performance need not be optimal to be reasonable.”). Applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625.

Second, counsel's deficient performance must have prejudiced Applicant such that “there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.” Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. “The prejudice analysis requires the court deciding the ineffectiveness claim to consider the totality of the evidence before the judge or jury.” United States v. Basham, 789 F.3d 358, 371-72 (4th Cir. 2015) (quoting Elmore v. Ozmint, 661 F.3d 783, 858 (4th Cir. 2011)).

In the context of a guilty plea, Applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he/she would not have pleaded guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 59 (1985). Because a guilty plea is a solemn, judicial admission of the truth of the charges against an individual, the PCR applicant’s right to contest the validity of such a plea is usually, but not invariably, foreclosed. See Blackledge v. Allison, 431 U.S. 63, 73-74 (1977) (“Solemn declarations in open court carry a strong presumption of verity. The subsequent presentation of conclusory allegations unsupported by specifics is

subject to summary dismissal, as are contentions that in the face of the record are wholly incredible.”). Statements made during a guilty plea should be considered conclusively, unless an Applicant presents valid reasons why he or she should be allowed to depart from the truth of his statements. Dalton v. State, 376 S.C. 130, 137-38, 654 S.E.2d 870, 874 (Ct. App. 2007) (citing Crawford v. United States, 519 F.2d 347, 350 (4th Cir. 1975)).

The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. Strickland, 466 U.S. at 696. A court need not first determine whether counsel’s performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies; if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Id. at 696-97.

1. Failure to Investigate Double Jeopardy Defense

Applicant contends Counsel failed to investigate material grand jury transcripts. In reviewing a claim that defense counsel failed to properly investigate a defense to a crime, a court’s principle concern is whether the investigation “was itself reasonable.” Taylor v. State, 404 S.C. 350, 364, 745 S.E.2d 97, 104 (2013).

Here, Counsel credibly testified Applicant guaranteed a favorable grand jury transcript was available for their review. Specifically, Counsel credibly recalled Applicant claiming this transcript was the key getting current charges dismissed. Further, Counsel credibly recalled Applicant expressing personal belief this piece of evidence would get his charges thrown out for double jeopardy. However, Counsel credibly testified he advised Applicant the alleged circumstances did not amount to a claim of double jeopardy.

Additionally, Counsel credibly testified Applicant told him investigate relevant records in Horry County. Counsel further credibly recalled Applicant claiming to have several charges dismissed in Horry County. Thereafter, Counsel credibly testified he had an investigator check in Horry County to see if there were any relevant records available. However, Counsel credibly testified his investigator could not find anything related to Applicant.

Accordingly, this Court finds Counsel delivered credibly testimony on this issue. It appears Counsel followed through with investigating relevant evidence in Horry County even though he was suspicious anything existed. The investigator delivered news that confirmed Counsel's suspicions. Therefore, this Court finds Counsel conducted a reasonable investigation into relevant records at the request of Applicant. This Court further finds Applicant has failed to prove Counsel was deficient based upon a failure to investigate.

Applicant contends grand jury transcripts exist which would have led to a dismissal of his charges based upon double jeopardy. To establish counsel failed to adequately investigate a defense, applicant must present evidence of what counsel could have discovered or what other defenses could have been pursued had counsel more fully prepared. Jackson v. State, 329 S.C. 345, 495 S.E.2d 768 (1998); Moorehead v. State, 329 S.C. 329, 496 S.E.2d 415 (1998) (failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to the result).

Here, Counsel credibly testified there was no transcript available from previous grand jury proceedings based upon charges against Applicant. Further, Counsel credibly testified transcripts are not customarily recorded for grand jury proceedings. On the other hand, Applicant testified his grand jury transcript exists. Applicant further testified this transcript was wrongly withheld from him. However, Applicant did not specify the charges dismissed. Applicant also did not

specify the month or year these charges were dismissed. As a result, this Court finds no credible testimony or evidence in the record corroborates a relevant grand jury transcript exists. Therefore, this Court finds Applicant is merely providing insufficient speculation to support his claim. This Court further finds he has failed to overcome the burden to prove a failure to investigate prejudiced his double jeopardy defense.

Additionally, Applicant contends double jeopardy attaches after a grand jury dismisses an indictment. The submission of an indictment by the government attorney to the grand jury, and the examination of witnesses before them, do not amount to the institution of a prosecution. Post v. United States, 161 U.S. 583 (1896). Moreover, the double jeopardy clause protects against second prosecution for same offense, after conviction or acquittal, and multiple punishment for same offense Jivers v. State, 304 S.C. 556, 406 S.E.2d 154 (1991).

Here, Applicant testified the transcript would be from a grand jury proceeding dismissing previous indictments. He further testified this is sufficient for double jeopardy. However, grand jury indictment are not considered prosecution. The double jeopardy clause provides protection where there has already been previous prosecution. Therefore, this Court finds a grand jury dismissal on any charges would not be sufficient to satisfy the previous prosecution requirement of double jeopardy. Accordingly, this Court finds Applicant did not suffer prejudice in failing to acquire a grand jury transcript for the purposes of arguing double jeopardy.

2. *Failure to Communicate*

Applicant contends Counsel deficiently failed to communicate the availability of material evidence throughout his representation.

Here, Counsel credibly testified he met with Applicant about seventy time about this case. Furthermore, Counsel credibly testified they discussed the transcript issue numerous times.

Finally, Counsel credibly testified he advised Applicant the transcript from a grand jury did not exist. Contrarily, Applicant testified a transcript existed from the grand jury who dismissed his charges. Applicant testified Counsel failed to meet with him about the status of collecting this transcript. Applicant further testified he believed he was supposed to get the relevant transcript. However, Applicant testified the state withheld it.

Accordingly, this Court finds Counsel delivered credible testimony on this issue. It appears Counsel entertained the issue in several meetings, but always responded with accurate legal advice. Therefore, this Court finds Counsel reasonably communicated with Applicant about grand jury transcripts. This Court further finds Applicant has failed to overcome the burden to prove Counsel was deficient based upon a failure to communicate.

Applicant contends he was not able to notify Counsel about material evidence that would have resulted in his charges being dismissed. Mere speculation as to what might have happened had defense counsel independently investigated is not sufficient for prejudice, where the record indicates an investigation would have resulted differently. Kibler v. State, 267 S.C. 250, 256, 227 S.E.2d 199, 202 (1976) (finding applicant suffered no prejudice where he could not corroborate an investigation would have produced evidence he did not possess necessary intent to commit the crime).

Here, Applicant reiterated the material evidence was this grand jury transcript. Further, Applicant testified this transcript was violating his due process based upon double jeopardy. Finally, Applicant testified the Assistant Solicitor withheld the transcripts in an effort to get him to plead guilty. On the other hand, Counsel credibly testified grand jury proceedings are not traditionally recorded with a transcript. Further, Counsel credibly testified a previous failure to indict was not, by itself, material evidence.

Accordingly, the issue is whether this alleged grand jury transcript can be considered material evidence. Applicant has not provided any context about the basis for these alleged grand jury proceedings. Applicant has not provided any evidence about the basis for this alleged dismissal. Therefore, no credible evidence in the record corroborates this alleged transcript would contain material evidence. Accordingly, this Court finds the record indicates an investigation into the alleged grand jury transcript would not have produced material evidence sufficient for dismissal.

Additionally, the South Carolina Supreme Court has found deficient counsel does not prejudice an applicant where the basis for their decision to avoid trial was a favorable plea. Goins v. State, 397 S.C. 568, 575, 726 S.E.2d 1, 4 (2012). (finding no prejudice where evidence showed Applicant accepted the plea after State offered to dismiss certain charges).

Here, Counsel credibly testified the Assistant Solicitor was ready to go to trial any of the ten armed robbery charges. Thereafter, Counsel credibly recalled the Assistant Solicitor intended to prosecute Applicant as many times as it took to get life without parole. Counsel credibly testified he notified Applicant of the Assistant Solicitor's LWOP intention. Counsel credibly testified the Assistant Solicitor offered a range of twenty to twenty five years. Subsequently, Counsel credibly testified Applicant said he would accept a negotiated range contingent upon lowering the minimum to seventeen years. Counsel credibly testified the Assistant Solicitor agreed to seventeen years contingent upon raising the potential maximum to twenty eight years. Finally, Counsel credibly testified all parties agreed to a negotiated range of seventeen to twenty eight years on five armed robbery charges. Counsel also credibly testified the agreement further stipulated the other fifteen charges would be dismissed.

Accordingly, this Court finds Counsel has provided credibly testimony on the issue. The testimony indicates Applicant pled with the motivation to avoid LWOP exposure. Further it indicates Applicant pled with the motivation to potentially receive the lower end of a negotiated range. Finally, it indicates Applicant pled with the motivation to have fifteen other charges dismissed. Therefore, this Court finds Applicant has failed to overcome the burden to prove he pled in reliance upon any deficient behavior by Counsel.

3. *Failure to Conduct Mental Evaluation*

Applicant contends Counsel deficiently failed to have him evaluated for legal incompetency based upon mental health issues.

At the plea hearing, Counsel notified the court of mental health concerns. (Tr. 33-4). He made the court aware Applicant had a longstanding illness of schizophrenia. (Tr. 34). Counsel also indicated he hired had two mental health experts evaluate Applicant. (Tr. 34). Counsel further stated Applicant was fine when he took his medication. (Tr. 34).

Here, Counsel credibly testified he suspected Applicant had mental health issues during their first meeting. Thereafter, Counsel credibly testified he pulled previous documents on Applicant which indicated mental health issues. Counsel credibly testified he had a mental health evaluation conducted where Applicant was found to be incompetent. Counsel credibly recalled improvements after medical experts gave Applicant appropriate medication. Subsequently, Counsel credibly testified Applicant was found to be competent in October 2017. The plea hearing was not until March 20, 2018. Accordingly, this Court finds Counsel took reasonable steps in evaluating competency. This Court further finds Applicant has failed to overcome the burden to prove Counsel was deficient in having him mentally evaluated.

Applicant contends he was legally incompetent to voluntarily enter into a negotiated sentence. The test for competency to stand trial or continue trial is whether the defendant has the sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and whether he has a rational, as well as a factual, understanding of the proceedings against him. McLaughlin v. State, 352 S.C. 476, 481, 575 S.E.2d 841, 843 (2003). The defendant bears the burden of proving his incompetence to stand trial by a preponderance of the evidence. Id.

Here, Counsel credibly recalled Applicant became competent after he was put on the proper medication. This is consistent with his mitigation statements at the plea hearing. (Tr. 34). Further, this is consistent with one expert's evaluation which was submitted to the plea court. (Tr. 34).

On the other hand, Applicant testified he was incompetent on the day of the plea hearing. However, this is not consistent with the record. An expert originally found Applicant to be legally incompetent on April 28, 2017. (Tr. 12). Thereafter, the same expert found Applicant to be legally competent on October 16, 2017. (Tr. 12). Further, Applicant was found to be criminally responsible in a report compiled on November 3, 2017. All three of these evaluations were submitted to the plea court on March 20, 2018. Accordingly, this Court finds Applicant has provided insufficient evidence to conclude he would have successfully been found incompetent when the negotiated sentence was entered. Therefore, this Court finds Applicant has failed to overcome the burden to prove he was prejudiced by not being evaluated for competency before entering a negotiated sentence.

IV. ILLEGAL SENTENCE

Applicant contends the plea court imposed an illegal sentence. A person who commits robbery while armed with a pistol, dirk, slingshot, metal knuckles, razor, or other deadly weapon,

or while alleging, either by action or words, he was armed while using a representation of a deadly weapon or any object which a person present during the commission of the robbery reasonably believed to be a deadly weapon, is guilty of a felony and, upon conviction, must be imprisoned for a mandatory minimum term of not less than ten years or more than thirty years, *no part of which may be suspended* or probation granted. A person convicted under this subsection is not eligible for parole until the person has served at least seven years of the sentence S.C. Code Ann. § 16-11-330 (a) (emphasis added). The issue regarding whether an applicant is serving an illegal sentence is a question of law. Bordeaux v. State, 410 S.C. 495, 765 S.E.2d 143 (2014). Post-conviction relief may be tailored to remedy the precise prejudice resulting from constitutional violations. Boan v. State, 388 S.C. 272, 277, 695 S.E.2d 850, 852 (2010).

At the plea hearing, Applicant entered into a negotiated sentencing range of seventeen to twenty eight years based upon the charge of armed robbery. (Tr. 35). However, Applicant was sentenced to thirty years suspended upon the service of eighteen. (Tr. 37). As a matter of law, Applicant's sentence for armed robbery cannot be suspended. Accordingly, this Court finds Applicant is serving an illegal sentence. This Court finds the appropriate remedy is to vacate the sentence and afford Applicant a new sentencing hearing.

V. CONCLUSION

Based on all the foregoing, this Court finds and concludes that Applicant has established the sole constitutional violation in that he is serving an illegal sentence. Therefore, this application for post-conviction relief must be granted in-part and denied in-part.

