

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Richland County

Honorable D. Craig Brown, Circuit Court Judge

EDWARD KIRK,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2022-001823

APPENDIX

JESSICA M. SAXON
Appellate Defender

ALAN WILSON
Attorney General

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

D. RUSSELL BARLOW
Assistant Attorney General
P.O. Box 11549
Columbia, SC 29211-1549

ATTORNEY FOR PETITIONER

ATTORNEYS FOR RESPONDENT

RECEIVED

Aug 12 2024

S.C. SUPREME COURT

INDEX

INDEX	i
APPLICATION FOR POST-CONVICTION RELIEF	1
STATE’S RETURN AND PARTIAL MOTION TO DISMISS	9
FILED CONSENT ORDER GRANTING APPELLATE REVIEW	19
INDICTMENTS, SENTENCE SHEETS AND ARREST WARRANTS	22
MOTION TO REMAND FOR RECONSTRUCTION – APPELLATE CASE NO. 2022-001823	31
EMAIL FROM STATE RE: MOTION	67
ORDER HOLDING MATTER IN ABEYANCE AND REMANDING TO CIRCUIT COURT	69
PLEA RECONSTRUCTION HEARING TRANSCRIPT DATED DECEMBER 15, 2023	71

FORM 5

STATE OF SOUTH CAROLINA)

COUNTY OF RICHLAND)

EDWARD KIRK)

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

v.)

State of South Carolina)

IN THE COURT OF COMMON PLEAS

2021CP400 2769

APPLICATION FOR

POST-CONVICTION RELIEF

2021 JUN -8 AM 9:30

INSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legally 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 McCormick Correctional Institution
2. Name and location of Court which imposed sentence Richland County Judicial Center
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) 2015 G540 04155 (Pointing and Presenting)
 - (b) 2015 G540 04156 (Arm Robbery)
 - (c) 2015 G540 04161 (Kidnapping)
5. The date upon which sentence was imposed and the terms of the sentence:
 - (a) 6/28/16
 - (b) 6/28/16

- (c) 2015 G540 04161 (6/28/16)
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?
Yes
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
 - i. South Carolina Court of Appeals
 - ii. _____
 - iii. _____
 - (b) the result in each such Court to which you appealed:
 - i. The Applicant recently found out his pro se appeal was not filed
 - ii. _____
 - iii. _____
 - (c) the date of each such result:
 - i. n/a
 - ii. _____
 - iii. _____
 - (d) if known, citations of any written opinion or orders entered pursuant to such results:
 - i. n/a
 - 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:

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

(A) Was the Applicant denied Appellate Counsel on direct review

(B) Was plea counsel ineffective for failure to file a timely appeal on direct review

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

(A) The Applicant had filed a pro se appeal to the South Carolina Court of Appeals. The Applicant also wrote a letter to the South Carolina Commission on indigent defense requesting for the appointment of counsel on direct appeal. The Applicant had not received any response from them.

(B) The Applicant had informed plea counsel to file a notice of appeal upon information and belief the Applicant family member had recently informed him that the South Carolina Court of Appeals had informed them that there was no appeal pending for the Applicant.

- (a) _____
- (b) _____
- (c) _____

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

- (a) _____
- (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? 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. n/a
- ii. _____
- iii. _____
- iv. _____

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

- i. n/a
- ii. _____
- iii. _____
- iv. _____

(c) the disposition thereof:

- i. n/a
- ii. _____
- iii. _____

- iv. n/a
- (d) the date of each such disposition:
 - i. n/a
 - ii. n/a
 - iii. n/a
 - iv. n/a
- (e) if known, citations of any written opinions or orders entered pursuant to each such disposition:
 - i. n/a
 - ii. n/a
 - iii. n/a
 - iv. n/a
- 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?
n/a
- 15. If you answered "yes" to (14) identify:
 - (a) which grounds have been presented:
 - i. n/a
 - ii. n/a
 - iii. n/a
 - (b) the proceedings in which each ground was raised:
 - i. n/a
 - ii. n/a
 - iii. n/a
- 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) n/a
 - (b) n/a
 - (c) n/a
- 17. Were you represented by an attorney at any time during the course of:

- (a) your arraignment and plea? _____
- (b) your trial, if any? _____
- (c) your sentencing? _____
- (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? was denied Appellate Counsel
- (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. Anna Good
 - ii. _____
 - iii. _____
- (b) the proceedings at which each such attorney represented you:
 - i. Plea and sentencing
 - ii. _____
 - iii. _____

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

Reduction of sentence and/or trial

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

n/a

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

Edward Kirk

I, _____, 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.

Edward Kirk
Applicant

SWORN or affirmed to and subscribed before me this
26th day of May, 2021
Lakiasa D. Gray
Notary Public

My Commission Expires: 01/13/30



2021 JUN -8 AM 9:30
JF A. C. & G. S.

STATE OF SOUTH CAROLINA)

VERIFICATION

County of)

Edward Kirk

I, Edward Kirk, 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.

Edward Kirk

SWORN to and subscribed before me this 26th
day of May, 2 2021

Lakisha D. Gray (L.S.)
Notary Public

My Commission Expires: 01/13/30



2021 JUN -8 AM 9:30
JEANETTE A. BRYANT
CLERK, 2nd FL.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND	)	FOR THE FIFTH JUDICIAL CIRCUIT
	)	
Edward Kirk, Jr., #368801	)	2021-CP-40-2769
	)	
Applicant	)	
	)	
v.	)	RETURN & PARTIAL MOTION TO DISMISS
	)	(Counsel Appointed)
State of South Carolina,	)	
	)	
Respondent	)	
	)	

In response to Applicant, Edward Kirk, Jr.’s action for post-conviction relief (PCR) commenced June 8, 2021, Respondent, the State of South Carolina, makes the following return and moves to dismiss the application as untimely pursuant to S.C. Code Ann. § 17-27-45. Respondent respectfully offers the following in support of its return and motion to dismiss:

I. PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections (SCDC). During the August 2015 term, the Richland County Grand Jury indicted Applicant for armed robbery (2015-GS-40-4155), pointing and presenting firearms at a person (2015-GS-40-4156), and kidnapping (2015-GS-40-4161). Anna R. Good, Esquire, represented Applicant. April Sampson of the Fifth Circuit Solicitor’s Office prosecuted the case.

Applicant pled guilty on June 28, 2016, before the Honorable Jocelyn Newman. Judge Newman sentenced Applicant pursuant to recommendation by the state to sixteen years imprisonment for armed robbery, five years for pointing and presenting a firearm, and sixteen years for kidnapping, to run concurrently. Applicant alleges he submitted a *pro se* appeal.

II. CURRENT APPLICATION

In his application for PCR, Applicant alleges he is being held in custody unlawfully on the following grounds:

1. "Was the Applicant denied Appellate Counsel on direct review"
 - a. "The Applicant had filed a pro se appeal to the South Carolina Court of Appeals. The Applicant also wrote a letter to the South Carolina Commission on indigent defense requesting for the appointment of counsel on direct appeal. The Applicant had not received any response from them."
2. "Was plea counsel ineffective for failure to file a timely appeal on direct review"
 - a. "The Applicant had informed plea counsel to file a notice of appeal upon information and belief the Applicant family member had recently informed him that the South Carolina Court of Appeals had informed them that there was no appeal pending for the Applicant."

Attached to this return and incorporated herein are the Richland County Clerk of Court records, Applicant's SCDC records, and the records of this PCR action. Respondent reserves the right to amend this return upon receipt of any relevant materials.

III. RESPONSE TO *WHITE* CLAIM

Respondent interprets Applicant's claims as requesting relief pursuant to *White v. State*, 263 S.C. 110, 208 S.E.2d 35 (1974). Respondent submits the allegation that counsel was ineffective for failing to file a direct appeal is without merit. As an initial matter, this application for post-conviction relief was filed outside of the one-year statute of limitation outlined in the Uniform Post-Conviction Procedure Act. S.C. Code §17-27-45(A) (1976). However, the one-year limitations period in which to file a petition for post-conviction relief does not apply where the defendant alleges he was denied a direct appeal due to ineffective assistance of counsel. *Wilson v. State*, 348 S.C. 215, 559 S.E.2d 581 (2002). Therefore, Respondent submits Applicant's allegations

should be dismissed unless he can establish a legitimate basis to prove he did not timely file based on a belief an appeal was pending.

The decision of the South Carolina Supreme Court, in *White* holds even though the post-conviction relief court finds the applicant had never voluntarily and intelligently abandoned his appeal, the court has no jurisdiction to grant a belated appeal. However, where an accused establishes in a post-conviction relief hearing that he was unconstitutionally deprived of his statutory right to a direct appeal, the South Carolina Supreme Court, upon an appeal of the post-conviction relief decision, will review the trial record and pass upon all issues properly raised and argued as if the direct appeal has been perfected. *Id.* at 119, 108 S.E.2d at 39-40.

Following a trial, counsel is required to make certain the defendant is made fully aware of the right to appeal. *Turner v. State*, 380 S.C. 223, 224-25, 670 S.E.2d 373, 374 (2008) (internal citations omitted). In the absence of an intelligent waiver by the defendant, counsel must either initiate an appeal or comply with the procedure in *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967). *Id.* However, the standard for a guilty plea differs. Absent extraordinary circumstances, such as when there is reason to think a rational defendant would want to appeal (for example, because there are non-frivolous grounds for appeal) or when the defendant reasonably demonstrated an interest in appealing, there is no constitutional requirement that a defendant be informed of the right to a direct appeal from a guilty plea. *Id.*

Respondent submits Applicant cannot show any “extraordinary circumstances” were present at the time of the plea, which would trigger plea counsel’s duty to consult with Applicant about his right to appeal. Applicant’s allegations as pled are additionally conflicting and contradictory. Applicant claims he both filed a *pro se* notice of appeal requesting the appointment of appellate counsel, in addition to alleging he asked plea counsel to timely file for direct review.

It is therefore unclear to Respondent exactly in what way Applicant believes counsel was ineffective for failing to file an appeal when Applicant stated he filed a *pro se* notice of appeal himself. However, the allegation regarding a belated direct appeal may raise a question of fact which is not conclusively refuted by the record. Accordingly, Respondent requests an evidentiary hearing solely on this allegation. *Sharper v. State*, 305 S.E.2d 247.

IV. PARTIAL MOTION TO DISMISS

Respondent submits Applicant's allegations, except for claim that he is entitled to belated appellate review of direct appeal issues pursuant to *White v. State*, 263 S.C. 110, S.E.2d 35 (1974), should be summarily dismissed for failure to comply with the filing procedures of the Uniform Post-Conviction Procedure Act. S.C. Code Ann. §17-27-10 to -160. Specifically the act requires as follows:

(A) An application for relief filed pursuant to this chapter must be filed within one year after the entry of a judgment of conviction or within one year after the sending of the remittitur to the lower court from an appeal or the filing of the final decision upon an appeal, whichever is later.

(B) When a court whose decisions are binding upon the Supreme Court of this State or the Supreme Court of this State holds that the Constitution of the United States or the Constitution of South Carolina, or both, impose upon state criminal proceedings a substantive standard not previously recognized or a right not in existence at the time of the state court trial, and if the standard or right is intended to be applied retroactively, an application under this chapter may be filed not later than one year after the date on which the standard or right was determined to exist.

(C) If the applicant contends that there is evidence of material facts not previously presented and heard that requires vacation of the conviction or sentence, the application must be filed under this chapter within one year after the date of actual discovery of the facts by the applicant or after the date when the facts could have been ascertained by the exercise of reasonable diligence.

S.C. Code Ann. § 17-27-45.

The South Carolina Supreme Court has held the statute of limitations shall apply to all applications filed after July 1, 1996. *Peloquin v. State*, 321 S.C. 468, 469 S.E.2d 606 (1996). A motion for summary judgment may properly be used to raise the defense of statute of limitations. *McDonnell v. Consolidated School District of Aiken*, 315 S.C. 487, 445 S.E.2d 638 (1994). Additionally, S.C. Code Ann. § 17-27-70(c) authorizes the Court to “grant a motion by either party for summary disposition of [an] application when it appears from the pleadings . . . that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.”

Applicant pled guilty on June 28, 2016, and did not pursue a direct appeal. Therefore, the PCR application should have been filed on June 28, 2017. However, this application was filed on June 8, 2021, almost three years after the statutory filing period had expired. Moreover, Applicant has completely failed to provide any specific facts to support his claims. Respondent requests that this Court summarily dismiss the remaining allegations, except for the claims of a belated direct appeal, for failure to file within the time mandated by the Uniform Post-Conviction Procedure Act.

A *White* claim alleges that an applicant wanted or would have wanted an appeal of his conviction or sentence and did not receive appellate review of his conviction or sentence due to a failure of his counsel. *White*, 263 S.C. 110, 208 S.E.2d 35. If a factual dispute exists as to whether an applicant knowingly and intelligently waived his right to appeal his conviction or sentence, he has the right to an evidentiary hearing on that issue. *Id.* at 119, 208 S.E.2d at 39. Further, *Wilson* holds an applicant has the right to that evidentiary hearing, on a *White* claim, even if the PCR application was filed beyond the statute of limitations. *Wilson*, 348 S.C. at 218, 559 S.E.2d at 582.

Should the Court find that Applicant did not timely file his PCR application based on an error with Applicant’s direct appeal, Respondent requests Applicant establish circumstances sufficient to support equitable tolling for his application. Our courts have held that “statutes of

limitations are not simply technicalities, but are fundamental to a well-ordered judicial system.”