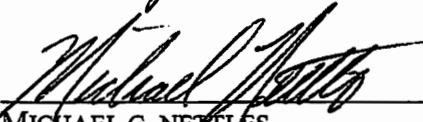
This Court notifies both parties they must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453,

409 S.E.2d 395 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCP provides that if the Applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. That the Applicant's sentence be vacated; Applicant be remanded to Charleston County Detention Center; and Applicant be re-sentenced.
2. That the other claims in this Application for Post-Conviction Relief must be denied and dismissed with prejudice.

AND IT IS SO ORDERED this 19 day of Sept, 2019.


 MICHAEL G. NETTLES
 Presiding Judge
 Ninth Judicial Circuit

Florence, South Carolina

STATE OF SOUTH CAROLINA	)	COURT OF GENERAL SESSIONS
	)	
COUNTY OF CHARLESTON	)	DOCKET NO. 2014-GS-10-7147
	)	2014-GS-10-7142
	)	2014-GS-10-7111
	)	2014-GS-10-7123
	)	2014-GS-10-7145
	)	
STATE OF SOUTH CAROLINA	)	
	)	
	)	
vs.	)	
	)	
	)	
ANTONIO O. SIMMONS	)	
	)	
Defendant	)	
	)	
	)	
	)	
_____	)	TRANSCRIPT OF RECORD
		January 10, 2020
		Charleston, South Carolina

B E F O R E:

THE HONORABLE R. MARKLEY DENNIS, JR., JUDGE

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

DAVID L. OSBORNE, ESQ.
Attorney for the State

CHRISTOPHER R. GEEL, ESQ.
Attorney for the Defendant

JOYCE C. RUEGER,
Certified Verbatim Reporter-Master
Circuit Court Reporter

[Certified Transcript Provided for: SCCID]

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No exhibits were introduced

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PROCEEDINGS

THE COURT: Okay. Mr. Solicitor?

MR. OSBORNE: Thank you, Judge. On March the 20th of 2018 the Defendant pleaded guilty to five counts of armed robbery.

THE COURT: Okay.

MR. OSBORNE: You sentenced him to 28 years suspended to 18 years and that was on the indictment ending in 1711. The Defendant filed a PCR based on several claims. Judge Nettles' order on September ---

THE COURT: --- I read it ---

MR. OSBORNE: --- the 19th of 2019 that the sentence would be vacated and remanded to be resentenced. All the other claims were dismissed. And the charges were basically he was arrested for ten counts of armed robbery. I can go through the facts if you need me to; he's already pled to it ---

THE COURT: --- he has.

MR. OSBORNE: The plea offer was the Defendant had like I said ten armed robberies. The plea was a negotiated range to plead to five of them for 20 to 25.

THE COURT: That's correct.

MR. OSBORNE: Mr. Apicella represented him at the time ---

THE COURT: --- that's correct ---

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1 MR. OSBORNE: --- we negotiated it to be down to 17
2 years on the bottom end.

3 THE COURT: Correct.

4 MR. OSBORNE: I then put 28 on the top end so it
5 was a negotiated range of 17 to 28. Judge Nettles had
6 ruled that no part of the armed robbery could be
7 suspended and you gave him the 18.

8 THE COURT: And I -- we have to agree to disagree
9 on the interpretation of that because I think we have the
10 right, inherent right to suspend any -- I understand what
11 the statute says. But typically it says, what you see
12 with minimum sentence is no part may be suspended -- may
13 not suspend below the mandatory minimum. But the statute
14 does say that and so I agree with that. And your range
15 was 17 to 28.

16 MR. OSBORNE: Yes, Your Honor.

17 THE COURT: Okay. Mr. Geel?

18 MR. GEEL: Thank you, Your Honor. So just a few
19 things. As Mr. Osborne said the record as far as
20 sentencing there was already a hearing on it. Your Honor
21 may recall that Doctor Mulbry submitted a report.

22 THE COURT: Yes.

23 MR. GEEL: There were some mental health issues.
24 Those are in the record as Court's exhibit 1.

25 THE COURT: Right.

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1 MR. GEEL: So I don't know if we need to retread
2 that ground.

3 THE COURT: No.

4 MR. GEEL: So the one thing that I will point out
5 Your Honor and us giving some thought to this in my
6 discussions with Mr. Osborne what he has indicated to me
7 is that before Mr. Simmons proceeded with his PCR that
8 the Department of Corrections would have treated the
9 sentence that was imposed by the Court as simply a 18
10 year sentence ---

11 THE COURT: --- correct ---

12 MR. GEEL: --- which is what he had in hand prior
13 to his filing this PCR.

14 THE COURT: Oh, I understand that.

15 MR. GEEL: Now one of things that this brings to
16 mind, and I'm not sure if Your Honor made this connection
17 is that North Carolina v Pearce and the line of Supreme
18 Court cases whereby if someone prevails in some kind of
19 collateral or direct appeal and they come back for
20 resentencing that there is a presumption of the due
21 process violation if the sentence is higher without a
22 valid reason. So whether or not ---

23 THE COURT: --- I'll be happy to give the reason.
24 No problem with that one ---

25 MR. GEEL: --- understood. The thing that I just

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1 wanted to make, I wanted to put that on the radar
2 essentially is that there is a presumption of some kind
3 of problem if someone comes back after exercising their
4 right to collateral review.

5 THE COURT: I agree with you wholeheartedly. In
6 fact I will tell you this. He is retired now, retired
7 from the bench and went to the Legislature; he's now in
8 the Legislature, but Judge Clary did something and I
9 understand why he did it.

10 He revoked -- it was in Aiken I think. I don't
11 remember the case name. It's funny; I can remember the
12 facts but I can't remember the name of the case and I
13 remember the judge. But it was a probation revocation
14 and he had up to seven years and he revoked five.

15 And the Defendant made a motion, which he had an
16 absolute right to do, to reconsider the sentence and
17 revoke less. Judge Clary said I will. I'm going to
18 revoke seven. And the Supreme Court reversed him on that
19 because it was obvious you can't punish him for
20 exercising his fair and valuable right. So I understand
21 that. I would never do that in the first place ---

22 MR. GEEL: --- and I believe that. Unless I'm
23 mistaken I believe the Court does cite North Carolina v
24 Pearce as the logic for why that was improper.

25 THE COURT: Yeah, well the problem is they failed

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1 to interpret something else and this needs to be
2 addressed because one of the things that the attorney for
3 the Department of Probation and Parole is advocated this
4 to new judges. And I'll be happy -- I mean anything else
5 you want to say to me on the sentencing?

6 MR. GEEL: Yes sir, very briefly.

7 THE COURT: Okay.

8 MR. GEEL: So whatever sentence the Court does
9 impose I have two things. I have his Department of
10 Corrections information here and what it indicates here
11 is the start date of this sentence was April 11th, 2014.

12 THE COURT: That's fine ---

13 MR. GEEL: --- so that's 2,101 days.

14 THE COURT: No problem. I have no problem with him
15 getting credit for all the time he has served.

16 MR. GEEL: And then the last thing, the other thing
17 as far as new information is that he doesn't have any
18 disciplinary whatsoever since he was incarcerated.

19 THE COURT: I'm glad.

20 MR. GEEL: So I think that warrants consideration.

21 THE COURT: Sure.

22 MR. GEEL: And just a moment, Judge ---

23 THE COURT: --- I'll be happy to hear from him if
24 he wants to speak.

25 [Whereupon, Mr. Geel confers with the Defendant]

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1 MR. GEEL: Just a moment.

2 THE COURT: Sure. Careful what you ask for though.

3 [Whereupon, Mr. Geel confers with the Defendant]

4 THE COURT: I'll be happy to hear from you, sir.

5 MR. SIMMONS: On the probation they been charging me
6 which is double jeopardy on the probation.

7 THE COURT: I'm not talking about probation. I
8 mentioned that case for probation was to talk about what
9 the judge did. He did something to penalize the person.
10 It has nothing to do with your case.

11 MR. SIMMONS: All right. But the plea was not no
12 way intelligent.

13 THE COURT: Listen, you've already argued that
14 before the judge in the PCR and he denied that. But he
15 said the sentence that was in effect because I couldn't
16 suspend any portion of it is what he said. And what I
17 tried to do was give you a break. And I articulated that
18 to you but you didn't apparently hear it.

19 [Whereupon, Mr. Geel confers with the Defendant]

20 THE COURT: Well, let me ask you something.
21 Seriously, maybe you want to talk to him. It was a
22 negotiated plea as I recall.

23 MR. OSBORNE: Yes, Your Honor.

24 THE COURT: Negotiated between now 17 and 28.

25 MR. OSBORNE: Yes, sir.

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1 THE COURT: And that's what he wanted me to do too.
2 Now, you're telling me, I'm hearing you; you want to
3 withdraw all your pleas and go to trial on each one of
4 them?

5 MR. SIMMONS: Yes, sir.

6 THE COURT: That's what you want to do?

7 MR. SIMMONS: Yes, sir.

8 THE COURT: So you want to face 30 years and then
9 have a potential life imprisonment. That's what you want
10 to do?

11 MR. SIMMONS: Yes, sir.

12 THE COURT: Why?

13 MR. SIMMONS: Because my rights been violated.

14 THE COURT: I'm not asking you that. Why do you
15 want -- tell me why you want to face five chances of
16 getting a 30 year sentence?

17 MR. SIMMONS: Because I'm innocent.

18 THE COURT: Well, that's good. Well, why did you
19 plead guilty before me?

20 MR. SIMMONS: Because my lawyer was ineffective ---

21 THE COURT: --- no, no, no. You answered my
22 questions. You told me I want to plead guilty. And I
23 asked you specifically why because you are guilty? Yes.
24 And you told me you wanted to waive all your rights and
25 then you further told me because one of the things about

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1 this is important, and it's important for me for today.
2 You know why? Because you told me something. Every time
3 I take a negotiated sentence I do this intentionally;
4 it's why I do this. You asked me to impose that
5 sentence. You're the one that wanted me to do it. You
6 deny saying that on the record?

7 MR. SIMMONS: No, I probably did that ---

8 THE COURT: --- well, you probably did. So what's
9 the truth? Which is true?

10 MR. SIMMONS: I was diagnosed off medicine ---

11 THE COURT: --- sir, which is true? I asked you
12 whether you were under the influence of anything on that
13 day and you said no, and you knew what you were doing.

14 MR. SIMMONS: The record should state that my
15 lawyer was ---

16 THE COURT: --- listen, you're -- the problem you
17 have here is your lawyer negotiated you a sentence and
18 then you come in -- and that's the problem with a
19 negotiated sentence. If this was a straight up plea, I
20 hear you man. But in this this isn't a straight up plea.
21 This is the only time when the Court is left with
22 something. I have to accept it or reject it.

23 Now, to be candid with you given that I can say
24 reject it and it starts over because I don't -- I could
25 say I don't want to take it. And you could go back to

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1 square one. You want me to do that?

2 MR. SIMMONS: [No response]

3 THE COURT: You better talk to your lawyer buddy.
4 I'm telling you that right now. Why don't y'all talk in
5 private for a minute, Mr. Geel? Explain what I'm telling
6 him.

7 [Off the record momentarily while Mr. Geel confers
8 with his client]

9 THE COURT: Thank you, Mr. Geel.

10 MR. GEEL: Thank you, Judge.

11 THE COURT: I appreciate you taking a moment to
12 talk with your client. Yes, sir?

13 MR. SIMMONS: I would like a jury trial, sir.

14 THE COURT: All right. So you -- you can't have
15 that option, okay; right now. Right now you can't. But
16 I'm going to set up the possibility of that, okay. Mr.
17 Osborne, if I can't -- I can't accept the range, the
18 limitation because one of the concerns that I have is why
19 I did what I did.

20 And that is to give him the benefit of a lower
21 sentence but to have an option to have some time that if
22 he violated it we could protect society and protect him
23 and provide some counseling for him by sending him back
24 and then starting the two year supervision all over
25 again. So, and that was my rationale for doing it. I

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1 was willing to do it and accept the negotiated sentence
2 Mr. Geel with that flexibility. But if I'm limited to
3 giving him just a straight sentence I think given five
4 separate armed robberies I couldn't possibly accept that
5 limited, I think that's too low. I think if he is going
6 to be sentenced on one he ought to be sentenced to the
7 maximum I believe because of the five.

8 But now in light of also that he wants to say I
9 didn't want that negotiated sentence that gives me pause
10 as well. And that may have something -- he said he has
11 some mental health issues and that gives me concern also
12 as to whether or not he can consciously do that. I think
13 we go back to square one.

14 MR. OSBORNE: The only thing I would say to that in
15 reference to the mental health issues he was evaluated
16 that morning ---

17 THE COURT: --- oh, I know he was ---

18 MR. OSBORNE: --- by Doctor Godfrey and she did
19 find him competent.

20 THE COURT: Well, I'll tell you what. If y'all
21 want to talk among yourselves and give me a range I'll be
22 happy to let him do that. But I can't accept the
23 negotiated sentence. Now, somebody else might. Another
24 judge might. But given what we're talking about I don't
25 think you're going to get to first base on that.