Moates v. Bobb, 322 S.C. 172, 176, 470 S.E.2d 402, 404 (Ct. App. 1996). *Moates* explained:

Statutes of limitations embody important public policy considerations in that they stimulate activity, punish negligence, and promote repose by giving security and stability to human affairs. One purpose of a statute of limitations is to relieve the courts of the burden of trying stale claims when a plaintiff has slept on his rights. Another purpose of a statute of limitations is to protect potential defendants from protracted fear of litigation.

Id.

In rare circumstances, the statute of limitations will be equitably tolled to allow a petitioner the opportunity to exercise his or her rights when they were denied the chance to do so. This doctrine has been specifically extended into the context of post-conviction relief cases, as well. Equitable tolling has been deemed available where: (1) extraordinary circumstances prevented the plaintiff from filing despite his due diligence; (2) the plaintiff actively pursued his or her judicial remedies by filing a defective pleading during the statutory period or the claimant has been induced or tricked by the defendant's misconduct into allowing the filing deadline to pass; and (3) the plaintiff, despite all due diligence, is unable to obtain vital information bearing on the existence of his or her claim. *Pelzer v. State*, 378 S.C. 516, 521, 662 S.E.2d 618, 619-20 (Ct. App. 2008). *Pelzer* further explained the doctrine should be limited to very exclusive circumstances. “[E]quitable tolling, which allows a plaintiff to initiate an action beyond the statute of limitations deadline, is typically available only if the claimant was prevented in some extraordinary way from exercising his or her rights, or, in other words, if the relevant facts present sufficiently rare and exceptional circumstances that would warrant application of the doctrine.” *Pelzer*, 378 S.C. at 521, 662 S.E.2d at 620.

This Court has held that the statute of limitations should be equitably tolled for the filing of a post-conviction relief application in limited circumstances. See *Ferguson v. State*, 382 S.C.

615, 677 S.E.2d 600 (2009) (finding the statute of limitations should be equitably tolled when a mentally incompetent PCR applicant was prevented from timely filing by his mental incompetency, and the applicant should proceed with his PCR action only if the application was filed within one year of the applicant regaining competency); *Mose v. State*, 420 S.C. 500, 803 S.E.2d 718 (2017) (allowing equitable tolling where the applicant notarized and relinquished control of his application to prison authorities for mailing seventeen days prior to the filing deadline, but due to circumstances outside applicant's control, the application was not filed until three days past the deadline). Consequently, equitable tolling has also been allowed where “extraordinary circumstances prevented the plaintiff from filing despite his or her diligence” and where “the plaintiff, despite all due diligence, is unable to obtain vital information bearing on the existence of his or her claim.” *Pelzer*, 378 S.C. at 521, 662 S.E.2d at 621.

In the present case, Respondent submits there are no extraordinary circumstances present to warrant tolling of the statute of limitations. Applicant had a full year to submit a post-conviction petition, and ignorance of the statute of limitations is not an excuse for late filing. *See Leamon v. State*, 363 S.C. 432, 435, 611 S.E.2d 494, 496 (2005). However, should Applicant establish he is entitled to equitable tolling of the statute of limitations, Respondent requests Applicant, through counsel, provide specific claims and facts to support the remaining vague allegation in his application. Should it be necessary, Respondent further requests an evidentiary hearing to fully resolve the remaining issues and will file an amended return to address the merits of Applicant’s underlying claims. *See Sharper v. State*, 279 S.C. 264, 265, 305 S.E.2d 247, 248 (1983).

V. ANY FUTURE AMENDMENTS AND INVOCATION OF DISCOVERY

Applicant must specify any claims he intends to raise at the PCR evidentiary hearing. 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 the State pursuant to *Love v. State*, 428 S.C. 231, 834 S.E.2d 196 (2019), or, alternatively, Respondent will request a continuance in the matter. *See id.* at 245, 834 S.E.2d at 203 (Kittredge, J., dissent) (“If, however, the proposed amendment . . . would truly prejudice the State, the better course of action would be to continue the matter and thus remove any possibility of prejudice resulting from the belated amendments.”).

Pursuant to section 17-27-150 of the South Carolina Code, Applicant may not invoke formal discovery processes to issue subpoenas or otherwise obtain discovery materials unless granted leave from the Court upon a showing of good cause. Further, Respondent requests that all potential exhibits and materials used to produce potential expert witness testimony be sent to Respondent well in advance of the evidentiary hearing. As noted above, Respondent reserves the right to request a continuance and oppose witness testimony and exhibits that are withheld until the last minute resulting in undue prejudice to the State. *See Love*, 428 S.C. 231, 834 S.E.2d 196.

VI. ALL OTHER CLAIMS

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 an evidentiary hearing solely to address the issue of whether Applicant is entitled to belated appeal pursuant to *White*.

Respectfully submitted,

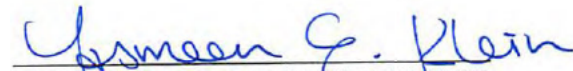
ALAN WILSON
Attorney General

W. JEFFREY YOUNG
Chief Deputy Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General

YASMEEN E. KLEIN
Assistant Attorney General

By:



ATTORNEYS FOR RESPONDENT
Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211

August 18 2021

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS

2021-CP-40-2769

EDWARD KIRK, #368801

Applicant,

vs

CERTIFICATE OF SERVICE BY MAIL

STATE OF SOUTH CAROLINA,

Respondent,

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 & Partial Motion to Dismiss** in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Jonathan D Waller
Waller Law Group, LLC
1821 Hampton Street
Columbia, SC 29201

DATED this 18th day of August, 2021.

Katie Wade, Legal Assistant
For Respondent

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

Edward Kirk, Jr., #368801

Applicant,

v.

State of South Carolina,

Respondent.

) IN THE COURT OF COMMON PLEAS
) FIFTH JUDICIAL CIRCUIT
)

) CASE NO. 2021-CP-40-2769
)

) **CONSENT ORDER GRANTING**
) **BELATED APPELLATE REVIEW**
) **PURSUANT TO WHITE v. STATE**
)

RICHLAND COUNTY
FILED
2022 DEC 16 AM 9:55
C.C.P., G.S., 17-25

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed June 8, 2021. Respondent made its Return on August 18, 2021. An evidentiary hearing on the matter was scheduled for November 15, 2021, at the Richland County Courthouse. Prior to the commencement of the hearing, counsel for the Applicant, Jonathan Waller, Esquire, and counsel for the Respondent, D. Russell Barlow, II, Esquire, of the South Carolina Office of the Attorney General, informed the court that the parties had reached a consent resolution to the matter and presented the proposed resolution to the court. This Order follows.

The Court had before it the Richland County Clerk of Court records, Applicant's records from the South Carolina Department of Corrections, Applicant's application, and Respondent's return.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections (SCDC). During the August 2015 term, the Richland County Grand Jury indicted Applicant for armed robbery (2015-GS-40-4155), pointing and presenting firearms at a person (2015-GS-40-4156), and kidnapping (2015-GS-40-4161). Anna R. Good, Esquire, represented Applicant. April Sampson

DCS
12/3
6

of the Fifth Circuit Solicitor's Office prosecuted the case.

Applicant pled guilty on June 28, 2016, before the Honorable Jocelyn Newman. Judge Newman sentenced Applicant pursuant to a recommendation by the State, to sixteen years imprisonment for armed robbery, five years for pointing and presenting a firearm, and sixteen years for kidnapping, to run concurrently. Applicant alleges he submitted a *pro se* appeal.

ALLEGATIONS

In his application for PCR, Applicant alleges he is being held in custody unlawfully on the following grounds:

1. "Was the Applicant denied Appellate Counsel on direct review"
 - a. "The Applicant had filed a pro se appeal to the South Carolina Court of Appeals. The Applicant also wrote a letter to the South Carolina Commission on indigent defense requesting for the appointment of counsel on direct appeal. The Applicant had not received any response from them."
2. "Was plea counsel ineffective for failure to file a timely appeal on direct review"
 - a. "The Applicant had informed plea counsel to file a notice of appeal upon information and belief the Applicant family member had recently informed him that the South Carolina Court of Appeals had informed them that there was no appeal pending for the Applicant."

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Applicant alleges Counsel failed to file an appeal of his guilty plea after Applicant requested Counsel to do so. The State has consented to Applicant receiving a belated appeal pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35, (1974). Therefore, based on the foregoing, this Court finds Applicant is entitled to a belated direct appeal pursuant to White, and grants relief in the form of a belated appeal only.

The Court notes Applicant must file and serve a notice of appeal within thirty days from PCR counsel's receipt of written notice of entry of judgment to secure the appropriate appellate

Dec 2013

review. See Rule 203, SCACR. Applicant is directed to Rule 243, SCACR, for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. The Court grants Applicant a belated appeal pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35, (1974); and
2. Applicant shall be remanded to the custody of the State.

AND IT IS SO ORDERED this 17 day of November, 2022.



D. CRAIG BROWN
Presiding Judge
Fifth Judicial Circuit

Columbia, South Carolina.

Dec
0. 3. 23

WITNESSES

(S) Cris Truluck
- Richland County Sheriff

ARREST WARRANT NUMBER

2015A4010600146

ACTION OF GRAND JURY

TRUE BILL

E. L. M. M. M.
Foreperson of Grand Jury
Date: **AUG 13 2015**

VERDICT

Foreperson of Petit Jury
Date:

DOCKET NO. 2015GS4004155

The State of South Carolina

County of

Richland

COURT OF GENERAL SESSIONS

AUGUST TERM 2015

91

**THE STATE
vs.**

Edward Kirk Jr.

**Indictment for
ROBBERY / ARMED ROBBERY, ROBBERY
WHILE ARMED OR ALLEGEDLY ARMED
WITH A DEADLY WEAPON**

SC Code: 16-11-0330(A)
CDR Code: 0139

After being fully advised as to my
legal rights, I hereby waive presentment
to the Grand Jury.

Defendant

I
hereby appear in my own proper person and plead
guilty to the within indictment or to

EK
Defendant

Witness:

C.C.C. PLS. AND G.S.

STATE OF SOUTH CAROLINA)
)
 COUNTY OF RICHLAND)

INDICTMENT

At a Court of General Sessions, convened on AUGUST 12, 2015,
 the Grand Jurors of Richland County present upon their oath:

ARMED ROBBERY

That Edward Kirk Jr did in Richland County on or about January 14, 2015,
 commit robbery by feloniously taking from the person or presence of
 MARIANNA REYES, by means of force or intimidation, goods or monies of
 BEEZERS SANDWHICH SHOP and/or MARIANNA REYES, such goods
 or monies being described as PURSE, and/or FOOD, and/or CELL
 PHONE with the intent to deprive the owner permanently of such property,
 while armed with a pistol, dirk, slingshot, metal knuckles, razor, or other
 deadly weapon, or while alleging, either by actions or words, that he or she
 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. All in violation of §16-11-330(A), SC
 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.



DAN JOHNSON, SOLICITOR

STATE OF SOUTH CAROLINA

COUNTY OF Richland
STATE VS.
Edward Kirk Jr

AKA: _____
Race: BLACK Sex: M Age: 21
DOB: _____ SS#: _____
Address: Trotter Road
City, State, Zip: Columbia, SC 29209
DL#: _____ SID#: _____

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

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

TO: Robbery / Armed Robbery, robbery while armed or allegedly armed with a deadly weapon

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(CSC w/minor 1st or Lewd Act) ☐ §17-25-45

The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. (defendant's initials)

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

WITNESSETH: April Sampson 15964 EC Amma R Hood 72808
SAMPSON, APRIL SC Bar# Defendant Attorney for Defendant SC Bar#

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,
for a determinate term of 20 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 Services standard conditions of probation, which are incorporated by reference.

☒ CONCURRENT or ☐ CONSECUTIVE to sentence on: 2015 - GS - 40 - 4156, 4159, 4161 (6/28/16)
☒ 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 the 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 (Criminal Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

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

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
§ 14-1-211(A)(2) (DUI Surcharge)	\$100
§ 56-5-2995 (DUI Assessment)	\$12
§ 56-1-286 (DUI Breath Test)	\$25
Proviso 47.9 (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
Proviso 90.5 (SCCA Surcharge)	\$5
3% to County (if paid in installments)	\$
TOTAL	\$

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 2015GS4004155

A/W#: 2015A4010600146

Date of Offense: 1/14/2015

S.C. Code § : 16-11-0330(A)

CDR Code #: 0139

AMENDED
SENTENCE SHEET

☐ CONVICTED OF or ☒ PLEADS

CERTIFIED TRUE COPY
OF ORIGINAL FILED
JANETTE W. BUDGETT
C.C.P. & S.
RICHLAND COUNTY
SOUTH CAROLINA

Obtain GED ☐

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: _____

☐ Appointed PD or Appointed Counsel, § 47.12 requires \$500 fee paid to Clerk during probation.

Presiding Judge

Judge Code: 2757

Sentence Date: June 28, 2016

Jocelyn Yuman 8/11/16

Clerk of Court/ Deputy Clerk

Court Reporter: Holmes

SCCA/217 (03/2011)

WITNESSES

(S) William Gonzalez
- Richland County Sheriff

ARREST WARRANT NUMBER

2015A4010900052

ACTION OF GRAND JURY

TRUE BILL

Deann C. Gardner
Foreperson of Grand Jury
Date: **SEP 09 2015**

VERDICT

Foreperson of Petit Jury
Date:

DOCKET NO. 2015GS4004156

The State of South Carolina

County of

Richland

COURT OF GENERAL SESSIONS

SEPTEMBER TERM 2015

91

**THE STATE
vs.**

Edward Kirk

**Indictment for
WEAPONS / POINTING AND PRESENTING
FIREARMS AT A PERSON**

SC Code: 16-23-0410
CDR Code: 0122

After being fully advised as to my
legal rights, I hereby waive presentment
to the Grand Jury.