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1 MR. OSBORNE: Well, you know the only thing I would
2 say to that is that he did plead. And ---

3 THE COURT: --- oh, I know he plead ---

4 MR. OSBORNE: --- and so that ---

5 THE COURT: --- but the Court said I couldn't do
6 what I did. And that's the sole reason I accepted the
7 negotiated sentence because if you recall I think Mr.
8 Apicella said wait a minute; that's more that what we --
9 that was more that what we were talking about and I said
10 yeah, but that's why -- but I'm within the range of
11 actual time.

12 MR. OSBORNE: Now, that you mention that I do
13 recall that ---

14 THE COURT: --- you remember I said -- you remember
15 that? No sir, I can't take it if I can't, don't have
16 that flexibility unless he -- I mean if he insists I'd do
17 it now. I guess I'm bound by accepting it. But he said
18 I didn't do it in the first place. I'm not a part of
19 that.

20 Well, now we've got both of us not in agreement with
21 the negotiated sentence. So, I mean you know if he had
22 come in here and said, yeah, I stand by my request; I'm
23 guilty, please do that that. Then I think I'm stuck by
24 virtue of the ruling. But since he's coming in and
25 saying no and my rationale -- there is no question that I

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1 would probably just go on the -- given what I've said and
2 that's the rationale. I want the record clear that I'm
3 not punishing him. That's the reason that I didn't give
4 him the maximum sentence. I think 28 was the maximum?

5 MR. OSBORNE: Right.

6 THE COURT: If he wants a negotiated sentence
7 that's -- I -- I would like to have 30 but if he tells me
8 I accept it then I would sentence him to 28 years and
9 give him the top end of it with no suspension. But he's
10 telling me I don't want that.

11 MR. GEEL: Your Honor, if I could very briefly. I
12 completely understand the Court's ruling or at least the
13 way the Court is moving towards it ---

14 THE COURT: --- well, let me ask you this. Do you
15 think your client-- well, first of all I thought that was
16 addressed by Judge -- has he appealed that decision of
17 the judge -- Judge Nettles?

18 MR. GEEL: Of the PCR ruling?

19 THE COURT: Yes.

20 MR. GEEL: No, sir.

21 THE COURT: And that time has run?

22 MR. GEEL: That's why I'm standing is that it has
23 run.

24 THE COURT: And he raised that as an issue as well
25 as I recall reading that. Were you his PCR lawyer?

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1 MR. GEEL: No, sir.

2 THE COURT: As I recall Judge Nettles' order denied
3 the other reasons for it but granted it on the sentence
4 being...

5 MR. GEEL: I believe that's correct.

6 THE COURT: But he argued that his client, he
7 didn't know what he was doing as I recall and it was not
8 what he wanted to do. So he hasn't appealed that ruling?

9 MR. GEEL: I don't know, Judge. My client is
10 telling me he did appeal it but I wasn't involved. I
11 became involved as soon as this was already back on
12 remand for resentencing. So I'm not familiar with the
13 PCR procedure ---

14 THE COURT: --- yes, sir?

15 MR. SIMMONS: Can I speak, Your Honor?

16 THE COURT: Oh, sure.

17 MR. SIMMONS: My PCR lawyer abandoned me so I can't
18 get the transcript to help support the facts because he
19 became my new lawyer on the resentencing.

20 THE COURT: Yeah.

21 MR. GEEL: Your Honor, if I could just complete my
22 thought?

23 THE COURT: Yes, please do.

24 MR. GEEL: I understand that's the court's ruling.
25 I will pose an objection. I'm not certain of this but

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1 I'm not certain whether given the procedural posture
2 today whether we can go back to square one.

3 THE COURT: All right. That's fine.

4 MR. OSBORNE: And I would submit, to piggyback on
5 that because I was just thinking, you had mentioned that
6 it was five armed robberies. It was actually ten.

7 THE COURT: Oh, ten?

8 MR. OSBORNE: And what I was going to do -- and
9 there was a confession involved in it. And so as you
10 were talking I was thinking in my mind fine, I'll LWOP
11 him. But we had competency as being an issue. So if
12 we're withdrawing this plea now I worry about his
13 competency right now.

14 THE COURT: Me too.

15 MR. OSBORNE: So now -- and then I end up LWOP'ing
16 him later I think I'm just setting myself up for a
17 problem later on.

18 THE COURT: All right. He says he's appealed it.
19 If he hasn't then I would say that that issue is moot as
20 to whether or not he knew what he was doing at the time
21 because the judge ruled that he did based on the record.
22 So that kicks it back to me of being -- that I have to go
23 forward with the plea.

24 MR. GEEL: And Your Honor as far as any
25 unchallenged issues, things that were not raised

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1 correctly or not raised at all in a state collateral
2 proceeding the venue for those kinds of claims is the
3 federal habeas if there were issues that were not
4 properly raised.

5 THE COURT: I understand ---

6 MR. GEEL: --- so there is still a venue to raise
7 those kinds of missed issues.

8 THE COURT: Correct. Anything else, Mr. Osborne?

9 MR. OSBORNE: No, Your Honor.

10 THE COURT: Does your client want to say anything
11 else?

12 [Whereupon, Mr. Geel confers with the Defendant]

13 [Whereupon, the court reporter confers with the
14 Court]

15 THE COURT: Thank you. My court reporter advised
16 me that she did the PCR and the transcript has not been
17 requested. So that's -- I share that with you because
18 that was discussed while you're present. So any
19 questions you want to have of her?

20 MR. GEEL: No, sir.

21 THE COURT: Mr. Osborne?

22 MR. OSBORNE: No, Your Honor.

23 THE COURT: And thank you for sharing that with me.
24 What else? Your client is continuing to talk to you.

25 [Whereupon, Mr. Geel confers with the Defendant]

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1 MR. GEEL: Court's indulgence, Your Honor.

2 THE COURT: Certainly. Take your time, Mr. Geel.

3 [Whereupon, Mr. Geel confers with the Defendant]

4 MR. GEEL: Your Honor, thank you for the Court's
5 patience.

6 THE COURT: Sure.

7 MR. GEEL: My client is indicating to me that he
8 does want to go back to square one ---

9 THE COURT: --- I understand ---

10 MR. GEEL: --- we stand by our objection to that ---

11 THE COURT: --- that I can't.

12 MR. GEEL: Yes.

13 THE COURT: As his lawyer you're saying Judge, I
14 know what my client wants but you don't have the
15 authority to do that.

16 MR. GEEL: Yes, sir. I don't believe you have the
17 authority to alter ---

18 THE COURT: --- and Mr. Geel, let me state for the
19 record that that's precisely why, and I want to credit
20 you sir that you're an officer of the Court and you took
21 an oath just as I did. And I appreciate you saying that.

22 So what you said reminded me that in the future when
23 I'm taking these negotiated sentences I better be sure
24 that I can do what I want to do. Otherwise, I've locked
25 myself into something. And I appreciate it. You're

State v Antonio Orlando Simmons
Motion to Reconsider Sentencing
January 10, 2020

1 probably right. Based on, based on -- that would be --
2 that would be really setting aside a guilty plea that was
3 accepted. And I can't undo -- I can't do that. We know
4 that once it is accepted by the Court we don't have
5 qualified guilty pleas in this state. They've said that
6 over and over again ---

7 THE COURT: --- yes sir. And I would also think of
8 it as you know when in a public courtroom and with a
9 limited questioning you can't then reopen the remainder
10 of the record ---

11 THE COURT: --- you cannot. You're absolutely
12 right ---

13 MR. GEEL: --- to get that way ---

14 THE COURT: --- you're absolutely right. Give me
15 the background and his history if you have that.

16 MR. OSBORNE: The background of the incidents?

17 THE COURT: No. You just said he had ten
18 outstanding armed robberies?

19 MR. OSBORNE: There were ten armed robberies and
20 accompanying the ten possession of a weapon during the
21 commission of a violent crime; 20 charges total.

22 THE COURT: Okay.

23 MR. OSBORNE: I think he pled to ten armed
24 robberies and ten weapons -- or five armed robberies and
25 five weapons ---

State v Antonio Orlando Simmons
Motion to Reconsider Sentencing
January 10, 2020

1 THE COURT: --- correct ---

2 MR. OSBORNE: --- sorry. I pled -- he pled to five
3 armed robberies. I dismissed all the other 15 charges.

4 THE COURT: So there were five years -- so they
5 were five year sentences, mandatory five year sentences
6 associated with each of those?

7 MR. OSBORNE: That I dismissed. That's right ---

8 THE COURT: --- that you dismissed. Okay, that's
9 helpful.

10 MR. OSBORNE: And just -- there were a string of
11 armed robberies over a period of months so it wasn't just
12 like from one night. That's why I was ---

13 THE COURT: --- it wasn't just a week occurrence?

14 MR. OSBORNE: Right. And that's why I took LWOP
15 off the table. I thought I could go forward with LWOP on
16 that and that's why I took that off the table as part of
17 ---

18 THE COURT: --- did he have a record? Do you know
19 Mr. Geel?

20 MR. GEEL: Yes, sir. He had malicious injury, a
21 larceny, and I think there was an assault charge. So
22 nothing ---

23 THE COURT: --- nothing of that nature ---

24 MR. GEEL: --- nothing like this, no sir.

25 THE COURT: Your client wants to speak again? Yes,

State v Antonio Orlando Simmons
Motion to Reconsider Sentencing
January 10, 2020

1 sir? You were raising your hand.

2 MR. SIMMONS: I'm about to talk to him.

3 THE COURT: You can talk to him if you want to.

4 [Whereupon, Mr. Geel confers with the Defendant]

5 MR. GEEL: We're ready, Judge.

6 THE COURT: Okay. Given the nature of this
7 offense, given the incredible benefits that the Defendant
8 obtained through his prior lawyer avoiding an LWOP, an
9 absolute LWOP situation because if there were ten all you
10 had to do was get two of those because those are most
11 serious; armed robberies. Two convictions would have
12 resulted in a mandatory, if you LWOP him, a mandatory
13 life sentence.

14 So he received an incredible benefit. I articulated
15 that when I took the plea. And that was the rationale
16 because I wanted because of the situation; because of his
17 mental illness problems I wanted the capability of having
18 him supervised for the two year period of time which will
19 accompany this sentence.

20 But I wanted the exposure that he would have more
21 than just the two years he would have the suspended
22 portion which would give an opportunity for him to be
23 sent back. And really kind of the way that Drug Court
24 metes out punishment commensurate with the act so that if
25 he did a slight violation you could sentence him back to

State v Antonio Orlando Simmons
Motion to Reconsider Sentencing
January 10, 2020

1 30 days but up to a year. But he doesn't -- but he comes
2 back out and he starts the two year over all over again,
3 which again allows the State to be working with him to
4 try to benefit him.

5 In this particular non-paroleable offense obviously
6 Judge Nettles called that to my attention. I wish the
7 Legislature would amend the statute. But because they
8 didn't then I'm locked in to what the statute says.

9 I can't perform -- I can't provide that protection
10 that I try to provide when I suspend a sentence because
11 we know there is no probation. You can't have probation
12 on a non-paroleable so that's the only way we can create
13 a supervisory period for a period of time with some
14 exposure to protect society.

15 Given that and given the multitude of offenses and
16 given the restrictions then I can't do anything for me in
17 good conscience for society and my job other than to give
18 him the maximum sentence, so 28 years.

19 So if you will prepare -- I need you to prepare the
20 order because I want it stated in there that your client
21 wanted me, and I stated in the record that I would like
22 to reject the offer without the flexibility. But you are
23 correct; I don't have that luxury. And I want the term
24 luxury put in it that the ruling restricted me. So given
25 that the only way I can fulfill my responsibility to

State v Antonio Orlando Simmons
Motion to Reconsider Sentencing
January 10, 2020

1 society is give him the maximum sentence so that we are
2 protected. And hopefully you'll be able to do the two-
3 year supervision without a problem. Good luck to you,
4 sir. I appreciate you calling that to my attention,
5 though.

6 MR. OSBORNE: Have a good weekend, Judge.

7 THE COURT: You too.

8 MR. SIMMONS: Your Honor?

9 THE COURT: Yes, sir?

10 MR. SIMMONS: I just asked my lawyer if he can put
11 in a direct appeal.

12 THE COURT: Oh yeah, he can file whatever once the
13 order is signed.

14 MR. GEEL: Yes. And for the record Judge, I will
15 do that, and I will do that, Judge.

16 THE COURT: Thank you. But I want you to prepare
17 the order.

18 MR. GEEL: Yes, sir.

19 THE COURT: Thank you. And run it by Mr. Osborne.
20 Thanks, Chris.

21 MR. GEEL: Will do.

22 *****END OF TRANSCRIPT OF RECORD*****
23
24
25

State v Antonio Orlando Simmons
Certificate of the Court Reporter
January 10, 2020

C E R T I F I C A T E

I, the undersigned, Joyce C. Rueger, Official
Circuit Court Reporter for the Ninth Judicial Circuit of
the State of South Carolina, do hereby certify that the
foregoing is a true, accurate, and complete Transcript of
Record of the proceedings had and evidence introduced in
the trial of the captioned case, relative to appeal, in
the Court of General Sessions for Charleston County,
South Carolina on the 10th day of January, 2020.

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

June 16, 2020

A handwritten signature in cursive script, reading "Joyce C. Rueger", written over a horizontal line.

Joyce C. Rueger, CVR-M

Court Reporter

State of South Carolina	In the Court of General Sessions
Charleston County	Warrant No(s): 2014A1010900229, 2014A1010900232, 2014A1010900193, 2014A1010900276, 2014A1010201854
State of South Carolina	
v.	SENTENCING ORDER
Antonio Simmons	

The above-referenced case was remanded for re-sentencing pursuant to a September 19, 2019 Order granting the defendant's application for Post-Conviction Relief. The PCR court found that the sentence previously imposed in the above-referenced case was prohibited by S.C. Code § 16-11-330.

On January 10, 2020 the court convened a re-sentencing hearing. The defendant was present and represented by new counsel. Defense counsel argued that the court was constrained to sentence the defendant to 18 years' incarceration, in light of North Carolina v. Pearce, 395 U.S. 711 (1969). During the hearing, the defendant indicated that he did not want to be re-sentenced, but instead wanted to withdraw his prior guilty plea. Additionally, the defendant requested a jury trial on all of his charges. Defense counsel indicated to the court that he did not believe the court was authorized to grant the defendant's request, given the procedural posture of the case. The State agreed. Having considered the arguments of both parties, the court hereby imposes the following sentence:

The defendant shall serve a term of incarceration of 28 years on each of the above-stated warrants, each sentence to be served concurrently, with credit for time served.

The court is mindful of its responsibility pursuant to North Carolina v. Pearce, 395 U.S. 711 (1969), and hereby notes for the purposes of the appellate record that the prior negotiated plea and sentencing range was only accepted *because* the court intended to suspend a portion of

JAN 15 2020
JULIE J. ARMSTRONG
CLERK, C.P. & G.S.

2020 JAN 15 11:18
Clocked in date Canceled

RMD,

the defendant's sentence in order to ensure the defendant's continued supervision after his release from state custody. Because such a sentence is not permitted under the law as it stands, the court elects to sentence the defendant to the maximum term allowable under the terms of the negotiated plea.

IT IS SO ORDERED.


JUDGE R. MARKLEY DENNIS
NINTH JUDICIAL CIRCUIT

DATE: 1/14/2020

RMD₂

FILED

JAN 15 2020

JULIE J. ARMSTRONG
CLERK, C.P. & G.S.

FILED
2020 JAN 15 AM 11:18
JULIE J. ARMSTRONG
CLERK OF COURT
Clocked in date Canceled

STATE OF SOUTH CAROLINA)

County of CHARLESTON)ANTONIO O. SIMMONS 5279418)

Full name and prison number (if any) of Applicant)

v.)

State of South Carolina)

2019-CP-10-6370
IN THE COURT OF COMMON PLEAS

APPLICATION FOR

POST-CONVICTION RELIEF

FILED
JUL 10 10 11 AM '19
CLERK OF COURT**INSTRUCTIONS - READ CAREFULLY**

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention BROAD RIVER CORRECTION INSTITUTION
4460 BROAD RIVER ROAD, COLA., S.C. 29210
2. Name and location of Court which imposed sentence CHARLESTON COUNTY
COURT OF GENERAL SESSIONS 100 BROAD ST. #106 CHARLESTON, S.C.
3. Name(s) of co-defendant(s) (if any) _____ 29401-2258
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) 2014-GS-100-7123-ARMED ROBBERY/2014-GS-100-7145
 - (b) 2014-GS-100-7111-ARMED ROBBERY

(c) 2014-GS-100-7142-ARMED ROBBERY/2014-GS-169-7147

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

(a) MARCH 20, 2018

(b) " " "

(c) " " "

6. Check whether a finding of guilty was made:

(a) after a plea of guilty ✓

(b) after a plea of not guilty

(c) after a plea of nolo contendere

7. Did you appeal from the judgment of conviction or the imposition of sentence?

NO

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

(a) the name of each Court to which you appealed:

i.

ii.

iii.

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

i.

ii.

iii.

(c) the date of each such result:

i.

ii.

iii.

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

i.

ii.

iii.

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

(a)

(b)

- (c) _____
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:
- (a) See Attached
- (b) _____
- (c) _____
11. State concisely and in the same order the facts which support each of the grounds set out in (10):
- (a) See Attached
- (b) _____
- (c) _____
12. Prior to this application have you filed with respect to this conviction:
- (a) any petition in a State Court under South Carolina Law? YES
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? _____
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? _____
- (d) any other petitions, motions or applications in this or any other Court? _____
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. POST CONVICTION RELIEF
- ii. _____
- iii. _____
- iv. _____
- (b) the name and location of the Court in which each was filed:
- i. Court of Common Plea 100 Broad St Charleston SC 29401
- ii. _____
- iii. _____
- iv. _____

(c) the disposition thereof:

- i. Relief in Part Dismissal in Part
- ii. _____
- iii. _____
- iv. _____

(d) the date of each such disposition:

- i. Sept 19th
- ii. _____
- iii. _____
- iv. _____

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

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

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

NO

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

(a) which grounds have been presented:

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

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

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

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

(a) _____
 (b) _____
 (c) _____

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

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

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. Christina Parnall
 ii. John M Apicella
 iii. Christopher L Murphy
146 Fairchild St Suite 130 Charleston SC 29412

- (b) the proceedings at which each such attorney represented you:

i. Preliminary hearing
 ii. Guiltg plea
 iii. P.C.R

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

Austin Hearing

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

STATE OF SOUTH CAROLINA)
County of Charleston, S.C.)

VERIFICATION

I, Antonio Simmons #279418, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

Antonio Simmons

SWORN to and subscribed before me this 21st
day of November, 2019.

Honzor Nelson (L.S.)
Notary Public

My Commission Expires: 8/5/2024

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

I, Antonio O. Simmons #279418, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

- (1) I am the applicant in this action and I believe I am entitled to redress.
- (2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.

Antonio O. Simmons
Applicant

SWORN or affirmed to and subscribed before me this

21st day of November, 2019.

Kangwa Robert
Notary Public

My Commission Expires:

8/5/2024

10 (a) The applicant was denied

his sixth and fourteenth
Amendment right to effective assistance of
appellate counsel, where post conviction counsel
failed to appeal the denial of post conviction
relief.

11 (a) litigant's are entitled to appeal from denial
of post conviction relief under Austin v State
409 S.E. 395. The Applicant did not voluntarily
waive his right to appeal and should be allowed
to file this subsequent application asking for
New counsel and a hearing pursuant to Austin

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON	)	FOR THE NINTH JUDICIAL CIRCUIT
	)	
Antonio Simmons, SCDC# 279418,	)	Case No.: 2019-CP-10-6370
Applicant,	)	
	)	
v.	)	RETURN AND MOTION TO DISMISS
	)	
State of South Carolina,	)	
Respondent.	)	
_____	)	

This matter comes before this Court by way of a successive application for post-conviction relief filed by Applicant Antonio Simmons. In response, Respondent the State of South Carolina moved for the matter to be summarily dismissed as successive to his prior post-conviction relief action pursuant to S.C. Code Ann. § 17-27-20, § 17-27-45, and § 17-27-90. After a review of all records before this Court, the current application, and Respondent's motion to dismiss, this Court provisionally dismisses this action based on the following:

I. Procedural History

Antonio Simmons (Applicant) is presently confined pursuant to orders of the Charleston County Clerk of Court. In December 2014, the Charleston County Grand Jury indicted Applicant for five counts of Armed Robbery (2014-GS-10-07111/2014-GS-10-07123/2014-GS-1007142/2014-GS-10-07145/2014-GS-10-07147).

Michael Apicella, Esquire represented Applicant. Assistant Solicitor David Osborne, Esquire prosecuted the case. On March 20, 2018, Applicant pleaded guilty as indicted to all charges before the Honorable R. Markley Dennis. Judge Dennis sentenced Applicant to a negotiated 28 years suspended on the service of 18 years on indictment 2014-GS-10-01711 and the other indictments were dismissed as part of the plea. Applicant did not appeal his conviction or sentence.

Applicant's Initial Post-Conviction Relief Action (2018-CP-10-4505)

Applicant filed his first application for post-conviction relief on September 18, 2018. In that application, Applicant alleged he was being held in custody unlawfully based on:

1. Due Process Violations
2. Prosecutorial Misconduct
3. Ineffective Assistance of Counsel
4. Violation of Equal Protection Law

Respondent made its return on January 10, 2019, requesting an evidentiary hearing be held. An evidentiary hearing was held on July 23, 2019, before the Honorable Michael G. Nettles, circuit court judge. Applicant was represented by Christopher Murphy, Esquire. Following the evidentiary hearing, Judge Nettles granted relief in part and denied relief in part. The order was filed on October 1, 2019. Applicant did not file an appeal.

II. Current Application

In his second and current application for post-conviction relief, Applicant alleges he is entitled to belated appellate review of his initial post-conviction relief action pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991).

Attached to this Return and incorporated by reference are the records of the Charleston County Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, the transcript from Applicant's plea, the records from Applicant's first post-conviction relief matter, and this current application. Respondent reserves the right to amend this Return upon receipt of any relevant materials.

III. MOTION TO DISMISS

Respondent moves for summary dismissal pursuant to section 17-27-70 of the South Carolina Code on the basis that there is no genuine issue of material fact which would necessitate an evidentiary hearing. See Welch v. MacDougall, 246 S.C. 258, 260, 143 S.E.2d 455, 456 (1965)

(requiring a PCR applicant to make a *prima facie* showing he is entitled to relief before the court will hold an evidentiary hearing). Because there is no question of law or fact to necessitate a hearing, the State requests this Court issue a conditional order of dismissal indicating the Court's intent to dismiss the application and its reasons for so doing.¹ See S.C. Code Ann. § 17-27-70(b) (establishing procedure for summary disposition of PCR applications); Leamon v. State, 363 S.C. 432, 434, 611 S.E.2d 494, 495 (2005) (summary disposition appropriate when there is no need to develop facts and the applicant is not entitled to relief). In making its return in support of the motion for summary judgment, the State would respectfully show this court:

SUCCESSIVE APPLICATIONS

Respondent also moves to summarily dismiss the application because it is successive to Applicant's prior post-conviction relief application and his prior motion for a new trial on this same ground. Courts disfavor successive applications and place the burden on applicants to establish that any new ground raised in a subsequent application could not have been earlier raised in a previous application. Foxworth v. State, 275 S.C. 615, 274 S.E.2d 415 (1981); Arnold v. State, 309 S.C. 157, 420 S.E.2d 834 (1992). Section 17-27-90 of the South Carolina Code states:

All grounds for relief available to an applicant under this chapter must be raised in his original, supplemental, or amended application. Any ground finally adjudicated or not so raised, or knowingly, voluntarily, and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding the applicant has taken to secure relief, may not be the basis for a subsequent application, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental, or amended application.

Section 17-27-90 is clear—successive post-conviction relief applications are forbidden unless an applicant can indicate a “sufficient reason” why new grounds for relief were not raised or were not

¹ A proposed Conditional Order of Dismissal consistent with this return and motion to dismiss is concurrently submitted for the Court's consideration.

properly raised in previous applications or actions challenging this conviction. Aice v. State, 305 S.C. 448, 409 S.E.2d 392 (1991). Any new ground raised in a subsequent application is limited to those grounds that “could not have been raised ... in the previous application.” Id. at 450, 409 S.E.2d at 394. If the applicant could have raised these allegations in a previous application, then the applicant may not raise those grounds in successive applications. Id. Applicant bears the burden of showing the allegations could not have been previously raised. Land v. State, 274 S.C. 243, 262 S.E.2d 735 (1980).

The South Carolina Supreme Court held the PCR rules “contemplate an adjudication on the merits of the original petition, one bite at the apple as it were.” Aice, 305 S.C. at 452, 409 S.E.2d at 395 (citing Gamble v. State, 298 S.C. 176, 178, 379 S.E.2d 118, 119 (1989)). The Court also noted, “[f]inality must be realized at some point in order to achieve a semblance of effectiveness in dispensing justice.” Id. at 451, 409 S.E.2d at 395. Here, Applicant has failed to show that a successive application is appropriate or why he could not have raised these claims in his prior post-conviction relief action.

Accordingly, the application should be dismissed as successive to Applicant’s prior post-conviction relief action.

IV. MOTION TO FILE OUT OF TIME

Respondent moves the Court accept this return for filing out of time. Respondent received the application on or about April 4, 2018, such that the return to the application was originally due June 4, 2018. See Rule 12(a), SCRPC (“[T]he State of South Carolina shall answer or otherwise respond to an application for post-conviction relief within 60 days after service of the application, if it arises out of a guilty plea, and 90 days if it arises out of a trial.”). Respondent did not previously move for an extension of time to file the return. Having completed the return required in this

matter, and in light of no demonstrable prejudice to Applicant as a consequence of the delay based on the clearly applicable procedural bars to his successive application, Respondent moves the Court accept the return as timely filed. See S.C. Code Ann. § 17-27-70(a) (establishing that the Court may fix the time in which the State must respond and that “respondent shall file with its answer the record or portions thereof that are material to the questions raised in the application.”); Guinyard v. State, 260 S.C. 220, 195 S.E.2d 392 (1973) (holding the trial court may extend the time for filing and that the time limit prescribed by the statute is not mandatory, but discretionary with the trial court.).