Defendant

I
hereby appear in my own proper person and plead
guilty to the within indictment or to

Defendant

Witness:

C.C.C. PLS. AND G.S.

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

INDICTMENT

At a Court of General Sessions, convened on SEPTEMBER 9, 2015,
the Grand Jurors of Richland County present upon their oath:

POINTING AND PRESENTING A FIREARM

That Edward Kirk did in Richland County on or about January 13, 2015,
point or present a loaded or unloaded firearm, to wit: SILVER AND
BLACK REVOLVER HANDGUNS, at one CHARLES SANDERSON, in
violation of Section 16-23-0410, S. C. 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.


DAN JOHNSON, SOLICITOR

STATE OF SOUTH CAROLINA

IN THE COURT OF GENERAL SESSIONS

27

COUNTY OF Richland
STATE VS.
Edward Kirk

AKA:

Race: BLACK Sex: M Age: 21DOB: SS#Address: Roberson StreetCity, State, Zip: Columbia, SC 29209DL#: SID#:*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐

In disposition of the said indictment comes now the Defendant who was
TO: Weapons / Pointing and presenting firearms at a person

INDICTMENT/CASE#: 2015GS4004156A/W#: 2015A4010900052Date of Offense: 1/13/2015S.C. Code § : 16-23-0410CDR Code #: 0122

SENTENCE SHEET

☐ CONVICTED OF or ☒ PLEADSin violation of § 16-23-0410 of the S.C. Code of Laws, bearing CDR Code # 0122

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

The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. (defendant's initials)The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☒ Recommendation by the State.

ATTEST: Samuel Simpson
SAMPSON, APRIL

15964
SC Bar# 312
Defendant

Anna R. Hood
Attorney for Defendant 72808
SC Bar#

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,
for a determinate term of 5 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 Services standard conditions of
probation, which are incorporated by reference.

☒ CONCURRENT or ☐ CONSECUTIVE to sentence on: 2015-GS-40-4155, 4159, 4161 (6/20/16)

☐ 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 the 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 (Criminal
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: \$ _____

Payment Terms: _____

☐ Set by SCDPPPS

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 47.9 (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
Proviso 90.5 (SCCJA Surcharge)	\$5
3% to County (if paid in installments)	\$
TOTAL	\$

_____ days/hours Public Improvement

Obtain GED ☐

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: _____

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

Clerk of Court/ Deputy Clerk

Court Reporter: Holmes

SCCA/217 (03/2011)

Presiding Judge

Judge Code: 2757Sentence Date: June 28, 2016

**CERTIFIED TRUE COPY
OF ORIGINAL FILED**
Jeanette W. McBride
C.C.C.P.&G.S.
RICHLAND COUNTY
SOUTH CAROLINA

WITNESSES

(S) William Gonzalez
- Richland County Sheriff

ARREST WARRANT NUMBER

2015A4010900057

ACTION OF GRAND JURY

TRUE BILL

Deann C. Gardner

Foreperson of Grand Jury

Date:

SEP 09 2015

VERDICT

Foreperson of Petit Jury
Date:

DOCKET NO. 2015GS4004161

The State of South Carolina

County of

Richland

COURT OF GENERAL SESSIONS

SEPTEMBER TERM 2015

91

THE STATE
vs.

Edward Kirk

Indictment for
KIDNAPPING / KIDNAPPING

SC Code: 16-03-0910
CDR Code: 0095

After being fully advised as to my
legal rights, I hereby waive presentment
to the Grand Jury.

Defendant

I
hereby appear in my own proper person and plead
guilty to the within indictment or to

Defendant

Witness:

C.C.C. PLS. AND G.S.

STATE OF SOUTH CAROLINA)
)
 COUNTY OF RICHLAND)

INDICTMENT

At a Court of General Sessions, convened on **SEPTEMBER 9**, 2015,
 the Grand Jurors of Richland County present upon their oath:

KIDNAPPING

That Edward Kirk did in Richland County on or about January 13, 2015,
 unlawfully seize, confine, inveigle, decoy, kidnap, abduct or carry away
 one CHARLES SANDERSON, without authority of law, in violation of
 Section 16-03-0910, S. C. 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.



DAN JOHNSON, SOLICITOR

Amended sentence

STATE OF SOUTH CAROLINA

IN THE COURT OF GENERAL SESSIONS

COUNTY OF Richland
STATE VS.
Edward Kirk

AKA: _____
Race: BLACK Sex: M Age: 21
DOB: _____ SS#: _____

INDICTMENT/CASE#: 2015GS4004161
A/W#: 2015A4010900057
Date of Offense: 1/13/2015
S.C. Code §: 16-03-0910
CDR Code #: 0095

**AMENDED
SENTENCE SHEET**

City, State, Zip: Columbia, SC 29209 Gadsden, SC 29053

DL#: _____ SID#: _____

*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐
In disposition of the said indictment comes now the Defendant who was
TO: Kidnapping / Kidnapping

☐ CONVICTED OF or ☐ PLEADS

in violation of § 16-03-0910 of the S.C. Code of Laws, bearing CDR Code # 0095
☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☒ MOST SERIOUS ☐ Mandatory GPS(CSC ☐ §17-25-45
w/minor 1st or Lewd Act)

The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. (defendant's initials)

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

ATTEST: [Signature] 15964 SK Anna P. Good 72808
SAMPSON, APRIL SC Bar# Defendant Attorney for Defendant SC Bar#

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,
for a determinate term of 2016 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 Services standard conditions of
probation, which are incorporated by reference.

☒ CONCURRENT or ☐ CONSECUTIVE to sentence on: 2015-GS-40-4155, 4156, 4159 (6/28/16)
☒ 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 the 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 (Criminal
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: \$ _____

Payment Terms: _____

☐ Set by SCDPPPS _____

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 47.9 (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
Proviso 90.5 (SCCJA Surcharge)	\$5
3% to County (if paid in installments)	\$
TOTAL	\$

_____ days/hours Public Service Employment

Obtain GED ☐

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: _____

No sex offender registry

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

Clerk of Court/ Deputy Clerk

Court Reporter: Nelmas

SCCA/217 (03/2011)

Presiding Judge

Judge Code: 2757

Sentence Date: June 28, 2016

Jocelyn Hummer 8/11/16

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Richland County
D. Craig Brown, Circuit Court Judge

EDWARD KIRK,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

APPELLATE CASE NO. 2022-001823

MOTION TO HOLD APPEAL IN ABEYANCE
AND
MOTION TO REMAND FOR RECONSTRUCTION OF
GUILTY PLEA HEARING

Pursuant to Rule 240 of the South Carolina Appellate Court rules, undersigned counsel requests an order requiring the parties to reconstruct Petitioner's guilty plea hearing originally held before the Honorable Jocelyn Newman on June 28, 2016. While this motion is pending, Petitioner asks this Court to hold the timelines for filing his appendix and petition for certiorari in abeyance.

In support of his motion, Petitioner would present the following:

1. The undersigned represents Petitioner in his appeal before this Court.
2. The transcript from Petitioner's guilty plea hearing cannot be produced or ascertained. (See e-mail from legal assistant at the South Carolina Attorney General's

Office dated January 10, 2023, attached as Exhibit A and e-mail from Tammie Holmes, Court Reporter Manager, dated January 12, 2013 attached as Exhibit B).¹

3. In order to allow for meaningful appellate review, the record must be reconstructed.

PROCEDURAL HISTORY

4. Petitioner was indicted by a Richland County grand jury in August 2015 for armed robbery (2015-GS-40-4155), pointing and presenting a firearm (2015-GS-40-4156), and kidnapping (2015-GS-40-4161).

5. Anna Good represented Petitioner; April Sampson appeared on behalf of the state.

6. As noted above, Petitioner pled guilty before the Honorable Jocelyn Newman on June 28, 2016. The state recommended a sixteen year sentence, which Judge Newman handed down on the armed robbery and kidnapping offenses, concurrent. Judge Newman sentenced Petitioner to five years on the pointing and presenting charge.

7. On June 8, 2021, Petitioner filed an application for post-conviction relief with the Richland County Clerk of Court (Exhibit C). On the third page, he contends that he filed a *pro se* appeal with the South Carolina Court of Appeals. He also alleges that he asked plea counsel to file a notice of appeal.

8. On or about August 18, 2021, the state filed its Return and Partial Motion to Dismiss (Exhibit D).

¹ Under Rule 607(i), SCACR, court reporters are required to retain the tapes from proceedings for a period of only five years.

9. The Honorable D. Craig Brown signed a Consent Order Granting Belated Appellate Review Pursuant to White v. State on November 17, 2022 (Exhibit E). According to the Order, no evidentiary hearing occurred (counsel for the state “informed the court that the parties had reached a consent resolution to the matter and presented the proposed resolution to the court”).

10. The PCR court granted relief “in the form of a belated appeal only.” A Notice of Appeal was filed with this Court on December 30, 2022.

11. An Administrative Coordinator for the South Carolina Commission on Indigent Defense, Sean Flynn, then contacted the South Carolina Attorney General’s Office to procure documents to be included in the Appendix under Rule 243, SCACR.

12. Flynn was told that the transcript did not exist. He then checked with the State Grand Jury Division at the South Carolina Attorney General’s Office but was again advised that the transcript did not exist and could not be produced.

13. Another Administrative Coordinator for the South Carolina Commission on Indigent Defense, Della White, attempted to obtain the guilty plea transcript but was told that it cannot be produced.

ARGUMENT

The transcript of the guilty plea cannot be produced based on the number of years that have elapsed since it occurred.

When a trial transcript has been lost or destroyed, the Court may vacate the conviction and sentence and remand for a new trial if meaningful appellate review is not possible. See Koon v. State, 358 S.C. 359, 367, 595 S.E.2d 456, 460 (2004); overruled on other grounds by State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005); Whitehead v.

State, 352 S.C. 215, 574 S.E.2d 200 (2002); Deaton v. Leath, 279 S.C. 82, 84, 302 S.E.2d 335, 336 (1983); China v. Parrott, 251 S.C. 329, 162 S.E.2d 276 (1968); Dolive v. J.E.E. Developers, Inc., 308 S.C. 380, 383, 418 S.E.2d 319, 321 (Ct. App. 1992); State v. Ladson, 373 S.C. 320, 325, 644 S.E.2d 271, 273-274 (Ct. App. 2007).

In Deaton, *supra*, the defendant's convictions were set aside and a new trial had where the court reporter's equipment malfunctioned and there was no transcript of the trial court proceedings in the case from which to base an appeal. Citing Deaton, this Court denied a request for reconstruction in State v. Serrette, 375 S.C. 650, 652-653, 654 S.E.2d 554, 555 (Ct. App. 2007) where the reason for the lack of transcript was due to the defendant's absence for a ten-year period, which this Court explained was "not a situation where the court reporter's equipment malfunctioned at trial leading to a loss of the trial transcript."

In the matter at hand, Petitioner attempted to file a *pro se* appeal with the South Carolina Court of Appeals. For reasons unknown, his case was never assigned an Appellate Case Number or assigned to an Appellate Defender at the South Carolina Commission on Indigent Defense. As it stands, the transcript from his guilty plea is unavailable, and the state has consented to belated appellate review.

The case which first provided a remedy in the form of delayed appellate review, Austin v. State, saw this Court reverse the summary dismissal of a second PCR application and remand for an evidentiary hearing, where the petitioner alleged in his second application that his first PCR counsel was ineffective for failing to seek appellate review. 305 S.C. 453, 409 S.E.2d 395 (1991). Specifically, this Court stated: "Because petitioner is entitled to the assistance of appellate counsel on PCR, and because we must

craft a remedy to correct the unfairness which has occurred, we find his allegation that counsel failed to seek review in this case sufficiently states a claim for ineffective assistance.” Id. at 454, 409 S.E.2d at 396. Thus, “[u]nder Austin, a defendant can appeal a denial of a PCR application after the statute of limitations has expired if the defendant either requested and was denied an opportunity to seek appellate review, or did not knowingly and intelligently waive the right to appeal.” Odom v. State, 337 S.C. 256, 260, 263, 523 S.E.2d 753, 755, 756 (1999) (“The one-year statute of limitations for PCR applications is not applicable to appeals filed pursuant to Austin v. State.”); see also Whitehead v. State, 352 S.C. 215, 219, 574 S.E.2d 200, 202 (2002) (“We have held that the PCR statute of limitations found in S.C. Code Ann. § 17–27–45(A) (Supp.2001) does not apply to Austin claims.”).

Petitioner respectfully requests an order for the remand of this matter and subsequent reconstruction of Petitioner’s guilty plea hearing in order to perfect the certiorari appeal in this case. A reconstruction hearing is appropriate because the incomplete nature of the plea hearing transcript prevents this Honorable Court from conducting meaningful appellate review. Ladson at 325, 644 S.E.2d 271, 274. See also In re D.W., 171 N.C.App. 496, 615 S.E.2d 90, 94 (2005); State v. Chanze, 211 W.Va. 257, 565 S.E.2d 379, 382-83 (2002) (finding criminal defendant is entitled to meaningful appellate review of his lower court proceedings, and if this is not possible from a reconstructed record, a new trial is appropriate).

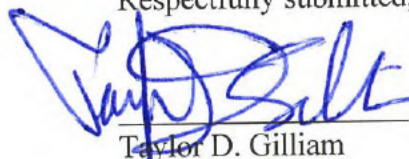
In the present case, the guilty plea transcript cannot be produced. A reconstructed transcript of this hearing is necessary for appellate counsel to represent him effectively, and for this Court to give meaningful appellate review of his conviction. Petitioner also

respectfully requests that the Order remanding this matter contain language giving the trial court the option to conclude that the record cannot be reconstructed with the specificity to support meaningful appellate review. “It is simply unrealistic and unreasonable to think that a trial judge and counsel can—under these circumstances—reconstruct a proper record that will permit meaningful appellate review, especially in light of our issue preservation rules.” Ladson, 373 S.C. at 326, 644 S.E.2d at 274.

While this motion is pending, Petitioner asks this Court to hold the timelines for filing his petition for certiorari and appendix in abeyance. The undersigned discovered this predicament early and endeavored to prepare this motion before taking any extensions in Petitioner’s case.

By way of e-mail earlier today, March 13, 2023, opposing counsel consented to this request.

Respectfully submitted,



Taylor D. Gilliam
Appellate Defender
South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

March 13, 2023

EXHIBIT

A

From: [Summer Etheredge](#)
To: [Flynn, Sean](#)
Subject: RE: [External] RE: Edward Kirk
Date: Tuesday, January 10, 2023 12:20:40 PM
Attachments: [image001.png](#)

Hey,

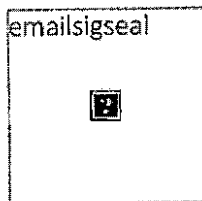
After researching this, it looks like a transcript wasn't ordered until after the 5 year retention period which was too late. You can try and reach out to SGJ, but I can not confirm or deny if they would have it.

Let me know what you come up with.

Thanks!

SUMMER ETHEREDGE, Legal Assistant
 South Carolina Attorney General's Office
 Post-Conviction Relief | Office 803-734-2567
 P.O. Box 11549 | Columbia, SC 29211

Rambert C. Dennis Building
 1000 Assembly Street
 Columbia, SC 29201
Scag.gov



From: Flynn, Sean <sflynn@sccid.sc.gov>
Sent: Tuesday, January 10, 2023 12:13 PM
To: Summer Etheredge <SummerEtheredge@scag.gov>
Subject: RE: [External] RE: Edward Kirk

Do you think maybe the State Grand Jury office might have that transcript?

From: Flynn, Sean
Sent: Tuesday, January 10, 2023 12:11 PM
To: Summer Etheredge <SummerEtheredge@scag.gov>
Subject: RE: [External] RE: Edward Kirk

Thank you very much. Hmmm no GP or trial transcript? Page 2 of 3 of the Order says "Applicant pled guilty on June 28, 2016, before the Honorable Jocelyn Newman". Was this hearing not

transcribed somehow?

From: Summer Etheredge <SummerEtheredge@scag.gov>

Sent: Tuesday, January 10, 2023 11:57 AM

To: Flynn, Sean <sflynn@sccid.sc.gov>

Subject: [External] RE: Edward Kirk

Good morning!

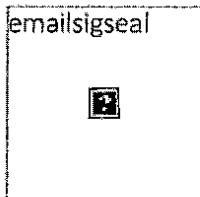
Please see the requested attached documents. There was no transcript for this case.

Should you need anything further, please advise.

Thanks!

SUMMER ETHEREDGE, Legal Assistant
South Carolina Attorney General's Office
Post-Conviction Relief | Office 803-734-2567
P.O. Box 11549 | Columbia, SC 29211

Rembert C. Dennis Building
1000 Assembly Street
Columbia, SC 29201
Scag.gov



From: Flynn, Sean <sflynn@sccid.sc.gov>

Sent: Monday, January 9, 2023 1:35 PM

To: Summer Etheredge <SummerEtheredge@scag.gov>

Subject: Edward Kirk

Good afternoon,

Attached is the document request for the above named individual. Thank you for your time and help regarding this matter. Please let me know if you need anything further from me to complete this request. I look forward to hearing back from you.

Sean Flynn
Administrative Coordinator
SCCID/Appellate Division
(803) 734-1330

EXHIBIT B

From: [White, Della](#)
To: [Gillian, Taylor](#)
Cc: [Leverett, Scott](#)
Subject: FW: [External] RE: Edward Kirk 2015-GS-40-04155, 4156, 4161
Date: Monday, March 13, 2023 8:39:22 AM

Please see below.

From: Transcripts <transcripts@sccourts.org>
Sent: Thursday, January 12, 2023 4:26 PM
To: White, Della <dwhite@sccid.sc.gov>; Transcripts <transcripts@sccourts.org>
Subject: RE: [External] RE: Edward Kirk 2015-GS-40-04155, 4156, 4161

I cant find anything regarding the matter with Mr. Kirk. If the court reporter produced the transcript, it has probably been destroyed at this point per Rule 607.
 You may want to contact the AG's office and see if they can send you a copy of the transcript.

Thank you.

Tammie M. Holmes
 Court Reporter Manager
 South Carolina Judicial Branch
 1220 Senate Street, Ste. 200
 Columbia, SC 29201
tholmes@sccourts.org
 803-734-1825

From: White, Della <dwhite@sccid.sc.gov>
Sent: Thursday, January 12, 2023 4:08 PM
To: Transcripts <transcripts@sccourts.org>
Subject: RE: [External] RE: Edward Kirk 2015-GS-40-04155, 4156, 4161

***** EXTERNAL EMAIL:** This email originated from outside the organization. Please exercise caution before clicking any links or opening attachments. ***

No, the AG's office would have ordered it. We need it for the PCR case.

Hope this helps. Please let me know. Thank you.

From: Transcripts <transcripts@sccourts.org>
Sent: Thursday, January 12, 2023 4:00 PM
To: White, Della <dwhite@sccid.sc.gov>; Transcripts <transcripts@sccourts.org>
Subject: [External] RE: Edward Kirk 2015-GS-40-04155, 4156, 4161

Good afternoon Della.

Do you know when this transcript was ordered?

Thank you.

Tammie M. Holmes
Court Reporter Manager
South Carolina Judicial Branch
1220 Senate Street, Ste. 200
Columbia, SC 29201
tholmes@sccourts.org
803-734-1825

From: White, Della <dwhite@sccid.sc.gov>
Sent: Thursday, January 12, 2023 2:32 PM
To: Transcripts <transcripts@sccourts.org>
Subject: Edward Kirk 2015-GS-40-04155, 4156, 4161

***** EXTERNAL EMAIL:** This email originated from outside the organization. Please exercise caution before clicking any links or opening attachments. ***

Good afternoon,

We are looking for a Guilty Plea transcript dated June 28, 2016 before Jocelyn Newman in Richland Co. in the above case.

Thank you,

Della White
South Carolina Commission on Indigent Defense
1330 Lady Street
Columbia, South Carolina 29201