V. RESPONSE TO OTHER ALLEGATIONS

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

VI. CONCLUSION

WHEREFORE, Respondent moves to summarily dismiss the application because it was filed after the statute of limitations had expired and is successive to Applicant's prior post-conviction relief action.

Respectfully submitted,

ALAN WILSON
Attorney General

W. JEFFREY YOUNG
Chief Deputy Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General

BENJAMIN LIMBAUGH
Assistant Attorney General

By: s/ Benjamin Limbaugh
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
Telephone: (803) 734-3737

February 17, 2021

STATE OF SOUTH CAROLINA)

COUNTY OF CHARLESTON)

ANTONIO SIMMONS, #279418)

Applicant,)

vs)

STATE OF SOUTH CAROLINA,)

Respondent,)

IN THE COURT OF COMMON PLEAS

2019-CP-10-6370

CERTIFICATE OF SERVICE BY MAIL

JULIE J. ARNOLD
CLERK OF COURT

2021 FEB 22 AM 11:51

FILED

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 and Motion to Dismiss** in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Antonio Simmons, #279418 (MAA-0232-A)
Broad River Correctional Institution
4460 Broad River Road
Columbia, SC 29210

DATED this 17th day of February, 2021.



Jennifer Jennison, Administrative Coordinator
 For Respondent

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

COURT OF COMMON PLEAS
2019-CP-10-06370

Antonio O. Simmons)

) TRANSCRIPT OF RECORD

-vs-

)

) November 3, 2022

State of South Carolina)

) Charleston, South Carolina

B E F O R E:

The Honorable Diane S. Goodstein, Judge

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

Samantha J. Weidauer, Esquire
Attorney for the State

James K. Falk, Esquire
Attorney for the Applicant

Reported By:

Yvestre Torres, OCR
Circuit Court Reporter for the
Ninth Judicial Circuit

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EXHIBITS

<u>NO</u>	<u>DESCRIPTION</u>	<u>ID</u>	<u>EVIDENCE</u>
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NO EXHIBITS INTRODUCED

INDEX

<u>WITNESS</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>
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Christopher Murphy

Mr. Falk	43			
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Ms. Weidauer		43		
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1 THE COURT: Thank you. Please be seated.
2 Thank you so much.

3 (Pause.)

4 THE COURT: All right. Yes, ma'am.

5 MS. WEIDAUER: Your Honor, would you like
6 me to call the case?

7 THE COURT: Sure. It's my understanding
8 there's a motion. So for the benefit of our record,
9 let's put on the -- just record what the case is,
10 then make your motion.

11 MS. WEIDAUER: All right. This is Antonio
12 Simmons, Case No. 2019-CP-10-6370. This matter comes
13 before the Court by way of a successive application for
14 post-conviction relief. In response, the Respondent,
15 the state of South Carolina, moves for the matter
16 to be summarily dismissed as successive to his prior
17 post-conviction relief action.

18 In December 2014, the Charleston County
19 Grand Jury indicted Applicant for five counts of armed
20 robbery. Michael Apicella represented Applicant;
21 Assistant Solicitor David Osborne prosecuted the
22 case. On March 20th, 2018, Applicant pleaded guilty,
23 as indicted, to all charges before the Honorable Markley
24 Dennis.

25 Judge Dennis sentenced Applicant

1 to a negotiated 28 years, suspended on the service
2 of 18, and the other indictments were dismissed as
3 part of a plea. Applicant did not appeal his conviction
4 or sentence.

5 Applicant filed his first PCR on September
6 18, 2018. In that application, Applicant alleged
7 ineffective assistance of counsel, prosecutorial
8 misconduct, due process, and violation of equal
9 protection. Respondent made its return on January
10 10, 2019, and requested an evidentiary hearing.
11 An evidentiary hearing was held July 23rd of 2019
12 before the Honorable Michael Nettles. Applicant
13 was represented by Christopher Murphy.

14 Following the evidentiary hearing,
15 Judge Nettles granted relief in part and denied relief
16 in part. The order was filed on October 1st of 2019,
17 and Applicant did not file an appeal. It is also my
18 understanding that Applicant was resentenced, based
19 on that grant of relief, to 28 years of imprisonment.

20 THE COURT: To 28 years?

21 MS. WEIDAUER: Yes.

22 THE COURT: Okay. And then this PCR
23 followed?

24 MS. WEIDAUER: Yes, this PCR followed,
25 Your Honor.

1 THE COURT: All right. And there's
2 a motion?

3 MR. FALK: Yes, Your Honor.

4 THE COURT: Yes.

5 MR. FALK: My client and I are not on the
6 same page in this case because this is -- the only
7 reason we're here is really for Austin relief. We can
8 put Mr. Murphy up on the stand, and he'll say, yeah,
9 I should have filed an appeal. But my client has
10 been wanting -- my client has asked me numerous times,
11 and I haven't done it, to subpoena witnesses for this
12 for, like, an evidentiary hearing.

13 And, you know -- but I have explained to him
14 that, you know, doing that, the only issue that I'm here
15 -- we can get this decision today. I'm sure Mr. Murphy
16 can testify that way; I'm sure the judge would grant him
17 Austin relief on appeal of his PCR. He wants to enter
18 new evidence, and maybe it's best if he went pro se.
19 I'm just not sure because we are absolutely not on the
20 same page on this case.

21 THE COURT: But the grounds that have been
22 filed at this moment with regards to the PCR is the
23 Austin relief, correct?

24 MR. FALK: Right.

25 THE COURT: Okay.

1 MR. FALK: But ---

2 THE COURT: And the question is whether
3 or not -- and I got it.

4 MR. FALK: I mean, the reason why Mr. Geel
5 is not here is that he could still have a PCR from
6 his sentencing, from Mr. Geel's representation at his
7 resentencing hearing.

8 THE COURT: Yes.

9 MR. FALK: And that's still right for PCR.

10 THE COURT: Yes.

11 MR. FALK: He can still do that. And,
12 you know, there's probably ---

13 THE COURT: Yes, without a doubt.

14 MR. FALK: There's probably more issues
15 there, but that's not what he wants.

16 THE COURT: Okay. Got it.

17 MR. FALK: And I just need some guidance
18 from the Court ---

19 THE COURT: Sure.

20 MR. FALK: --- as to whether or not --
21 I mean, if the Court orders me to subpoena these
22 witnesses, I'll do it, but I don't think ---

23 THE COURT: Well, let me ask this question.
24 What is the relief that is granted? What is the desire?
25 Let me sort of back into it. What is the relief that

1 Mr. Simmons has prayed for that is before the Court
2 in the PCR? Is it the Austin relief?

3 MR. FALK: Typically, it's the Austin
4 relief.

5 THE COURT: It's the Austin relief. Well,
6 that's -- if you will, that's where we are at this
7 moment.

8 MR. FALK: Right.

9 THE COURT: So if we would go forward on
10 the merits today, that would be all that would be before
11 the Court because the State has got to be put on notice
12 of any other ground, not that it can't be amended.
13 I suppose it could be amended, but if what we're about
14 today -- and is that accurate, that's what the State
15 would be here ready to deal with, is the Austin --
16 request for Austin relief?

17 MS. WEIDAUER: Yes, Your Honor.

18 THE COURT: And I gather you've spoken
19 with Mr. Murphy as well?

20 MS. WEIDAUER: Yes.

21 THE COURT: All right. Very well.

22 MR. FALK: Because the issues that we would
23 raise ---

24 THE COURT: In the PCR.

25 MR. FALK: In the amended PCR ---

1 THE COURT: Right.

2 MR. FALK: --- would be all the issues that
3 were briefed before the Court of Appeals on the appeal
4 of the resentencing.

5 THE COURT: Right.

6 MR. FALK: So that was already through
7 the process.

8 THE COURT: Right.

9 MR. FALK: When he filed this PCR ---

10 THE COURT: Right.

11 MR. FALK: --- you know, we initially were
12 going to stay this proceeding until the Appellate Court
13 ruled, but he elected instead to abandon his -- and so
14 we're here. So, I mean, the State is aware of what the
15 issues are, and that's why Geel was on the -- you know,
16 was on the docket for today because that's the only
17 thing I could do. That's not what my client is looking
18 for. He's looking for more of an evidentiary hearing.

19 THE COURT: I gotcha. I gotcha. Well --
20 gotcha. Well, how are you, Mr. Simmons?

21 THE APPLICANT: How are you doing?

22 THE COURT: I am fine. Now before I say
23 anything, I want you to brief for me because you've
24 got several options, but I want you to hear what
25 I'm going to tell you, the procedure. We have to follow

1 the procedure, and let me tell you why. You know,
2 Mr. Falk has -- he's probably -- I'm confident that
3 he's as experienced in post-conviction relief matters
4 as any lawyer in the state of South Carolina and maybe
5 the United States. So you've got -- so what he needs --
6 what he and I are doing right now is we're talking
7 procedure to procedure to procedure, okay?

8 THE APPLICANT: Right.

9 THE COURT: And that's why I wanted to
10 confirm on behalf of the State that they are on the same
11 page.

12 THE APPLICANT: Right.

13 THE COURT: So, I'm going to talk to you
14 a little bit about the procedure. But when I do that,
15 I don't want you to get frustrated ---

16 THE APPLICANT: Right.

17 THE COURT: --- because there are -- it's
18 like driving in the mountains.

19 THE APPLICANT: Right.

20 THE COURT: You know, you've got to go this
21 way, and you can go that way, and you can go this way,
22 but you get to the top of the mountain.

23 THE APPLICANT: Right.

24 THE COURT: So -- but you've got to follow
25 the right trail. You know what I mean?

1 THE APPLICANT: Right.

2 THE COURT: So, I want you to just bear
3 with me just for a minute, okay?

4 THE APPLICANT: All right.

5 THE COURT: Now, the first thing that I want
6 you to hear is, I want you to hear where I'm coming
7 from, okay? I want you to hear me. You and I just met.
8 I don't know -- I know very, very little about your
9 case. These lawyers were kind enough to give me, like,
10 a thumbnail so that I would know, okay, tell me what
11 Mr. Simmons was charged with, and where are we in the
12 process, okay?

13 THE APPLICANT: All right.

14 THE COURT: So that's -- so, I've just been
15 brought up to speed; you've been living with this for
16 years.

17 THE APPLICANT: Right.

18 THE COURT: So, I'm trying to get, like,
19 a little bit of the way ---

20 THE APPLICANT: Right.

21 THE COURT: --- when you're all the way.

22 THE APPLICANT: All right.

23 THE COURT: And I want you to also
24 understand that I understand you've got your life
25 on the line. I get it.

1 THE APPLICANT: Right.

2 THE COURT: So, please, hear me with that.

3 THE APPLICANT: All right.

4 THE COURT: But here's the other thing.

5 Now let me tell you the other thing I've got. I've
6 got five armed robberies out here that I'm mindful
7 of, and I want you to know that.

8 THE APPLICANT: Right.

9 THE COURT: And I want you to know that
10 I am mindful of that.

11 THE APPLICANT: Right.

12 THE COURT: And that I'm also mindful
13 that the minimum sentence on that is ten years, right?

14 THE APPLICANT: Right, right.

15 THE COURT: So, I'm looking at, like, 50.

16 THE APPLICANT: Right, right, right.

17 THE COURT: So, I just want you to know
18 I get the seriousness.

19 THE APPLICANT: Right.

20 THE COURT: You with me?

21 THE APPLICANT: Right.

22 THE COURT: And it's, like, real. It's like
23 a real -- it's not fake; it's, like, real. You know
24 what I mean? So, I want you to know that I know that.

25 THE APPLICANT: Right.

1 THE COURT: Okay. What has been filed
2 as of this moment? As of -- doesn't mean ---

3 THE APPLICANT: An Austin hearing.

4 THE COURT: Exactly. And that's on the
5 appeal.

6 THE APPLICANT: Right.

7 THE COURT: So, you know, my husband is --
8 was in the Army in Vietnam, and he was a tank commander.

9 THE APPLICANT: Right.

10 THE COURT: And he's always told me shoot
11 the first tank -- so don't worry about what's coming,
12 but you've got to worry about what's here.

13 THE APPLICANT: Right.

14 THE COURT: The first tank is your Austin
15 hearing.

16 THE APPLICANT: Right.

17 THE COURT: And so first thing for you to
18 decide is whether or not you want to appeal, and it
19 would be an appeal from ---

20 MR. FALK: Grant in part ---

21 THE COURT: Of ---

22 MR. FALK: Your Honor, Judge Nettles
23 actually granted partial relief.

24 THE COURT: Yes, I know.

25 MR. FALK: And so -- but that's the only

1 thing that's there.