This communication and any attachment thereto is intended only for use by the addressee(s) named herein, and may contain legally privileged and/or confidential information. If you are not the intended recipient of this e-mail, you are hereby notified that any dissemination, utilization, distribution or copying of this e-mail, and any attachments thereto, is strictly prohibited. If you have received this e-mail in error please notify the Commission on Indigent Defense immediately and permanently delete the original and any copy of any e-mail and any printout thereof. SCCID may be reached by using the email address of the sender, or at 803-734-1343.

~~~ CONFIDENTIALITY NOTICE ~~~ This message is intended only for the addressee and may contain information that is confidential. If you are not the intended recipient, do not read, copy, retain, or

# EXHIBIT C

## FORM 5

STATE OF SOUTH CAROLINA )

COUNTY OF RICHLAND )

EDWARD KIRK )

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

v. )

State of South Carolina )

IN THE COURT OF COMMON PLEAS

**2021CP4002769**

APPLICATION FOR

POST-CONVICTION RELIEF

INSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legally 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 McCormick Correctional Institution
2. Name and location of Court which imposed sentence Richland County Judicial Center
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) 2015 G540 04155 (Pointing and Presenting)
  - (b) 2015 G540 04156 (Arm Robbery)
  - (c) 2015 G540 04161 (Kidnapping)
5. The date upon which sentence was imposed and the terms of the sentence:
  - (a) 6/28/16
  - (b) 6/28/16

Revised 3/2003

- (c) 2015 G540 04161 (6/28/16)
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?  
Yes
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
    - i. South Carolina Court of Appeals
    - ii. \_\_\_\_\_
    - iii. \_\_\_\_\_
  - (b) the result in each such Court to which you appealed:
    - i. The Applicant recently found out his pro se appeal was not filed
    - ii. \_\_\_\_\_
    - iii. \_\_\_\_\_
  - (c) the date of each such result:
    - i. n/a
    - ii. \_\_\_\_\_
    - iii. \_\_\_\_\_
  - (d) if known, citations of any written opinion or orders entered pursuant to such results:
    - i. n/a
    - 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:

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

(A) Was the Applicant denied Appellate Counsel on direct review

(B) Was plea counsel ineffective for failure to file a timely appeal on direct review

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

(A) The Applicant had filed a pro se appeal to the South Carolina Court of Appeals. The Applicant also wrote a letter to the South Carolina Commission on indigent defense requesting for the appointment of counsel on direct appeal. The Applicant had not received any response from them.

(B) The Applicant had informed plea counsel to file a notice of appeal upon information and belief the Applicant family member had recently informed him that the South Carolina Court of Appeals had informed them that there was no appeal pending for the Applicant.

- (a) \_\_\_\_\_
- (b) \_\_\_\_\_
- (c) \_\_\_\_\_
11. State concisely and in the same order the facts which support each of the grounds set out in (10):
- (a) \_\_\_\_\_
- (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? 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. n/a
- ii. \_\_\_\_\_
- iii. \_\_\_\_\_
- iv. \_\_\_\_\_
- (b) the name and location of the Court in which each was filed:
- i. n/a
- ii. \_\_\_\_\_
- iii. \_\_\_\_\_
- iv. \_\_\_\_\_
- (c) the disposition thereof:
- i. n/a
- ii. \_\_\_\_\_
- iii. \_\_\_\_\_

- iv. n/a
- (d) the date of each such disposition:
  - i. n/a
  - ii. n/a
  - iii. n/a
  - iv. n/a
- (e) if known, citations of any written opinions or orders entered pursuant to each such disposition:
  - i. n/a
  - ii. n/a
  - iii. n/a
  - iv. n/a
- 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?  
n/a
- 15. If you answered "yes" to (14) identify:
  - (a) which grounds have been presented:
    - i. n/a
    - ii. n/a
    - iii. n/a
  - (b) the proceedings in which each ground was raised:
    - i. n/a
    - ii. n/a
    - iii. n/a
- 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) n/a
  - (b) n/a
  - (c) n/a
- 17. Were you represented by an attorney at any time during the course of:

- (a) your arraignment and plea? \_\_\_\_\_
  - (b) your trial, if any? \_\_\_\_\_
  - (c) your sentencing? \_\_\_\_\_
  - (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? was denied Appellate Counsel
  - (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. Anna Good
    - ii. \_\_\_\_\_
    - iii. \_\_\_\_\_
  - (b) the proceedings at which each such attorney represented you:
    - i. Plea and sentencing
    - ii. \_\_\_\_\_
    - iii. \_\_\_\_\_
19. State clearly the relief you seek in filing this application:  
Reduction of sentence and/or trial
20. Are you now under sentence from any other court that you have not challenged?  
n/a

STATE OF SOUTH CAROLINA )

County of )

VERIFICATION )

Edward Kirk

I, Edward Kirk, 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.

\* Edward I Kirk

SWORN to and subscribed before me this 26<sup>th</sup>  
day of May, 2 2021

Lakisha D. Gray (L.S.)  
Notary Public

My Commission Expires: 01/13/30



2021 JUN -8 AM 9:30  
DEAN J. A. AUBREY  
S.C. & A.C.



# EXHIBIT D

|                           |   |                                               |
|---------------------------|---|-----------------------------------------------|
| STATE OF SOUTH CAROLINA   | ) | IN THE COURT OF COMMON PLEAS                  |
| COUNTY OF RICHLAND        | ) | FOR THE FIFTH JUDICIAL CIRCUIT                |
|                           | ) |                                               |
| Edward Kirk, Jr., #368801 | ) | 2021-CP-40-2769                               |
|                           | ) |                                               |
| Applicant                 | ) |                                               |
|                           | ) |                                               |
| v.                        | ) | <b>RETURN &amp; PARTIAL MOTION TO DISMISS</b> |
|                           | ) | <b>(Counsel Appointed)</b>                    |
| State of South Carolina,  | ) |                                               |
|                           | ) |                                               |
| Respondent                | ) |                                               |

---

In response to Applicant, Edward Kirk, Jr.'s action for post-conviction relief (PCR) commenced June 8, 2021, Respondent, the State of South Carolina, makes the following return and moves to dismiss the application as untimely pursuant to S.C. Code Ann. § 17-27-45. Respondent respectfully offers the following in support of its return and motion to dismiss:

### **I. PROCEDURAL HISTORY**

Applicant is presently confined in the South Carolina Department of Corrections (SCDC). During the August 2015 term, the Richland County Grand Jury indicted Applicant for armed robbery (2015-GS-40-4155), pointing and presenting firearms at a person (2015-GS-40-4156), and kidnapping (2015-GS-40-4161). Anna R. Good, Esquire, represented Applicant. April Sampson of the Fifth Circuit Solicitor's Office prosecuted the case.

Applicant pled guilty on June 28, 2016, before the Honorable Jocelyn Newman. Judge Newman sentenced Applicant pursuant to recommendation by the state to sixteen years imprisonment for armed robbery, five years for pointing and presenting a firearm, and sixteen years for kidnapping, to run concurrently. Applicant alleges he submitted a *pro se* appeal.

## II. CURRENT APPLICATION

In his application for PCR, Applicant alleges he is being held in custody unlawfully on the following grounds:

1. "Was the Applicant denied Appellate Counsel on direct review"
  - a. "The Applicant had filed a pro se appeal to the South Carolina Court of Appeals. The Applicant also wrote a letter to the South Carolina Commission on indigent defense requesting for the appointment of counsel on direct appeal. The Applicant had not received any response from them."
2. "Was plea counsel ineffective for failure to file a timely appeal on direct review"
  - a. "The Applicant had informed plea counsel to file a notice of appeal upon information and belief the Applicant family member had recently informed him that the South Carolina Court of Appeals had informed them that there was no appeal pending for the Applicant."

Attached to this return and incorporated herein are the Richland County Clerk of Court records, Applicant's SCDC records, and the records of this PCR action. Respondent reserves the right to amend this return upon receipt of any relevant materials.

## III. RESPONSE TO *WHITE* CLAIM

Respondent interprets Applicant's claims as requesting relief pursuant to *White v. State*, 263 S.C. 110, 208 S.E.2d 35 (1974). Respondent submits the allegation that counsel was ineffective for failing to file a direct appeal is without merit. As an initial matter, this application for post-conviction relief was filed outside of the one-year statute of limitation outlined in the Uniform Post-Conviction Procedure Act, S.C. Code §17-27-45(A) (1976). However, the one-year limitations period in which to file a petition for post-conviction relief does not apply where the defendant alleges he was denied a direct appeal due to ineffective assistance of counsel. *Wilson v. State*, 348 S.C. 215, 559 S.E.2d 581 (2002). Therefore, Respondent submits Applicant's allegations

should be dismissed unless he can establish a legitimate basis to prove he did not timely file based on a belief an appeal was pending.

The decision of the South Carolina Supreme Court, in *White* holds even though the post-conviction relief court finds the applicant had never voluntarily and intelligently abandoned his appeal, the court has no jurisdiction to grant a belated appeal. However, where an accused establishes in a post-conviction relief hearing that he was unconstitutionally deprived of his statutory right to a direct appeal, the South Carolina Supreme Court, upon an appeal of the post-conviction relief decision, will review the trial record and pass upon all issues properly raised and argued as if the direct appeal has been perfected. *Id.* at 119, 108 S.E.2d at 39-40.

Following a trial, counsel is required to make certain the defendant is made fully aware of the right to appeal. *Turner v. State*, 380 S.C. 223, 224-25, 670 S.E.2d 373, 374 (2008) (internal citations omitted). In the absence of an intelligent waiver by the defendant, counsel must either initiate an appeal or comply with the procedure in *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967). *Id.* However, the standard for a guilty plea differs. Absent extraordinary circumstances, such as when there is reason to think a rational defendant would want to appeal (for example, because there are non-frivolous grounds for appeal) or when the defendant reasonably demonstrated an interest in appealing, there is no constitutional requirement that a defendant be informed of the right to a direct appeal from a guilty plea. *Id.*

Respondent submits Applicant cannot show any “extraordinary circumstances” were present at the time of the plea, which would trigger plea counsel’s duty to consult with Applicant about his right to appeal. Applicant’s allegations as pled are additionally conflicting and contradictory. Applicant claims he both filed a *pro se* notice of appeal requesting the appointment of appellate counsel, in addition to alleging he asked plea counsel to timely file for direct review.

It is therefore unclear to Respondent exactly in what way Applicant believes counsel was ineffective for failing to file an appeal when Applicant stated he filed a *pro se* notice of appeal himself. However, the allegation regarding a belated direct appeal may raise a question of fact which is not conclusively refuted by the record. Accordingly, Respondent requests an evidentiary hearing solely on this allegation. *Sharper v. State*, 305 S.E.2d 247.

#### IV. PARTIAL MOTION TO DISMISS

Respondent submits Applicant's allegations, except for claim that he is entitled to belated appellate review of direct appeal issues pursuant to *White v. State*, 263 S.C. 110, S.E.2d 35 (1974), should be summarily dismissed for failure to comply with the filing procedures of the Uniform Post-Conviction Procedure Act. S.C. Code Ann. §17-27-10 to -160. Specifically the act requires as follows:

(A) An application for relief filed pursuant to this chapter must be filed within one year after the entry of a judgment of conviction or within one year after the sending of the remittitur to the lower court from an appeal or the filing of the final decision upon an appeal, whichever is later.

(B) When a court whose decisions are binding upon the Supreme Court of this State or the Supreme Court of this State holds that the Constitution of the United States or the Constitution of South Carolina, or both, impose upon state criminal proceedings a substantive standard not previously recognized or a right not in existence at the time of the state court trial, and if the standard or right is intended to be applied retroactively, an application under this chapter may be filed not later than one year after the date on which the standard or right was determined to exist.

(C) If the applicant contends that there is evidence of material facts not previously presented and heard that requires vacation of the conviction or sentence, the application must be filed under this chapter within one year after the date of actual discovery of the facts by the applicant or after the date when the facts could have been ascertained by the exercise of reasonable diligence.

S.C. Code Ann. § 17-27-45.

The South Carolina Supreme Court has held the statute of limitations shall apply to all applications filed after July 1, 1996. *Peloquin v. State*, 321 S.C. 468, 469 S.E.2d 606 (1996). A motion for summary judgment may properly be used to raise the defense of statute of limitations. *McDonnell v. Consolidated School District of Aiken*, 315 S.C. 487, 445 S.E.2d 638 (1994). Additionally, S.C. Code Ann. § 17-27-70(c) authorizes the Court to “grant a motion by either party for summary disposition of [an] application when it appears from the pleadings . . . that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.”

Applicant pled guilty on June 28, 2016, and did not pursue a direct appeal. Therefore, the PCR application should have been filed on June 28, 2017. However, this application was filed on June 8, 2021, almost three years after the statutory filing period had expired. Moreover, Applicant has completely failed to provide any specific facts to support his claims. Respondent requests that this Court summarily dismiss the remaining allegations, except for the claims of a belated direct appeal, for failure to file within the time mandated by the Uniform Post-Conviction Procedure Act.

A *White* claim alleges that an applicant wanted or would have wanted an appeal of his conviction or sentence and did not receive appellate review of his conviction or sentence due to a failure of his counsel. *White*, 263 S.C. 110, 208 S.E.2d 35. If a factual dispute exists as to whether an applicant knowingly and intelligently waived his right to appeal his conviction or sentence, he has the right to an evidentiary hearing on that issue. *Id.* at 119, 208 S.E.2d at 39. Further, *Wilson* holds an applicant has the right to that evidentiary hearing, on a *White* claim, even if the PCR application was filed beyond the statute of limitations. *Wilson*, 348 S.C. at 218, 559 S.E.2d at 582.

Should the Court find that Applicant did not timely file his PCR application based on an error with Applicant’s direct appeal, Respondent requests Applicant establish circumstances sufficient to support equitable tolling for his application. Our courts have held that “statutes of

limitations are not simply technicalities, but are fundamental to a well-ordered judicial system.”

*Moates v. Bobb*, 322 S.C. 172, 176, 470 S.E.2d 402, 404 (Ct. App. 1996). *Moates* explained:

Statutes of limitations embody important public policy considerations in that they stimulate activity, punish negligence, and promote repose by giving security and stability to human affairs. One purpose of a statute of limitations is to relieve the courts of the burden of trying stale claims when a plaintiff has slept on his rights. Another purpose of a statute of limitations is to protect potential defendants from protracted fear of litigation.

*Id.*

In rare circumstances, the statute of limitations will be equitably tolled to allow a petitioner the opportunity to exercise his or her rights when they were denied the chance to do so. This doctrine has been specifically extended into the context of post-conviction relief cases, as well. Equitable tolling has been deemed available where: (1) extraordinary circumstances prevented the plaintiff from filing despite his due diligence; (2) the plaintiff actively pursued his or her judicial remedies by filing a defective pleading during the statutory period or the claimant has been induced or tricked by the defendant's misconduct into allowing the filing deadline to pass; and (3) the plaintiff, despite all due diligence, is unable to obtain vital information bearing on the existence of his or her claim. *Pelzer v. State*, 378 S.C. 516, 521, 662 S.E.2d 618, 619-20 (Ct. App. 2008). *Pelzer* further explained the doctrine should be limited to very exclusive circumstances. “[E]quitable tolling, which allows a plaintiff to initiate an action beyond the statute of limitations deadline, is typically available only if the claimant was prevented in some extraordinary way from exercising his or her rights, or, in other words, if the relevant facts present sufficiently rare and exceptional circumstances that would warrant application of the doctrine.” *Pelzer*, 378 S.C. at 521, 662 S.E.2d at 620.

This Court has held that the statute of limitations should be equitably tolled for the filing of a post-conviction relief application in limited circumstances. *See Ferguson v. State*, 382 S.C.

615, 677 S.E.2d 600 (2009) (finding the statute of limitations should be equitably tolled when a mentally incompetent PCR applicant was prevented from timely filing by his mental incompetency, and the applicant should proceed with his PCR action only if the application was filed within one year of the applicant regaining competency); *Mose v. State*, 420 S.C. 500, 803 S.E.2d 718 (2017) (allowing equitable tolling where the applicant notarized and relinquished control of his application to prison authorities for mailing seventeen days prior to the filing deadline, but due to circumstances outside applicant's control, the application was not filed until three days past the deadline). Consequently, equitable tolling has also been allowed where “extraordinary circumstances prevented the plaintiff from filing despite his or her diligence” and where “the plaintiff, despite all due diligence, is unable to obtain vital information bearing on the existence of his or her claim.” *Pelzer*, 378 S.C. at 521, 662 S.E.2d at 621.

In the present case, Respondent submits there are no extraordinary circumstances present to warrant tolling of the statute of limitations. Applicant had a full year to submit a post-conviction petition, and ignorance of the statute of limitations is not an excuse for late filing. *See Leamon v. State*, 363 S.C. 432, 435, 611 S.E.2d 494, 496 (2005). However, should Applicant establish he is entitled to equitable tolling of the statute of limitations, Respondent requests Applicant, through counsel, provide specific claims and facts to support the remaining vague allegation in his application. Should it be necessary, Respondent further requests an evidentiary hearing to fully resolve the remaining issues and will file an amended return to address the merits of Applicant’s underlying claims. *See Sharper v. State*, 279 S.C. 264, 265, 305 S.E.2d 247, 248 (1983).

#### **V. ANY FUTURE AMENDMENTS AND INVOCATION OF DISCOVERY**

Applicant must specify any claims he intends to raise at the PCR evidentiary hearing. 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, SCRCP. *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 the State pursuant to *Love v. State*, 428 S.C. 231, 834 S.E.2d 196 (2019), or, alternatively, Respondent will request a continuance in the matter. *See id.* at 245, 834 S.E.2d at 203 (Kittredge, J., dissent) (“If, however, the proposed amendment . . . would truly prejudice the State, the better course of action would be to continue the matter and thus remove any possibility of prejudice resulting from the belated amendments.”).

Pursuant to section 17-27-150 of the South Carolina Code, Applicant may not invoke formal discovery processes to issue subpoenas or otherwise obtain discovery materials unless granted leave from the Court upon a showing of good cause. Further, Respondent requests that all potential exhibits and materials used to produce potential expert witness testimony be sent to Respondent well in advance of the evidentiary hearing. As noted above, Respondent reserves the right to request a continuance and oppose witness testimony and exhibits that are withheld until the last minute resulting in undue prejudice to the State. *See Love*, 428 S.C. 231, 834 S.E.2d 196.

## VI. ALL OTHER CLAIMS

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 an evidentiary hearing solely to address the issue of whether Applicant is entitled to belated appeal pursuant to *White*.

Respectfully submitted,

ALAN WILSON  
Attorney General

W. JEFFREY YOUNG  
Chief Deputy Attorney General

MEGAN HARRIGAN JAMESON  
Senior Assistant Deputy Attorney General

YASMEEN E. KLEIN  
Assistant Attorney General

By:

  
ATTORNEYS FOR RESPONDENT  
Office of the Attorney General  
Post Office Box 11549  
Columbia, SC 29211

August 18 2021

# EXHIBIT E

STATE OF SOUTH CAROLINA  
COUNTY OF RICHLAND

Edward Kirk, Jr., #368801

Applicant,

v.

State of South Carolina,

Respondent.

) IN THE COURT OF COMMON PLEAS  
) FIFTH JUDICIAL CIRCUIT

) CASE NO. 2021-CP-40-2769

) **CONSENT ORDER GRANTING  
) BELATED APPELLATE REVIEW  
) PURSUANT TO WHITE v. STATE**

RICHLAND COUNTY  
FILED  
2022 DEC 16 AM 10:50  
CLERK, COURT OF COMMON PLEAS

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed June 8, 2021. Respondent made its Return on August 18, 2021. An evidentiary hearing on the matter was scheduled for November 15, 2021, at the Richland County Courthouse. Prior to the commencement of the hearing, counsel for the Applicant, Jonathan Waller, Esquire, and counsel for the Respondent, D. Russell Barlow, II, Esquire, of the South Carolina Office of the Attorney General, informed the court that the parties had reached a consent resolution to the matter and presented the proposed resolution to the court. This Order follows.

The Court had before it the Richland County Clerk of Court records, Applicant's records from the South Carolina Department of Corrections, Applicant's application, and Respondent's return.

### **PROCEDURAL HISTORY**

Applicant is presently confined in the South Carolina Department of Corrections (SCDC). During the August 2015 term, the Richland County Grand Jury indicted Applicant for armed robbery (2015-GS-40-4155), pointing and presenting firearms at a person (2015-GS-40-4156), and kidnapping (2015-GS-40-4161). Anna R. Good, Esquire, represented Applicant. April Sampson

of the Fifth Circuit Solicitor's Office prosecuted the case.

Applicant pled guilty on June 28, 2016, before the Honorable Jocelyn Newman. Judge Newman sentenced Applicant pursuant to a recommendation by the State, to sixteen years imprisonment for armed robbery, five years for pointing and presenting a firearm, and sixteen years for kidnapping, to run concurrently. Applicant alleges he submitted a *pro se* appeal.

### ALLEGATIONS

In his application for PCR, Applicant alleges he is being held in custody unlawfully on the following grounds:

1. "Was the Applicant denied Appellate Counsel on direct review"
  - a. "The Applicant had filed a *pro se* appeal to the South Carolina Court of Appeals. The Applicant also wrote a letter to the South Carolina Commission on indigent defense requesting for the appointment of counsel on direct appeal. The Applicant had not received any response from them."
2. "Was plea counsel ineffective for failure to file a timely appeal on direct review"
  - a. "The Applicant had informed plea counsel to file a notice of appeal upon information and belief the Applicant family member had recently informed him that the South Carolina Court of Appeals had informed them that there was no appeal pending for the Applicant."

### FINDINGS OF FACT AND CONCLUSIONS OF LAW

Applicant alleges Counsel failed to file an appeal of his guilty plea after Applicant requested Counsel to do so. The State has consented to Applicant receiving a belated appeal pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35, (1974). Therefore, based on the foregoing, this Court finds Applicant is entitled to a belated direct appeal pursuant to White, and grants relief in the form of a belated appeal only.

The Court notes Applicant must file and serve a notice of appeal within thirty days from PCR counsel's receipt of written notice of entry of judgment to secure the appropriate appellate

review. See Rule 203, SCACR. Applicant is directed to Rule 243, SCACR, for appropriate procedures for appeal.

**IT IS THEREFORE ORDERED:**

1. The Court grants Applicant a belated appeal pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35, (1974); and
2. Applicant shall be remanded to the custody of the State.

**AND IT IS SO ORDERED** this 17 day of November, 2022.



D. CRAIG BROWN  
Presiding Judge  
Fifth Judicial Circuit

Columbia, South Carolina.

*DCB*  
*11/17/22*

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

---

Appeal from Richland County

D. Craig Brown, Circuit Court Judge

---

EDWARD KIRK,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

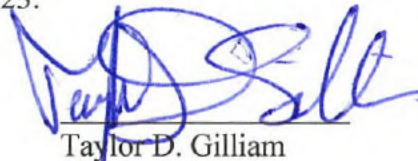
RESPONDENT.

---

CERTIFICATE OF SERVICE

---

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Motion to Hold Appeal in Abeyance and Motion to Remand for Reconstruction of Post-Conviction Relief Hearing has been served upon D. Russell Barlow, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS), this 13<sup>th</sup> day of March, 2023.



Taylor D. Gilliam  
Appellate Defender

ATTORNEY FOR PETITIONER.

**Leverett, Scott**

---

**From:** Russ Barlow <RussBarlow@scag.gov>  
**Sent:** Monday, March 13, 2023 4:32 PM  
**To:** Leverett, Scott  
**Subject:** [External] RE: reconstruction in Edward Kirk

No objections. I also checked, and we were not able to get the transcript.

Respectfully,

**Russ Barlow**

Assistant Attorney General  
 Post-Conviction Relief

South Carolina Attorney General's Office  
 Post Office Box 11549  
 Columbia, SC 29211  
 (803) 734-3737  
[RussBarlow@SCAG.gov](mailto:RussBarlow@SCAG.gov)

~~~ CONFIDENTIALITY NOTICE ~~~ This message is intended only for the addressee(s) and, along with any attachments, is considered confidential and may be legally privileged. If you have received it in error, please notify the sender immediately by reply email and delete this message from your system. Please do not copy or use it for any purposes or disclose its contents to anyone else. This email and attachments are subject to FOIA requests.

From: Leverett, Scott <sleverett@sccid.sc.gov>
Sent: Monday, March 13, 2023 2:05 PM
To: Russ Barlow <RussBarlow@scag.gov>
Cc: Summer Etheredge <SummerEtheredge@scag.gov>; Gilliam, Taylor <tgilliam@sccid.sc.gov>
Subject: FW: reconstruction in Edward Kirk

Dear Mr. Barlow,

I'm resending a message from Friday; I just wanted to make sure you saw it before we filed our motion, and ask if we have your consent/that you don't object. Thanks so much for your time and help.

-Scott Leverett
 Admin. Asst. for Taylor Gilliam
 Appellate Defense

From: Gilliam, Taylor <tgilliam@sccid.sc.gov>
Sent: Friday, March 10, 2023 9:44 AM
To: RussBarlow@SCAG.gov

Cc: Leverett, Scott <sleverett@sccid.sc.gov>

Subject: reconstruction in Edward Kirk

Good morning,

I understand you're in court today- this is not a pressing matter.

I believe you might've handled the Kirk case at the PCR level- a consent order granting belated appellate review was signed by Judge Brown in November 2022. I've attached it for context.

The 2016 guilty plea transcript from Kirk's case cannot be produced by the court reporter. I'm working on a motion to remand for reconstruction and will file it today. If you get this message and feel comfortable consenting or not objecting, great. If not, no worries- just wanted to put it on your radar.

Good luck with all your cases today. Hope you have a good weekend.

-Taylor

This communication and any attachment thereto is intended only for use by the addressee(s) named herein, and may contain legally privileged and/or confidential information. If you are not the intended recipient of this e-mail, you are hereby notified that any dissemination, utilization, distribution or copying of this e-mail, and any attachments thereto, is strictly prohibited. If you have received this e-mail in error please notify the Commission on Indigent Defense immediately and permanently delete the original and any copy of any e-mail and any printout thereof. SCCID may be reached by using the email address of the sender, or at 803-734-1343.

The Supreme Court of South Carolina

Edward Kirk, Jr., Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2022-001823

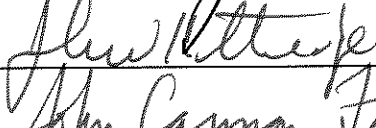
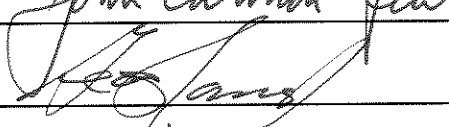
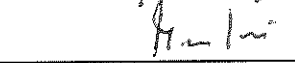
ORDER

This matter is before the Court by way of a notice of appeal from an order of the circuit court finding Petitioner is entitled to a belated direct appeal pursuant to *White v. State*, 263 S.C. 110, 208 S.E.2d 35 (1974). Because the record of Petitioner's guilty plea is not available, Petitioner asks this Court to hold this matter in abeyance and remand the case to the circuit court to reconstruct the record of Petitioner's guilty plea hearing. The State has filed a letter stating it does not object to Petitioner's motions.

We hereby hold this matter in abeyance and remand the matter to the circuit court to reconstruct the record of Petitioner's plea hearing. *See Koon v. State*, 358 S.C. 359, 367, 595 S.E.2d 456, 460 (2004) (holding where a transcript has been lost or destroyed, this Court may remand the matter to have the record reconstructed), *overruled on other grounds by State v. Gentry*, 363 S.C. 93, 610 S.E.2d 494 (2005). The circuit court may consider affidavits of plea counsel, the Assistant Attorney General who represented the State at the hearing, the court reporter, the plea judge, and any other person who may assist in determining what transpired at the hearing. *See China v. Parrott*, 251 S.C. 329, 333–34, 162 S.E.2d 276, 278 (1968) (holding the trial court properly considered affidavits of the plaintiff's counsel and the court reporter in determining what transpired at a hearing).

Petitioner's counsel shall contact counsel for the State and the circuit court within ten days of the date of this order to schedule such hearings as the circuit court deems appropriate. Petitioner's counsel shall provide an update to the Clerk of this Court not later than thirty days from the date of this order, and every thirty days

thereafter, with copies of the update provided to counsel for the State. If the circuit court determines reconstruction is not possible, the court shall immediately notify this Court and the parties of that determination. If the record is reconstructed, Petitioner's counsel shall notify this Court, and the matter will proceed on Petitioner's receipt of the transcript from the reconstructed hearing.

| | |
|--|------|
|  | C.J. |
|  | J. |
|  | J. |
|  | J. |
|  | J. |

Columbia, South Carolina
April 21, 2023

cc:
D Russell Barlow, II, Esquire
Taylor Davis Gilliam, Esquire

| | |
|---------------------------|------------------------------|
| State of South Carolina) | In the Court of Common Pleas |
|) | Fifth Judicial Circuit |
| County of Richland) | 2021-CP-40-02769 |

| | | |
|------------------------------|---|----------------------|
| Edward Kirk, Jr., |) | |
| |) | |
| Petitioner, |) | |
| |) | |
| vs. |) | Transcript of Record |
| |) | |
| |) | |
| The State of South Carolina. |) | |
| |) | |
| Respondent. |) | |
| _____ |) | |

December 15, 2023
Columbia, South Carolina

B E F O R E:

The Honorable Jocelyn Newman, Judge

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

Jessica Saxon, Esquire
Attorney for the Petitioner

April W. Sampson, Assistant Solicitor
Attorney for the State

ALSO PRESENT:

Anna R. Browder, Esquire

Elizabeth B. Harris, CVR-M-CM
Circuit Court Reporter
Certified Verbatim Reporter - Master
Certificate of Merit

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

I N D E X

| <u>Witness/Description</u> | <u>Page No.</u> |
|---|-----------------|
| Reconstruction of Guilty Plea | 3 |
| Certificate Page. | 33 |

E X H I B I T S

| <u>No.</u> | <u>Description</u> | <u>I.D.</u> | <u>Ev.</u> |
|-------------------------|--------------------|-------------|------------|
| No Exhibits Introduced. | | | |

1 THE COURT: Good afternoon. We will start with Edward
2 Kirk. Let's try to recreate this guilty plea. Is Mr. Kirk
3 in the courtroom?

4 Come on down here, Mr. Kirk. I think we're going to
5 try to stand where we would normally stand for a guilty
6 plea.

7 (WHEREUPON, EDWARD KIRK, JR., IS DULY SWORN.)

8 THE COURT: And, Ms. Sampson, do you happen to have
9 copies of the indictments issued or anything?

10 MS. SAMPSON: That would be with the clerk's office.

11 THE COURT: I wonder if maybe we should send ---

12 MR. BARLOW: Your Honor.

13 THE COURT: Yes.

14 MR. BARLOW: Russ Barlow with the AG's Office.

15 THE COURT: Yes.

16 MR. BARLOW: I've got it for you.

17 THE COURT: Wonderful. Thank you.

18 MR. BARLOW: It's copies of the amended and the
19 original.

20 THE COURT: Thank you.

21 MR. BARLOW: You're welcome.

22 THE COURT: So, we are on the record. This the *State*
23 *v. Edward Kirk, Jr.*, indictment 2015-GS-40-04155,
24 2015-GS-40-04161, and 2015-GS-40-04156. We are here today
25 for the purposes of re-creating a guilty plea which

1 occurred June 28th of 2016. The court has no notes on this
2 matter. It's my understanding that the record is not
3 available, and so this matter has been remanded to Circuit
4 Court by the Supreme Court for purposes of re-creating the
5 guilty plea.

6 The court will do the best that it can to in that
7 endeavor, but as I said, the court doesn't have any notes.
8 I understand from Ms. April Sampson, who was the solicitor
9 on this case, that you do have some notes of some kind. We
10 also have Ms. Anna Browder.

11 Were you Browder at the time?

12 MS. BROWDER: I was Goode at the time, I believe.

13 THE COURT: Formerly Anna Goode, now Anna Browder, who
14 is currently an assistant solicitor, but at the time was a
15 defense attorney and represented Mr. Kirk at the guilty
16 plea.

17 Mr. Kirk, is also present, along with?

18 MS. SAXON: Jessica Saxon of Appellate Defense, Your
19 Honor.

20 THE COURT: Exactly. So, Mr. Kirk has been sworn, and
21 honestly I don't exactly how I would have asked it, but I
22 would have asked probably Ms. Browder if she represents Mr.
23 Kirk.

24 MS. BROWDER: Yes, ma'am.

25 THE COURT: And whether she has advised him of his --

1 the charges against him, the possible punishment, his
2 constitutional rights.

3 MS. BROWDER: Yes, ma'am. I believe you probably
4 would have also gone into that because we had actually
5 started the trial and done pretrial.

6 MS. SAMPSON: Yes, ma'am. We had actually picked a
7 jury, and then we let the jury go for the day, based on my
8 records, so that we could do the pretrial. And then he
9 pled once you allowed in he was going forward on the middle
10 -- there were three armed robberies. We were going forward
11 on the middle armed robbery that happened January 14th of
12 2015, and we had -- the defense had moved to keep --
13 exclude any mention of the first armed robbery that
14 happened on June -- January 13th or the third one that
15 happened on January 15th.

16 We had a hearing before Your Honor. You agreed with
17 the state to allow us to include -- allow the victim and
18 the information from those two robberies to be presented to
19 the jury if he were to go forward with his jury trial. His
20 codefendants were testifying, as well as the witnesses, and
21 based on *res gestae* and also *Lyle*, under *Lyle*, you allowed
22 those to go forward, and then he decided to plead the next
23 morning.