2 THE COURT: Yes, for the appeal.

3 MR. FALK: Yes.

4 THE COURT: But not the resentencing because
5 that was dismissed, right? So that's gone.

6 MR. FALK: The appeal of the resentencing
7 is dismissed.

8 THE COURT: I know.

9 MR. FALK: Yeah.

10 THE COURT: That's been dismissed, so
11 that's gone. So what remains would be whether or not
12 Judge Nettles should have granted that relief, right?
13 That's what's up on Austin, and that's a win. Does that
14 make sense? That's a win, meaning, Mr. Murphy agrees
15 that he didn't advise you of that, right? So that's
16 the first tank -- that's your first issue.

17 That's -- but here's the thing. That
18 is -- that is all that is here today. Now, now, now,
19 if you want to raise more issues in your PCR, then --
20 and you're looking at me like why would I want to raise
21 more issues? If you want to say, I think that my lawyer
22 in my, what, PCR -- resentencing, my resentencing,
23 was ineffective, that's what this one is about. And
24 you can amend; you can move to amend your allegations
25 to add additional allegations. See what I'm saying?

1 THE APPLICANT: Right.

2 THE COURT: But that has to be done before
3 the Court can move to additional, to more issues,
4 than the Austin issue. Let me tell you why. There's
5 a reason for it. Let me tell you what the reason
6 is because it'll make sense to you, because they only
7 know about the one thing, and the State is entitled
8 to know what it is they're supposed to meet, you know,
9 what -- they're supposed to know what they're supposed
10 to prepare for. And all that they know they're supposed
11 to prepare for is the Austin hearing. They've probably
12 prepared too long on that one. They kind of know what
13 that is.

14 So the question is, is if there are
15 additional issues that you want to raise in your PCR,
16 this PCR, in addition to the Austin, there has to
17 be an amendment for those to be able to be heard.
18 You with me?

19 THE APPLICANT: Yes, ma'am. Can I speak?

20 THE COURT: Yes.

21 THE APPLICANT: The judge told me ---

22 THE COURT: Are you okay with that,
23 Mr. Falk?

24 MR. FALK: Yes, Judge.

25 THE COURT: I want you to listen to me for

1 one second. If you feel Mr. Falk tugging on you,
2 that's because he's afraid you might violate your Fifth
3 Amendment right, okay? So if you feel a tug on you,
4 then you've got to umm, because let me tell you why,
5 this is all on the record.

6 THE APPLICANT: Right.

7 THE COURT: And what we don't want to do
8 is we don't want to -- what's the term? We don't want
9 to thicken the stew. In other words, we don't want
10 to go any further than we need to go, right?

11 THE APPLICANT: Right.

12 THE COURT: All right. Go ahead.

13 THE APPLICANT: Well, I'm trying to explain
14 myself a little bit. When the first judge I've been
15 in front of, she told him to amend everything because
16 everything happened at one case. See what I'm saying?

17 THE COURT: Okay.

18 THE APPLICANT: So, I was trying to explain
19 to him that a lot of things were violated, and it all
20 happened in one case.

21 THE COURT: Right.

22 THE APPLICANT: So that's why she told him
23 to amend it, but nothing new, just everything that
24 happened in that one case.

25 THE COURT: Now are we -- can I ask

1 a question?

2 THE APPLICANT: Yes, ma'am.

3 THE COURT: Okay. Are we talking
4 about after the first sentencing with Judge Dennis,
5 or the second sentencing with Judge Dennis? Which time
6 are we talking? I know it's getting confusing because
7 you've had lots of procedures.

8 THE APPLICANT: Right. I think it was
9 the last one.

10 THE COURT: This is the last one.

11 THE APPLICANT: No ---

12 THE COURT: After the last sentencing with
13 Judge Dennis, or the first sentencing with Judge Dennis?
14 I bet it was the first sentencing with Judge Dennis.

15 THE APPLICANT: It was with the one when
16 I had that lawyer Murphy.

17 THE COURT: Uh-huh, uh-huh, uh-huh.

18 THE APPLICANT: That's what I'm trying
19 to tell you. All this happened ---

20 THE COURT: That's right.

21 THE APPLICANT: That's why she amended
22 everything.

23 THE COURT: Okay. All right. Now, listen
24 to me. On that one, now that one has been heard
25 and you won partially, okay? You won that. But that's

1 the one that, as I understand it, that the Austin
2 warning wasn't given.

3 MR. FALK: The PCR from his trial court
4 plea ---

5 THE COURT: That was granted.

6 MR. FALK: That was granted, but the appeal
7 from that ---

8 THE COURT: From that.

9 MR. FALK: That's why it's an Austin relief.

10 THE COURT: Sure, sure. And so let me ask
11 you this question. When you go back -- I want you to
12 go back with me to the order of Judge Nettles, okay?
13 I want you to think about that order, and that's the
14 order that said that I'm not going to disturb anything,
15 other than Judge Dennis's sentence that, as I understand
16 it, was 28 years, suspended to 17.

17 THE APPLICANT: Yes, ma'am.

18 THE COURT: And Judge Nettles said, I think
19 that was an illegal sentence.

20 THE APPLICANT: Yes, ma'am.

21 THE COURT: And so I'm going to -- I've
22 got to grant -- I'm going to grant the PCR with regards
23 to the sentence, but I'm going to affirm. In other
24 words, there wasn't any problem with the underlying
25 trial, okay? That was Judge Nettles's decision, okay?

1 You with me? Let me do it again because you're nodding,
2 and I get it. When -- you had your trial, right?

3 THE APPLICANT: Yes, ma'am.

4 THE COURT: All right. Then you filed
5 a PCR, right?

6 THE APPLICANT: Yes, ma'am.

7 THE COURT: Okay.

8 THE APPLICANT: Is this the first one?

9 THE COURT: The first PCR.

10 THE APPLICANT: Yes, ma'am.

11 THE COURT: And it was at that point
12 that you were told whatever you want to complain about
13 at trial, you've got to put it in your petition, right?

14 THE APPLICANT: Right.

15 THE COURT: And you did that.

16 THE APPLICANT: Right.

17 THE COURT: You amended and put it in.

18 THE APPLICANT: Right.

19 THE COURT: Then, you came and you had
20 a hearing, right? Yes?

21 THE APPLICANT: Yes, ma'am.

22 THE COURT: Okay. And that was before
23 Judge Nettles. Remember Judge Nettles? I'm trying
24 to ---

25 THE APPLICANT: Not quite.

1 THE COURT: Well, I understand. He's
2 a dark-haired gentleman.

3 THE APPLICANT: It was so much.

4 THE COURT: Yeah, you've been doing
5 it a little bit. All right. So you came before
6 Judge Nettles; you had a trial before Judge Nettles.
7 And what he said was I think there wasn't -- I don't
8 think there was ineffective assistance of counsel.
9 I think that's fine. His lawyer did a fine job.
10 However, Judge Dennis gave you an illegal sentence,
11 and you've got to go back and be resentenced.

12 THE APPLICANT: Right. Okay.

13 THE COURT: Right?

14 THE APPLICANT: Yeah.

15 THE COURT: All right. Okay. Now if we're
16 right here, if we're right here, and you think uh-uh,
17 uh-uh, I think I did show ineffective assistance
18 of counsel. I think I did show that.

19 THE APPLICANT: Yes, ma'am.

20 THE COURT: And I want to appeal that.

21 THE APPLICANT: Yes, ma'am.

22 THE COURT: Okay. That's what we're here
23 about today.

24 THE APPLICANT: Okay. I understand.

25 THE COURT: You with me?

1 THE APPLICANT: Right, right, right.

2 THE COURT: And I think that's right.

3 Based on what they told me, that might be a winner.

4 THE APPLICANT: Right, right.

5 THE COURT: So then what would happen,

6 then what would happen, is that the appeal from

7 Judge Nettles that said there was not ineffective

8 assistance of counsel, that would go to the Supreme

9 Court. See what I'm saying?

10 THE APPLICANT: Right.

11 THE COURT: And they might say, we agree

12 with you, you've got to go back. We think Judge Nettles

13 was wrong, okay?

14 THE APPLICANT: Right.

15 THE COURT: And then they do whatever they

16 would do.

17 THE APPLICANT: Right.

18 THE COURT: Okay. That's what's before

19 me right now.

20 THE APPLICANT: All right.

21 THE COURT: So that's a good place, right?

22 THE APPLICANT: That's the one where

23 he abused his discretion.

24 THE COURT: Well, that's the one -- that's

25 the Austin hearing, right?

1 THE APPLICANT: Yes, ma'am.

2 THE COURT: And that would allow you to
3 appeal what Judge Nettles did. Are you hanging with me?

4 THE APPLICANT: Right. That's the one where
5 he said he didn't see no merit.

6 THE COURT: To what you said was ineffective
7 assistance of counsel at the trial.

8 THE APPLICANT: Right.

9 THE COURT: At the trial.

10 THE APPLICANT: Right.

11 THE COURT: Then you could appeal that.

12 THE APPLICANT: Right.

13 THE COURT: Does that make sense? You with
14 me?

15 THE APPLICANT: I'm with you.

16 THE COURT: Okay. Then the question
17 is -- now let's walk a minute, okay? And with that,
18 you appeal that, then the Supreme Court -- you know,
19 you appeal that. And then the Appellate Court would
20 turn around and look, you know, it would look. And they
21 would say, was the decision of Judge Nettles correct?

22 THE APPLICANT: Right.

23 THE COURT: Was that correct? You know
24 what I mean? And they would do whatever they do about
25 that, right?

1 THE APPLICANT: Right.

2 THE COURT: Now, now, this PCR, that's what
3 this one is about. You with me?

4 THE APPLICANT: Yes, ma'am.

5 THE COURT: Okay.

6 THE APPLICANT: All right.

7 THE COURT: Now let me ask you this
8 question. With regards to the resentencing, where's
9 that? That is ---

10 MR. FALK: Well, we've discussed this
11 a couple of times. I'm not sure if that should
12 be a separate action ---

13 THE COURT: It seems to me that once --
14 you know, because there's -- isn't there an appeal
15 that's been filed with regards to that because he had
16 to do two, he had to resubmit the appeal, or it had
17 to go to PCR ---

18 MR. FALK: So he dismissed the appeal ---

19 THE COURT: So that's not this PCR?

20 MR. FALK: No.

21 THE COURT: That's another PCR.

22 MR. FALK: But the point is because there's
23 no real rule here, I think, we could probably amend
24 this PCR to include those claims from the ineffective
25 assistance of sentencing counsel -- resentencing

1 counsel. Or does that have to be a separate number?

2 THE COURT: I think it would have to
3 be separate for this reason because it is the remedy
4 that was provided by Judge Nettles, the resentencing,
5 and it's the resentencing that he would have that
6 concern on the ineffective assistance of resentencing
7 counsel. So what do you all think?

8 MS. WEIDAUER: I think it should be
9 separate, personally, because there were two different
10 judges, he's had two different attorneys, and there's
11 two cases.

12 THE COURT: Yeah, yeah. And the question
13 then is if it's appropriate for Austin, is the time
14 ticking for the PCR on the resentencing?

15 MS. WEIDAUER: I would argue no because
16 that order was a partial grant and a partial denial.
17 He's already received, through that resentencing,
18 a partial grant. So that partial denial was what Austin
19 was based on, and I don't think that they're connected.
20 They should be bifurcated, the partial grant to the
21 partial denial.

22 THE COURT: So what would happen on the PCR
23 with regards to resentencing?

24 MR. FALK: I think we still have the time.

25 MS. WEIDAUER: I'm not sure ---

1 THE COURT: I don't think you can chop
2 them up. I don't think you chop up PCRs. Hang tight.
3 I'll get you.

4 MS. WEIDAUER: It's a tricky question.

5 THE COURT: Because the Court can look
6 at both.

7 MS. WEIDAUER: Right. So can you ask your
8 question one more time, so I can be clear on what you're
9 asking?

10 THE COURT: In other words -- well, has
11 the PCR been filed arising out of the resentencing?

12 MR. FALK: No.

13 THE COURT: Okay. So it could be considered
14 that is premature if the Austin appeal is granted
15 because it would have to wait for the Austin appeal
16 to be resolved, and then the time would tick once
17 the appeal was over.

18 MS. WEIDAUER: Well, my understanding would
19 be that they would just give -- from the whole order,
20 I guess. So, yes, even with partial grant -- okay.

21 THE COURT: So don't think that ---

22 MS. WEIDAUER: Yes, Your Honor.

23 THE COURT: --- if Mr. Simmons wanted to
24 file a PCR with regards to the resentencing, the clock
25 would begin to tick upon the appeal being concluded

1 from the PCR grant -- partial grant, partial denial,
2 I think. Yes?

3 MS. WEIDAUER: I think so.

4 MR. FALK: Sounds right.

5 THE COURT: Okay. Now -- yes?

6 THE APPLICANT: Can I interrupt before
7 we go any further because I've got a question?

8 THE COURT: Uh-huh.

9 THE APPLICANT: Since we're going back
10 to that first one, on the first PCR, I put in equal
11 protection that -- and that protection of constitutional
12 right being violated. So, I just want to know if y'all
13 had looked at that too.

14 THE COURT: Good for you. That was before
15 Judge Nettles. And that was, as I understand it now,
16 as I understand it, that was denied. That's what would
17 be on appeal, see. That would be the issue that would
18 go up to the Supreme to say that shouldn't have been
19 denied. See what I'm saying?