24 THE COURT: Okay, and so I would have asked Mr. Kirk
25 whether he was under the influence of alcohol or drugs,

1 whether Mr. Kirk -- and I'm sure he would have answered in
2 the negative -- whether Mr. Kirk took any medication,
3 whether he was clearheaded and understood what he was
4 doing. I would have then advised him of his constitutional
5 rights, that by pleading guilty he is giving up his right
6 to remain silent, that he is giving up his right to have a
7 jury trial, and that he is giving up his right to require
8 that the state prove that he's guilty of each of these
9 offenses beyond a reasonable doubt.

10 I would have advised him that at a jury trial, he'd be
11 able to confront and cross-examine the state's witnesses
12 against him. He'd be able to present witnesses on his own
13 behalf. He could testify on his own behalf if he chose to,
14 but no one could force him to, and the jury could not hold
15 it against him if he chose not to. He'd be able to present
16 any defenses that he has to any of these charges, and the
17 state would be required to prove that he's guilty of each
18 of these offenses beyond a reasonable doubt. Whether he
19 understood all of that, I'm certain that he answered in the
20 affirmative.

21 I would have asked him if he wanted to plead guilty or
22 if he wants a jury trial. Clearly he said he wanted to
23 plead guilty, and I probably would have said something
24 along the lines of if you want a jury trial, you can have a
25 jury trial. We're already started the jury trial; there is

1 jury ready to come in tomorrow morning, and you can have
2 that jury trial without delay if you choose. And he would
3 have chosen to plead guilty evidently.

4 I would have asked Ms. Sampson present the facts of
5 the case.

6 MS. SAMPSON: And, and just to be clear, Your Honor,
7 we did this twice. He pled. You gave him a sentence, and
8 then they moved for a reconsideration.

9 THE COURT: Reconsideration.

10 MS. SAMPSON: And so we did it a second time. I don't
11 believe the second time I gave you the facts again. I
12 think we just went straight to the sentencing portion, but
13 I'll do the facts now.

14 Essentially -- and I'm going to be honest. Without
15 looking at the indictments, I'm not sure which two armed
16 robberies he pled to, but I'll just give you the facts of
17 all three and that will be ---

18 MS. BROWDER: It was not the China Pot one.

19 MS. SAMPSON: Okay.

20 MS. BROWDER: So, it would have been Beezer's and
21 Domino's.

22 MS. SAMPSON: Got it. All right.

23 So, on January 13th of 2015, this defendant, along
24 with three other defendants, Octavia Gill, Timothy Beecham,
25 and Shatavia Flowers, robbed the victim, Charles Sanderson,

1 who was delivering pizzas for Domino's. At the time it
2 would be alleged that Gill, not this defendant, was driving
3 all of them in a stolen black Cadillac. They saw Mr.
4 Sanderson making his delivery. As he was coming back to
5 his car, this defendant, along with Timothy Beecham,
6 pointed a gun at the victim, knocked the pizza bag out of
7 his hand, and took the money. They were wearing masks, so
8 the victim was not able to identify them, and then they get
9 back in the stolen car.

10 On January 15th, the same four individuals robbed
11 Maryanna Reyes, who was a delivery driver for Beezer's,
12 which is a sandwich shop near USC. They did so while armed
13 with guns. Again on this particular one, Gill called
14 Beezer's, placed the order under a false name, and then
15 waited for the delivery driver to come make the delivery.
16 When the delivery driver arrived, the codefendant Mr.
17 Beecham pointed a gun at her, demanding her purse and the
18 food. They take her purse, her food, the food, and phone,
19 cell phone from her. They then get into the black Cadillac
20 and drive away.

21 They were apprehended because as they're investigating
22 the first robbery and the second robbery, the third one
23 happens. Due to the similarity in the two -- first two
24 robberies, they kind of -- everybody starts investigating
25 them together. The third robbery occurred and on that one,

1 Mr. -- Ms. Gill again ordered from Tea Pot. That is not
2 the one he pled guilty to, but that's the information you
3 would have been given back then.

4 On that date, the 15th, she makes the order. The
5 victim, Scott Allison, delivers the food to 163 Astor
6 Circle here, which is here in Richland County. He is
7 flagged down by a male saying hey, it's my food. When he
8 attempts to give the food to the person, they, they then
9 rob him. One of them pointed a gun, and they took cell
10 phone, the food, and one of them pretended in this
11 particular case to be robbed by the third.

12 The victim was able to give them the number that was
13 used, and it was the same number that was used in the other
14 robbery from the day before. The victim also said that one
15 of the suspects throws a cigarette butt out. So, they go
16 to the incident location to look for the cigarette butt and
17 as they are doing that, they actually see the codefendant
18 Ms. Gill standing at her carport smoking a cigarette.

19 She had unrelated charges that they were going to
20 arrest her for. So, when they go to do -- arrest her for
21 those charges and talk to her about this case, she tries to
22 give her cell phone to her sister. When she does that,
23 they take the cell phone from her, and it is the cell phone
24 that was used to make the phone calls.

25 They also find, with a search warrant, find the

1 clothing matching the description that was worn by the
2 suspects, as well as receipts and menus from all three,
3 from -- get from -- excuse me, Beezer's, Tea Pot, and
4 Domino's. She was taken to headquarters and confessed,
5 implicated all three of her codefendants. They find Ms.
6 Flowers; she does the same. Based on their implications,
7 they talk to Mr. Beecham and Mr. Kirk, and they also
8 confessed, and that's basically what got us here today.

9 THE COURT: And I would have asked Mr. Kirk whether
10 that is correct.

11 Ms. Browder, do you have any notes about whether his
12 story varied from that in any way?

13 MS. BROWDER: Not that portion of it, no.

14 THE COURT: Okay, and so then I would have asked him
15 -- because I've read the indictment numbers, I did not read
16 the charges, but as far as I know, Mr. Kirk would have
17 agreed that at least the elements of each crime were met.
18 He may have had some disagreement with some portion of the
19 facts but not the salient points, and so I would have asked
20 him to the charge of armed robbery from January 14th of
21 2015, does he plead guilty or not guilty. He would've
22 responded guilty. To the charge of kidnapping from January
23 13, 2015, does he plead guilty or not guilty, and he was
24 have pled guilty. And finally to the charge of pointing
25 and presenting a firearm from January 13, 2015, does he

1 plead guilty or not guilty, and he would have said guilty.

2 I would have then asked are you guilty of all three of
3 these offenses? Has anyone promised you anything,
4 threatened you, coerced you, or mistreated you to force you
5 to plead guilty? Are you pleading guilty of your own free
6 will? Is it your own decision to plead guilty? Are you
7 pleading guilty because you are guilty?

8 I would have asked him if he's satisfied with his
9 attorney, whether she's done everything he asked her to do,
10 whether he's had sufficient time to talk to her, whether
11 he's understood his talks with her, whether he needed any
12 more time to talk to her, and whether he had any complaints
13 about her whatsoever. And he would have answered all those
14 questions appropriately to go forward with the guilty plea.

15 There were some sentence negotiations or were
16 recommendations?

17 MS. SAMPSON: He, if I remember correctly, he pled
18 straight up. At that point, I did dismiss the companion
19 charges. So, there was another pointing and presenting,
20 another kidnapping, I believe the other armed robbery. We
21 dismissed all of those, but he pled straight up. Initially
22 I had offered ten years, but he pled the day of the
23 sentence -- I mean, he pled the day of trial, so all offers
24 were off the table at that point.

25 THE COURT: However, the box for recommendation is

1 checked on all three sentencing sheets.

2 MS. BROWDER: It might have been for concurrent, Your
3 Honor.

4 MS. SAMPSON: Concurrent.

5 THE COURT: Okay.

6 MS. SAMPSON: I did recommend concurrent.

7 THE COURT: Okay.

8 MS. SAMPSON: That is correct, but that was it.

9 I will say while I'm speaking that the victims, I
10 tried to figure out whether the victims were here for the
11 plea or whether they spoke. I know they were here because
12 they were here to be witnesses. I, I cannot honestly say
13 to the court whether they spoke or not. I know that Ms.
14 Reyes was very scared, and they all quit being delivery
15 drivers after this occurred. That is what I remember them
16 always saying, but I cannot say for sure that they were
17 here for the plea or not.

18 THE COURT: Okay.

19 MS. SAMPSON: Or if they spoke. They were here. I
20 can't remember if they spoke or not.

21 THE COURT: So with recommendation being current time,
22 I would have explained to Mr. Kirk the recommendation and
23 explained that that's just a recommendation, and I do not
24 have to follow that. You understand if I decide to, I
25 could give you the maximum punishment on each of these

1 charges and run them consecutive. I would have added up
2 the number of years.

3 MS. SAXON: Sixty-five years, I believe, Your Honor.

4 THE COURT: Thank you. I would have told him if I
5 decide to, I could give you sixty-five years in the
6 Department of Corrections. Knowing that, do you still want
7 to plead guilty, and he would have said yes.

8 I would have also advised him that two of the three
9 offenses are most serious offenses or, as I would explain
10 it, two strikes against him under the state's two strike
11 law, meaning that if he's convicted in the future of a
12 qualifying offense, the state could seek a sentence of life
13 without the possibility of parole against him. Knowing
14 that, does he still want to plead guilty, and he would have
15 said yes.

16 I then would have heard from Ms. Browder.

17 MS. BROWDER: Based on my notes, Your Honor, it looks
18 like I would have let you know he was twenty-one years old
19 and he lives with his mother.

20 When you look at the facts of all three of these armed
21 robberies, Octavia Gill would have been the one that's the
22 most culpable. She has a very lengthy record. She's the
23 one that planned all these armed robberies and as the facts
24 go, Mr. Kirk actually did not have a weapon during the
25 armed robbery. That also makes him least culpable of all

1 the codefendants, and he was not charged with the China Pot
2 armed robbery because he had indicated that he came later
3 to that armed robbery and wasn't there during it.

4 I also mentioned, Your Honor, that he has no prior
5 record. He has a very supportive family. His mother was
6 here; I do believe she spoke. I wrote down emotional, so
7 I'm assuming she was very emotional. I don't remember what
8 she said, but that he does have a supportive family.

9 He is very aware that he has messed up, and he is
10 sorry to his family and the victims for putting himself in
11 a situation that's caused pain for all that's involved, and
12 it's been hard for him to deal with the consequences from
13 that.

14 But despite that, he has been in jail for sixteen
15 months, and he's been productive while he's been in jail.
16 He got his GED while he was in there waiting for trial or
17 plea date, and that the original plea deal was ten to
18 fifteen years and that we would be asking for the minimum
19 ten years.

20 THE COURT: And I skipped a step. Prior to hearing
21 from Ms. Browder, I would have found that there's a
22 substantial factual basis for Mr. Kirk's plea, that he's
23 made the plea freely and voluntarily, knowingly and
24 intelligently, with the advice of competent counsel with
25 whom he says he is satisfied, and I will accept his plea.

1 I then would have heard from Ms. Browder. I also would
2 have gotten his criminal record if he has any.

3 MS. SAMPSON: He didn't, and she stated he did not
4 have a prior record.

5 THE COURT: Did Mr. Kirk speak at the time?

6 MS. BROWDER: I don't believe so, but I don't know if
7 he remembers. I don't have down that he spoke.

8 THE COURT: Do you recall, Mr. Kirk, whether you said
9 anything to me before I sentenced you?

10 PETITIONER: Yeah. I was telling you that I wanted to
11 further my education and things of that nature at the time.

12 When will I have an opportunity to speak today about
13 what I remember?

14 THE COURT: Right now would be a good time.

15 PETITIONER: Yeah.

16 THE COURT: Sorry. I should have asked you.

17 PETITIONER: Basically, like you say, I was on my
18 second day of trial. I think my jury was out, so I was
19 going through with trial, but I was under the impression
20 that -- and my family was under the impression that, like I
21 said, if I, I took the plea, I'd get that crazy amount of
22 time that you were saying, maybe sixty-five years and all
23 that, but it supposed to be a negotiated plea in which I
24 was supposed to get ten years. That was the reason really
25 why I took the plea.

1 Other than that, at the end of my sentencing, I
2 remember you saying ten years but as I walked out of the
3 courtroom, I looked at my sentencing sheet and it said
4 twenty years. So, immediately after that I asked the
5 officer can you tell my lawyer come and talk to me? So, I
6 spoke with Ms. Goode and asked her, like, what happened.
7 She was, like, oh, I was so surprised. I don't know what
8 happened. So, I was, like, what can we do? And she said a
9 motion of reconsideration, but I was under the impression
10 that -- I wanted to file -- I wanted to file an appeal.
11 So, that's, that's why we're back here now because the
12 appeal was never filed. So, that was -- so, we had -- so,
13 I was supposed to get ten years to my understanding, to my
14 family's understanding.

15 Like you said, my mother spoke, and we didn't have
16 notice of this hearing today, so I don't have my mother
17 here. She would've been able to corroborate my story as
18 well, along with a couple of other people.

19 THE COURT: Okay. Well, I will reiterate of course I
20 cannot remember exactly what was said, but in all guilty
21 pleas I advise somebody, the defendant, of the maximum
22 possible punishment. Where there is a recommendation, I
23 advise the defendant that it is only the state's
24 recommendation, and I do not have to follow that. If I
25 choose to, I can sentence you to, in this case, sixty-five

1 years in the Department of Corrections. Knowing that, do
2 you still want to plead guilty, and we proceeded.

3 Evidently I heard from Ms. Goode, Browder, Mr. Kirk,
4 and Mr. Kirk's mother. Did I hear anything else from the
5 state?

6 MS. SAMPSON: The only thing we -- the only thing that
7 you said about the ten years -- I do remember that -- is
8 that that's the minimum because armed robbery carries --
9 you had to give him at least ten years. You did say that,
10 but that -- you never promised ten years, and I know that
11 Ms. Browder was never on the record that he was getting ten
12 years. That's the minimum for armed robbery. So, I don't
13 know if that's where the confusion that they had came from,
14 but you did say the minimum I can give you is ten years
15 because armed robbery has a minimum ten.