20 THE APPLICANT: That's why she's saying
21 that we can't -- we cannot go around that because we've
22 got to protect his constitutional right, and that's the
23 biggest part of this case because my amendment has been
24 violated.

25 THE COURT: Well, that's what you've raised.

1 THE APPLICANT: Right.

2 THE COURT: You raised that in your first
3 PCR over the trial, over the trial, right?

4 THE APPLICANT: Right. And I feel I should
5 be resentenced. I need to be released from all these
6 amendment violations.

7 THE COURT: Well, that's what you told
8 Judge Nettles, remember?

9 THE APPLICANT: Yes, ma'am.

10 THE COURT: Judge Nettles disagreed with
11 your position.

12 THE APPLICANT: Right.

13 THE COURT: So that's what you would appeal.
14 See what I'm saying?

15 THE APPLICANT: Right.

16 THE COURT: And we don't know what -- it
17 would be impossible to know what the Appellate Court
18 would do, right? You just can't know. So they might
19 grant, they might review, and agree with the State,
20 right?

21 THE APPLICANT: Right.

22 THE COURT: And if they agree with you,
23 you come back. And then you might have a new trial.
24 You don't know what would happen, but we can't know
25 because we don't know what the Appellate Court would

1 do, right? You with me?

2 THE APPLICANT: Yes, ma'am.

3 THE COURT: But you're concerned about your
4 arguments because that's the basis of a post-conviction
5 relief case, is that at -- what you're saying is that
6 at my trial, my constitutional rights were violated.
7 Yes?

8 THE APPLICANT: Yes.

9 THE COURT: And that PCR has been heard,
10 right?

11 THE APPLICANT: Right.

12 THE COURT: You won part of that, and
13 you lost part of that. But you've not had an appeal
14 on that, but that's what we're going to be talking
15 about today. Are you entitled to appeal the denial
16 of your PCR where it said there was ineffective
17 assistance of counsel? You with me?

18 THE APPLICANT: Right. And that's the one
19 that they say they didn't see no merit for it and there
20 was.

21 THE COURT: There wasn't any violation ---

22 THE APPLICANT: Right.

23 THE COURT: --- of your counsel at your
24 trial.

25 THE APPLICANT: Right.

1 THE COURT: Yes?

2 THE APPLICANT: Yes, ma'am.

3 THE COURT: You're clear?

4 THE APPLICANT: Right.

5 THE COURT: It's a lot. I mean, it's
6 complicated.

7 THE APPLICANT: Right.

8 THE COURT: I mean, it's complicated.

9 THE APPLICANT: And what I'm trying to
10 say is if my lawyer didn't default and took the proper
11 steps, it would have kicked me out because I would
12 have showed the facts, how my constitutional right
13 was violated.

14 THE COURT: And that's what was before Judge
15 Nettles, right? That's what you showed Judge Nettles;
16 he disagreed with you. So that's what would go up.
17 That's what -- you haven't been able to appeal that,
18 so that's what would go up to the Appellate Court,
19 right?

20 THE APPLICANT: Right. And that's what
21 I was saying, instead of going all the way back
22 to square one, all the way to sentencing, if I could
23 have -- by showing them that my rights were violated,
24 it would have just kicked me out instead of going back
25 all the way to square one, being resentencing. See what

1 I'm saying?

2 THE COURT: I do. I do, I do. And --
3 but I do want to be clear with you about one thing.
4 If, if, Judge Nettles had granted your PCR in its
5 entirety, you would have gotten -- you would have
6 received a new trial on everything. You with me?
7 You've been able to get -- and you may be found guilty,
8 maybe found not guilty, or it might be dismissed.
9 You don't know.

10 But what's important is that judge --
11 you need to remember that when you presented your case
12 to Judge Nettles ---

13 THE APPLICANT: Right.

14 THE COURT: --- that your constitutional
15 rights have been violated at your trial ---

16 THE APPLICANT: Right.

17 THE COURT: --- he denied that part,
18 that part. Now he didn't deny everything, but he denied
19 that part. That is what we're talking about today,
20 but you can appeal that.

21 THE APPLICANT: All right.

22 THE COURT: Right?

23 THE APPLICANT: Right.

24 THE COURT: And Mr. Murphy, I understand
25 from Mr. Falk, from your lawyer, Mr. Murphy said, no,

1 I didn't tell him that he could appeal if he wanted
2 to.

3 THE APPLICANT: And I've also seen a case
4 law on that where a lawyer default, and they had
5 to throw the whole case out because of that, because
6 if the lawyer didn't default, the case would have been
7 thrown forward and those constitutional rights had been
8 violated, and I submit the facts, it would have gotten
9 thrown out at that hearing right then.

10 THE COURT: Well, let me tell you. I think
11 that -- let me just say this. Typically and normally,
12 if a person wins the ineffective assistance of counsel
13 part of their case, normally what happens is that
14 there's a new trial granted, but that's not where
15 we are today.

16 Where you are today is -- the question is
17 whether you want, since Judge Nettles denied that part
18 of your case, do you want to take that to the Appellate
19 Court and have them either agree or disagree with him,
20 right? Because if they believe that Judge Nettles
21 committed an error, then you have -- then you can retry
22 your PCR case. Do you want me to say that again?

23 THE APPLICANT: Yeah -- I get what you're
24 saying.

25 THE COURT: It's complicated.

1 It's complicated.

2 THE APPLICANT: You're saying recharge --
3 it means, like, having another hearing.

4 THE COURT: Having another PCR hearing on
5 whether or not your constitutional rights were violated.

6 THE APPLICANT: And that there was ---

7 THE COURT: And then if there's
8 a determination made that your constitutional rights
9 were violated, then you get a new trial.

10 THE APPLICANT: I understand, but I'm saying
11 that would put you back all the way to square one,
12 right?

13 THE COURT: It puts you back -- this would
14 put you back to square one.

15 THE APPLICANT: Then you have to take
16 it back to the county?

17 THE COURT: Square one might be okay.

18 THE APPLICANT: See, that's what I'm talking
19 about.

20 THE COURT: Square one might be okay.

21 THE APPLICANT: And it'll put you all
22 the way back to the county. But, like, if the judge
23 have violated -- like you said, that hearing part
24 showing my constitutional rights have been violated,
25 if he had granted it, it would have kicked me out right

1 then.

2 THE COURT: No, no. I gotcha. No,
3 it wouldn't have kicked you out. What it would have
4 done is it would have taken -- it would have granted
5 you a new trial. You would have been granted a new
6 trial on all your charges.

7 THE APPLICANT: All right.

8 THE COURT: I mean, I know you would like
9 to have it all kicked out. I get that 100 percent,
10 but getting a new trial would be a good thing.
11 But we don't know what the Court of Appeals is going
12 to do, right? We can't possibly know. You don't know;
13 I don't know, right?

14 THE APPLICANT: So you're telling me they're
15 reviewing it right now.

16 THE COURT: No, no. Here's what's happening
17 right now. Right now what we're talking about is that
18 what we can do today in this PCR, right ---

19 THE APPLICANT: Right.

20 THE COURT: --- as it stands today, what's
21 before me to decide is whether or not you were told,
22 Mr. Simmons, I know that Judge Nettles ruled against
23 you in part of your case, and you have a right to appeal
24 that. Apparently, according to Mr. Falk, Mr. Murphy
25 was ---

1 THE APPLICANT: Ineffective.

2 THE COURT: Austin is a little bit
3 different. Austin is a little bit different. Austin
4 says that you're supposed to tell folks that they
5 can appeal. And so Mr. Murphy, as I understand it,
6 says, yeah, I forgot to tell him that he can appeal,
7 that half of the case that Judge Nettles did not grant.
8 And so what the Austin case does is just gets your
9 appeal.

10 THE APPLICANT: All right.

11 THE COURT: Gives you that back.

12 THE APPLICANT: Right. What about the ---

13 THE COURT: And that's what's before
14 me today.

15 THE APPLICANT: So the Judge Murphy one,
16 then trying to ---

17 THE COURT: No. No, no, no, no. Uh-uh, no.

18 THE APPLICANT: All right.

19 THE COURT: No, no, because Chris,
20 Mr. Murphy, he represented you in your PCR, right?

21 THE APPLICANT: Right, and he did not
22 appeal.

23 THE COURT: Well, that's -- well, that's
24 right. Because it was a part win and a part not win,
25 and it's, like, yeah, I agree. I forgot to tell him

1 that he could appeal, Judge Nettles ---

2 THE APPLICANT: Ruling.

3 THE COURT: --- finding that there was no
4 ineffective assistance of counsel. I forgot to tell
5 him. So the Austin -- and that's what Mr. Falk is
6 telling me. I haven't talked to Mr. Murphy about that;
7 that's what Mr. Falk is telling me.

8 THE APPLICANT: Right.

9 THE COURT: That's so, you're entitled
10 to an Austin appeal, then you get your chance to appeal
11 the denial of -- the denial by Judge Nettles where
12 he didn't think there was any ineffective assistance
13 of counsel.

14 THE APPLICANT: Right, right.

15 THE COURT: Got it?

16 THE APPLICANT: Right.

17 THE COURT: It's complicated, but that's
18 what's before me today. And I would think you would
19 want to do that, yes?

20 THE APPLICANT: Right, right. And that
21 would bring all those ---

22 THE COURT: And when that -- if the
23 Appellate Court agrees with you, then you'll come back,
24 and you would have another PCR hearing on ineffective
25 assistance of counsel.

1 THE APPLICANT: Based on the same ones that
2 I put in, right?

3 THE COURT: If you want to add some more,
4 you can add some more.

5 THE APPLICANT: No, just those same ones ---

6 THE COURT: You could do more if you wanted
7 to.

8 THE APPLICANT: Right. That's the one where
9 I told them that he abandoned me instead of an appeal.

10 THE COURT: Well -- well, where we would be
11 today is that -- did y'all agree that this is -- there's
12 an Austin appeal?

13 MS. WEIDAUER: We would like to, of course,
14 call Mr. Murphy.

15 THE COURT: And have him verify.

16 MS. WEIDAUER: Yes.

17 THE COURT: Well, I may be stepping right
18 out there maybe and go, I don't know what you're talking
19 about Goodstein. Yeah, assuming all of that ---

20 THE APPLICANT: Right.

21 THE COURT: --- you would have your appeal.

22 THE APPLICANT: All right.

23 THE COURT: Are you with me?

24 THE APPLICANT: Right. I had a defense
25 witness that Murphy didn't call to the stand either.

1 THE COURT: Well, well, that would be --
2 first step -- first step is the appeal.

3 THE APPLICANT: All right.

4 THE COURT: Right?

5 THE APPLICANT: Right.

6 THE COURT: First step is the appeal, right?
7 Okay. Got it.

8 THE APPLICANT: Gotcha.

9 THE COURT: Okay. Got it. All right.
10 Yes?

11 MR. FALK: Just to clarify, just to avoid
12 problems down the road.

13 THE COURT: Sure.

14 MR. FALK: There's no new evidence that
15 would come in, so there's no reason to subpoena any
16 witnesses for the appeal because the appeal is going
17 to be based solely on the transcript of the hearing
18 before Judge Nettles.

19 THE COURT: That's right.

20 MR. FALK: And Mr. Murphy.

21 THE COURT: You can't, based -- yes. Yeah,
22 that's really important for you to know.

23 THE APPLICANT: All right. Well, listen.
24 On that hearing, on that PCR, he did subpoena a witness,
25 and that's the witness that he didn't call to the stand.

1 That's what made it ineffective assistance of counsel.

2 THE COURT: But ---

3 THE APPLICANT: Because he didn't call
4 that defense witness to the stand who he subpoenaed
5 to the court.

6 THE COURT: I gotcha.

7 THE APPLICANT: That's when the judge
8 said he didn't see no merit because the defense witness
9 right here was at that trial, that my lawyer didn't
10 object the call to the stand.

11 THE COURT: Okay, okay. So that -- yes,
12 I understand.

13 THE APPLICANT: So we got a subpoena.

14 MS. WEIDAUER: And I think he's trying
15 to make the argument that he wants to argue ineffective
16 assistance of PCR counsel.

17 THE COURT: Yes, he is.

18 MS. WEIDAUER: And that's what I was just
19 going to ask that you explain to him, that that's not
20 an allegation that you can raise on a PCR.

21 THE COURT: Yeah, yes, yeah, yes. So --
22 right.

23 MS. WEIDAUER: As to Austin.

24 THE COURT: Right. That's right. Yeah,
25 exactly. So what you're talking about is different --

1 is a different action. It's called PCRing the PCR
2 lawyer, right, and that's what you're saying. So let's
3 be clear about that.

4 THE APPLICANT: Can you explain that again?

5 THE COURT: I can. Yes, I can. So what
6 you said -- what I think you just said, now you tell
7 me if I heard it wrong because I hear things wrong
8 sometimes. I do. I really do. You would be surprised
9 how many times lawyers say, Lord, that judge heard
10 that wrong. Now what you're telling me at this moment
11 is that you're concerned that Mr. Murphy at the PCR
12 hearing -- and I need you to listen to me.

13 THE APPLICANT: Yeah, I'm listening.
14 I'm listening.

15 THE COURT: I know. You're multitasking.
16 That's okay. So you're telling me that now you're
17 concerned that Mr. Murphy didn't call somebody to
18 your PCR hearing that you think he should have called.

19 THE APPLICANT: No, no. He subpoenaed -- he
20 didn't -- he put -- subpoenaed the witness, the defense
21 witness, to the court. She was in the courtroom.

22 THE COURT: Okay.

23 THE APPLICANT: He didn't object or call
24 the defense witness to the stand. When the judge said
25 he didn't see no merit, the defense witness was right

1 there in court. He didn't object to it or nothing.

2 THE COURT: Okay, okay, okay. So you think
3 there's something that he did at the PCR hearing that
4 he should have done differently?

5 THE APPLICANT: Right. He should have
6 called the witness to the stand when the judge said
7 that he didn't see no merit. That comes into Austin;
8 that falls into Austin because he didn't call ---

9 THE COURT: Nope, because -- let me tell
10 you when that would come up. That would happen --
11 that would come up -- well, well, if -- now, I looked
12 at the transcript at the PCR hearing, but if what
13 you're telling me is that Mr. Murphy was trying
14 to call a witness, and the judge wouldn't let him call
15 that witness, then you're right. That would be part
16 of Austin.

17 But, but, if you're telling me that there
18 was a witness that was present, or there was a witness
19 that should have been present, that Mr. Murphy should
20 have called that he did not call ---

21 THE APPLICANT: Right.

22 THE COURT: --- well, that would be --
23 that's called PCRing, raising a post-conviction relief,
24 saying that my post-conviction relief lawyer ---

25 THE APPLICANT: Right.

1 THE COURT: --- was ineffective.

2 THE APPLICANT: Right.

3 THE COURT: Well, that's not for today.

4 Do you understand? Because that's a different issue.

5 That's a different issue; that's a different case;

6 that's a different action, okay? To try to raise a PCR

7 on the PCR lawyer. Boy, that's hard to do; that's

8 real hard to do. But, but, be that as it may, that's

9 a different action.

10 I know that's a lot -- I told you this

11 was a like those paths, up and down. That's a different

12 action. And the reason that that's a different action

13 is because today what we're talking about, remember ---

14 THE APPLICANT: All right.

15 THE COURT: --- is Judge Nettles, his

16 decision, and that has to be done on the record as

17 it is. And if you think there were things that should

18 have been done at the PCR that were not done, that's

19 a different -- that's actually a whole other action,

20 okay?

21 I know, you're getting tired too.

22 I know you're mentally getting tired. I know you are.

23 But today what we're going to do, if you want to, and

24 I think you do, that you want to talk about your desire

25 for an appeal, to appeal the part of Judge Nettles's

1 decision that denied the PCR on the ineffective
2 assistance of counsel at the trial.

3 THE APPLICANT: Right, right.

4 THE COURT: That's what's before me today,
5 and we'll talk about that. Can you hang with that?

6 THE APPLICANT: Right, right.

7 THE COURT: All right. Don't let your
8 thoughts wander. You stay right there on that now,
9 okay?

10 THE APPLICANT: All right.

11 THE COURT: All right. Yes. So, I think
12 you've given me -- I think I've got the procedure.

13 MS. WEIDAUER: The procedural history?

14 THE COURT: I think.

15 MS. WEIDAUER: Yes, Your Honor.

16 THE COURT: I think I do. Call your first
17 witness, Mr. Falk.

18 MR. FALK: Call Mr. Murphy to the stand.

19 THE COURT: Yes. And you know y'all are
20 talking about just one issue.

21 THE CLERK: Raise your right hand.

22 MR. CHRISTOPHER MURPHY was called as
23 a witness, being duly sworn, was examined and testified
24 as follows:

25 THE CLERK: Please state your full name,

1 spelling your last name.

2 THE WITNESS: Christopher Murphy,
3 M-U-R-P-H-Y.

4 THE COURT: Your witness.

5 DIRECT EXAMINATION

6 BY MR. FALK:

7 Q. Mr. Murphy, did you represent Mr. Simmons
8 at a PCR hearing?

9 A. I did.

10 Q. And you're obviously here, so you've got --
11 Mr. Simmons got partial relief in that hearing?

12 A. That's correct.

13 Q. So there was a part of Judge Nettles's order that
14 denied part of Mr. Murphy's -- excuse me, Mr. Simmons's
15 application?

16 A. Right, affirming a part, denying a part.

17 Q. So did you make it clear to him that he could
18 appeal a part of Judge Nettles's order?

19 A. I did not.

20 MR. FALK: No further questions.

21 THE COURT: All right. Yes.

22 Cross-examination.

23 CROSS-EXAMINATION

24 BY MS. WEIDAUER:

25 Q. You had no discussions with Applicant about any

1 appeals that he could pursue after an order was issued
2 in his first PCR?

3 A. I don't recall any. Typically, I'll send them
4 a letter saying you can appeal this. Sometimes, I'll
5 file my own appeal. But I do recall in this case my --
6 and I think I argued this, but my logic was he got his
7 resentencing, so there was nothing to appeal. And
8 depending on what sentence he got, that might clear up
9 everything, or it might have him start all over again.
10 So this is kind of the procedural stuff you folks were
11 discussing. But I did not intend to appeal that part.
12 I didn't make it clear to him; I didn't talk to him
13 about that.

14 Q. And did he ever give you any indication that
15 he wished to appeal?

16 A. No, I don't recall. And I would have most likely
17 done that if he said so, but.

18 Q. Okay. And I believe you testified that you
19 were unsure whether you sent him a letter. Is that just
20 your normal practice, or you don't know whether you did
21 or did not?

22 A. No, I always send a closing letter, saying this
23 is the ruling, this is the end of my representation.
24 Sometimes -- and I can't remember when I did.
25 Sometimes, I will automatically file the appeal for them

1 on their behalf. Other times, I will say this is your
2 responsibility to file an appeal, and I will appoint
3 or I'll copy appellate counsel.

4 Q. Okay. So your closing letter would have
5 mentioned his right to pursue an appeal?

6 A. In this case, probably not, because again I was
7 thinking he got what he wanted. And I'm trying to --
8 I've always looked at these over the years because we're
9 trying to keep everything together just to avoid what
10 we're having here, three or four cases going on, and it
11 was always that once -- if the sentencing was an error,
12 which it was, then you get resentenced, and then he gets
13 to start his PCR over. That's how I was looking at it.
14 I wasn't looking at piecemealing this. So that was my
15 thought process.

16 Q. Okay.

17 MS. WEIDAUER: Nothing further, Your Honor.

18 THE COURT: All right. Very well.

19 Any redirect?

20 MR. FALK: No redirect.

21 THE COURT: All right. Thank you so much,
22 Mr. Murphy. All right. I think he gets his Austin
23 appeal, and you all will help me draft that order.

24 MS. WEIDAUER: Yes, Your Honor.

25 THE COURT: Okay. You're going to get your

1 appeal.

2 MS. WEIDAUER: Is 30 days to get that
3 to you okay?

4 THE COURT: Yes. I'll get the order in
5 30 days. And, Mr. Falk, you'll file a notice of appeal
6 for him?

7 MR. FALK: Yes.

8 THE COURT: Okay. Thank you. Thank you,
9 Mr. Simmons.

10 THE APPLICANT: All right.

11 MR. FALK: Thank you, Judge.

12 THE COURT: Thank you.

13 (End of Transcript of Record)

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CERTIFICATE OF REPORTER

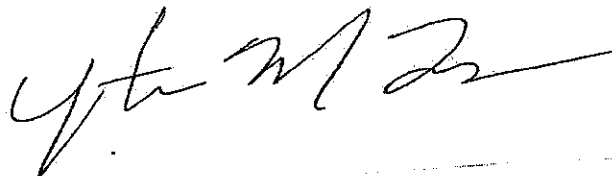
State of South Carolina)

County of Charleston)

I, the undersigned, Yvestre Torres, Circuit Court Reporter for the Ninth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of record of all the proceedings had and evidence introduced in the hearing of the captioned case, relative to appeal, in the Circuit Court for Charleston County, South Carolina, on the 3rd of November, 2022.

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

January 11, 2023



Yvestre Torres

Circuit Court Reporter

Att
GS
Sol
AG

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

Antonio Simmons, SCDC# 279418,
Applicant,

v.

State of South Carolina,
Respondent.

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT

Case No.: 2019-CP-10-6370

**ORDER GRANTING BELATED
PCR APPEAL PURSUANT TO
AUSTIN V. STATE**

This matter was before this Court on November 4, 2022 for an evidentiary hearing on Applicant's Post-Conviction application. The hearing was conducted in person with the assistance of WebEx, which the Applicant consented to. Samantha Weidauer, Esquire and Lauren Mims, Esquire were present representing the State. Applicant's counsel, James Falk, Esquire, and Applicant were both present.

Procedural History

On December 2014, the Charleston County Grand Jury indicted Applicant for five counts of Armed Robbery (2014-GS-10-07111/2014-GS-10-07123/2014-GS-1007142/2014-GS-10-07145/2014-GS-10-07147).

Michael Apicella, Esquire represented Applicant before the Charleston County court of General Sessions, and Assistant Solicitor David Osborne, Esquire prosecuted the case. On March 20, 2018, Applicant pleaded guilty as indicted to all charges before the Honorable R. Markley Dennis. Judge Dennis sentenced Applicant to a negotiated 28 years suspended on the service of 18 years on indictment 2014-GS-10-01711 and the other indictments were dismissed as part of the plea. Applicant did not appeal his conviction or sentence.

Applicant's Initial Post-Conviction Relief Action (2018-CP-10-4505)

Applicant filed his first application for post-conviction relief on September 18, 2018. In that application, Applicant alleged he was being held in custody unlawfully based on:

1. Due Process Violations
2. Prosecutorial Misconduct
3. Ineffective Assistance of Counsel
4. Violation of Equal Protection Law

Respondent made its return on January 10, 2019, requesting an evidentiary hearing be held. An evidentiary hearing was held on July 23, 2019, before the Honorable Michael G. Nettles, circuit court judge. Applicant was represented by Christopher Murphy, Esquire. Following the evidentiary hearing, Judge Nettles granted relief in part and denied relief in part. The order was filed on October 1, 2019. Applicant did not file an appeal.

On January 10, 2020 and pursuant to Judge Nettles' October 1, 2019 order the court convened a re-sentencing hearing. The Applicant was present and represented by Christopher R. Geel, Esquire. Defense counsel argued that the court was constrained to sentence the defendant to 28 year's incarceration, in light of North Carolina v. Pearce, 395 U.S. 711 (1969). During the hearing, the Applicant indicated that he did not want to be re-sentenced, but instead wanted to withdraw his guilty plea. Additionally, the Applicant requested a jury trial on all of his charges. Defense counsel indicated to the court that he did not believe the court was authorized to grant the defendant's request, given the procedural posture of the case. The State agreed. The Court sentenced Applicant to 28 years on each of the above warrants. Applicant, through counsel, filed a timely notice of appeal on January 17, 2020. On February 1, 2022 Applicant advised the Court of Appeals that he would withdraw his appeal. On February 9, 2022 the Court of Appeals entered an order dismissing Applicant's appeal.

Current Application

In his second and current application for post-conviction relief, Applicant alleges he is entitled to belated appellate review of his initial post-conviction relief action pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991). At the evidentiary hearing, Applicant's original PCR counsel acknowledged that he did not file a Notice of Appeal from Judge Nettles' October 1, 2019 order.

FINDINGS OF FACT AND CONCLUSION OF LAW

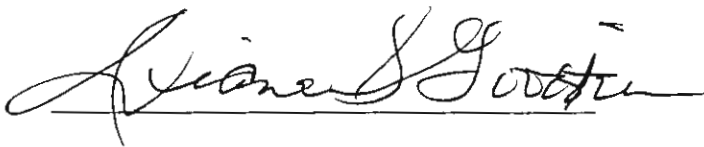
Based on Mr Murphy's testimony the court finds that Applicant did not knowingly and voluntarily waive his right to appeal. Therefore, Applicant is entitled to belated PCR appeal pursuant to Austin v. State. Thus, this Application for post-conviction Relief is granted.

IT IS THEREFORE ORDERED:

1. This Application for Post-Conviction Relief is DENIED WITH THE EXCEPTION OF GRANTING A BELATED AUSTIN APPEAL. Within thirty (30) days of service of this Order, counsel for the Applicant must file a Notice of Appeal to secure the appropriate review of the Applicant's first post-conviction relief action, captioned 2010-CP-02-1873. Counsel and the Applicant are directed to King v. State, 308 S.C. 348, 417 S.E.2d 868 (1992) and Rule 243, SCACR, for the appropriate procedure for a belated appeal; and
2. The Applicant is remanded to the custody of the Respondent for the completion of his sentence; and

3. Applicant's other post-conviction relief claims in the PCR regarding resentencing are stayed pending a resolution of ^{the}~~the~~ Austin appeal.

AND IT IS SO ORDERED this 10 day of April, 2023



The Honorable Diane Schafer Goodstein

Presiding Judge