16 PETITIONER: Ms. Reyes, she did say at my hearing, she
17 said she believed in second chances, and she wanted me to
18 get as less time as possible.

19 THE COURT: Okay. I don't recall, but that may have
20 happened. But after hearing all of that, I then would have
21 imposed sentence. On indictment 2015-GS-40-04155 for armed
22 robbery, the sentence is that Mr. Kirk be committed to the
23 State Department of Corrections for twenty years. On
24 2015-GS-40-04161 for kidnapping, the sentence is that Mr.
25 Kirk be committed to the State Department of Corrections

1 for twenty years. And on 2015-GS-40-04156, the sentence --
2 that's pointing and presenting firearm, the sentence is
3 that Mr. Kirk be committed to the State Department of
4 Corrections for five years with credit for any time that
5 he's served, all sentences to run concurrent to each other.

6 I don't know whether the court advised him of his
7 right to appeal. That is not currently my standard
8 practice, but it may have been at the time, but that would
9 have adjourned that matter for the day.

10 We then reconvened on August 11, 2016, after the
11 defense filed a motion for reconsideration of the sentence.
12 I don't -- do you have a copy of the motion?

13 MS. BROWDER: I do, Your Honor.

14 THE COURT: What date was that motion filed?

15 MS. BROWDER: June 29, 2016.

16 THE COURT: Okay. So, the motion was timely filed.
17 Therefore, we reconvened on August 11, 2016, for a hearing
18 on that motion to reconsider the sentence.

19 Ms. Browder, I'm happy to hear you.

20 MS. BROWDER: Your Honor, based on our motion, we were
21 asking for you to reduce his sentence, considering again
22 that he had no prior record. In addition, since the time
23 that he had pled guilty, one of the codefendants, Beecham,
24 who was going to testify who also had a prior record and
25 was more culpable than Mr. Kirk, had pled guilty and he

1 received only twelve years. So, we were asking you to
2 reduce his sentence since somebody who was more culpable
3 and had a record had received less time.

4 THE COURT: Do you have any notes or recollections of
5 that hearing?

6 MS. SAMPSON: I remember that I more or less stood on
7 the facts. I might have read them again, but it was the --
8 the facts didn't change. The only thing that I stated was
9 the reason for his -- the difference was that Beecham, I
10 had spoken with him. He was prepared to testify against
11 this defendant, as were the other -- specifically, Shatavia
12 Flowers was here to plead -- to testify against him. So,
13 they did get some benefit for the fact that they were there
14 to cooperate. And my belief was part of the reason that he
15 ended up pleading is that his codefendants were there and
16 available to testify as his trial.

17 THE COURT: Mr. Kirk, do you remember anything about
18 that resentencing hearing?

19 PETITIONER: The resentencing hearing, I don't
20 remember Ms. Sampson being there. Maybe she was and the
21 same time, I didn't know anything about my codefendants
22 being there to testify against me.

23 And the resentencing hearing, it's my understanding
24 the whole purpose of that was because, like I said, at the
25 end of the sentence, I remember you saying ten years was my

1 sentence. So, I thought, like, reconsideration hearing
2 was, was supposed to be appealed. I thought that it was --
3 wasn't correct, the fact that I was supposed to have ten
4 years but I still end up with sixteen.

5 THE COURT: Okay, and so having heard from counsel,
6 perhaps Mr. Kirk on that day, I did reduce Mr. Kirk's
7 sentence to sixteen years on the charge of armed robbery
8 and sixteen years on the charge of kidnapping. The
9 five-year sentence for pointing and presenting a firearm
10 remained as is. I amended the two sentencing sheets.
11 Again, all sentences were to run concurrent.

12 I also noted on the sentencing sheet for kidnapping
13 that the sex-offender registry was not required because
14 this was not a sexually-related offense, and as far as I
15 know, that would have adjourned that hearing for the day.

16 MS. SAMPSON: And per my notes, just because you said
17 that, per my notes, you did say that he didn't have to
18 register for sex-offender registry, but you also told him
19 he had ten days to appeal, per my notes.

20 THE COURT: That's probably true. Right.

21 Okay, anything else? Does anybody have any notes or
22 recollections?

23 MS. SAXON: I just have two things.

24 THE COURT: Yes, ma'am.

25 MS. SAXON: One, I would just question whether anyone

1 has any memory of any equivocating, stepping back, anything
2 in the plea that would have indicated some sort of
3 equivocation on the part of Mr. Kirk, if there's any
4 recollection from any of the parties on that.

5 MS. SAMPSON: In terms of -- I mean, we were going to
6 trial as far as I knew. We did the motion to -- we did the
7 motion all just -- we agreed on what the facts that were
8 going to be presented were, so we didn't put up witnesses.
9 But it still took thirty, forty-five minutes. It took a
10 minute for us to put everything on the record. You took a
11 minute to rule, and that was Monday. That was the first
12 day.

13 And then we came back on Tuesday and as far as I knew,
14 we were going to trial, and then when I spoke with Ms.
15 Browder -- Ms. Goode at this time -- he had decided to
16 plead. And so I don't know what hesitate -- he had
17 overnight to consider is all I knew and that he decided to
18 plead.

19 I had always gone to Ms. Goode at the time and asked,
20 since he had confessed, is there something I'm missing, and
21 so we had always said, well, we're just -- you know, I'm
22 going to go forward as long as you can present your case.
23 He's, he's saying he's not guilty.

24 MS. BROWDER: Your Honor, during the plea I don't have
25 anything written down indicating any hesitation. I don't

1 know if he remembers anything differently, if he had any
2 questions for me, but I don't have anything written down,
3 and usually I would have written something down if a client
4 had a question during a plea.

5 THE COURT: And as far as my recollection, I have
6 really no independent recollection of whether he
7 equivocated. However, it is my practice, particularly in a
8 situation like this, if there is any equivocation, can go
9 to trial, particularly in a case like this when a jury has
10 been selected and is ready. And since it was Tuesday
11 morning, they would have been sitting in the jury room
12 waiting for us to begin the trial. Had there been anything
13 that I perceived as equivocation, I would have had him go
14 sit back down and bring the jury and we can start. So, I
15 don't recall, but it's highly unlikely that I would have
16 perceived equivocation and gone forward with the plea.

17 MS. SAXON: Thank you, Your Honor, and then the other
18 request I would make is if we could, just for the fullness
19 of the record, the *Lyle* hearing, just the basic summary of
20 the arguments made. If that could be placed on the record?

21 MS. SAMPSON: I mean, I sort of did, Your Honor. I
22 just read the facts to you, and I was reading most of them
23 from my memo on -- in reference to the hearing.

24 But essentially what I argued, as best I can remember,
25 is that under 404(b), that evidence of the first and third

1 robberies was admissible to show motive, intent, common
2 scheme or plan, and/or identity. I argued that although
3 prior bad acts and subsequent acts are not admissible under
4 the rules, normally under the rules, they are admissible as
5 an exception to show motive, intent, absence, mistake, or
6 accident, a common scheme or plan, and break in the
7 commission of two or more crimes, or identity of a
8 perpetrator. I gave you the case law that would go along
9 with that. Furthermore, if not subject of a conviction,
10 proof of prior bad acts must be clear and convincing. And
11 lastly, even if the evidence is admissible under 404(b),
12 the court must make a determination that the probative
13 value of the evidence outweighs its prejudicial -- any
14 prejudice against the defense.

15 And I stated, that I believed under *State v. Aiken*,
16 because his codefendants were going to testify, as well as
17 the witnesses were going to testify, that that would
18 establish the clear and convincing evidence that he was
19 part of it. We were going to have -- as I stated, both
20 Octavia Gill and Shatavia Flowers were going to be here to
21 testify against him. Maureen Brown was also going to
22 testify, who was involved in one of the other robberies.
23 And so -- and it would be the state's position that that
24 was clear and convincing evidence.

25 I argued that it would show a common scheme or plan

1 because all of these were delivery. Like, they were based
2 on them being a delivery driver, and they were close degree
3 of time and similarity. These are back-to-back.

4 Under *State v. Stokes*, common scheme or plan concerns
5 more than the commission of two similar crimes. There has
6 to be some connection between the crimes. In this case, I
7 said first the victim of each crime is a fast-food delivery
8 driver. Second, the incidents all occur during the hours
9 of darkness, and each is a day apart from the other.
10 Third, the codefendants are almost always the same. They
11 were always Kirk, Beecham, Gill, and Flowers except in one
12 they had a fifth person. Fourth, in the two of the three
13 incidents, Gill calls the orders in, and they're all \$50 or
14 more, and uses the same phone number. Fifth, in two of the
15 three incidents, a female is the getaway driver using the
16 same stolen black Cadillac. Sixth, in two of the three
17 incidents, the defendants steal the food, the money, and
18 the cell phones. Seventh, similar handguns were used in
19 all three robberies. Eighth, black ski masks were utilized
20 to conceal the suspects' identities in all three incidents.
21 And then finally, the incident locations are apartment
22 complexes or rental homes that are in close proximity to
23 one another. They're about five minutes apart.

24 Based on these, I believe there was a close degree of
25 similarity between the robberies to show that they were

1 part of the same common scene or plan, and the connection
2 between each is decisive is what I argued. The same stolen
3 car was used, and it's the same people done in the same
4 manner. And then the motive of all three was to obtain
5 money, and that the codefendants were going to testify that
6 Kirk intended to commit the robberies and wanted to do so
7 while using the stolen car.

8 They had different roles except for the one that was
9 always the getaway driver, but under the theory of the hand
10 of one is the hand of all, their different roles would not
11 matter. They were all participating.

12 And then last I argued on that particular issue it
13 would not be unfairly prejudicial. Everything we put up,
14 that is somewhat prejudicial. The question is, is it
15 unfair prejudice. I argued that in this case, it was not
16 improper. The evidence -- he, he's denying guilt, so as
17 the state, we have to prove that he was involved and that
18 all -- that that was what we needed to do to do that.

19 Then the second argument was *res gestae*. That rule
20 recognizes that bad acts may be an integral part of the
21 crime and may be needed for the fact finder to understand
22 the context. I gave the proper case law for that, and then
23 in this case for *res gestae*, we argued first they were
24 intertwined. The investigators are investigating one
25 robbery; then the second happens. They're so close as to

1 what they are, they start working together and then while
2 they're investigating that one, the third happens. And so
3 when they go to investigate the first two, they go to the
4 -- to the home and there she is. That's how Ms. Gill even
5 gets arrested. So, I argued that there would be no way to
6 do the middle charge without talking about the first for
7 the jury to understand what happened. They wouldn't even
8 know why they were investigating Ms. Gill if they didn't
9 hear about the first one and why they were at the house was
10 because of the third one with the cigarette butt, and
11 that's why they stopped her specifically, to talk to her.
12 And so based on that, I argued *res gestae* it would be
13 necessary, either that or under 404(b), for the state to be
14 able to go into -- or something like that.

15 THE COURT: Ms. Browder.

16 MS. BROWDER: Yes, ma'am. Based on my notes, it looks
17 like I argued for *State v. Ford*, which was 513 SC 2d 385.
18 That was a robbery case where the other robbery was allowed
19 in. However, the difference was it was the same victim in
20 that case. It's different victims in this case. And in
21 the *Ford* case, they needed it to explain their theory of
22 why they were targeting that particular victim. In this
23 case, that is not the case, especially considering one of
24 those drivers -- was a spontaneous robbery. It was not
25 something that they had planned. And then also that

1 there's a logical connection between other criminal acts
2 and the crime charged. It had to be at least clear and
3 convincing evidence. In this case, it was not clear and
4 convincing and there was unfair prejudice under *State v.*
5 *Parker*, which was 315 SC 230.

6 I argued, Your Honor, that regarding the close
7 similarity, they were three days apart. Each one was a day
8 apart, so they weren't even in the same time period. They
9 were at least twenty-four hours apart, and he was not even
10 charged with one of them because they didn't have enough
11 evidence because some people said he showed up later, and
12 then they changed their -- changed it later. And that
13 because it was not clear and convincing, it only comes down
14 to the credibility of witnesses. The only witnesses that
15 would be testifying to that would have been the
16 codefendants, who were looking to get something out of it,
17 and the only constant in there between everything was the
18 codefendant Octavia Gill.

19 Regarding the Domino's prior, it was different because
20 there was no phone call to have the Domino's delivery come.
21 It was a spur-of-the-moment robbery. They were actually
22 going to rob somebody else, but they couldn't find that
23 person, so they hit the delivery guy instead.

24 And then as to the Beezer's robbery, they give two
25 statements as to who planned the robbery. One had the

1 defendant doing it and then someone else doesn't have him
2 do it. So, it was not clear and convincing because there
3 was inconsistency between the two different statements with
4 different codefendants, in addition to Octavia saying that
5 he was not present for the Domino's and then he was. So, I
6 did not think that there was clear and convincing evidence
7 to show that he -- should come in.

8 MS. SAMPSON: And to be clear, just so the record is
9 clear, the reason we agreed not to put up witnesses is
10 although she disagreed as to whether they were credible or
11 not, she did agree and we stated that the facts that I was
12 giving Your Honor as to what they would say is what they
13 would say. It would have been the jury's call whether to
14 believe them or not, but there was no dispute as to what
15 the facts that I gave are going to be put up. So, we
16 didn't feel like it was necessary to bring the witnesses in
17 to do that twice, and we put that -- I'm almost positive we
18 put that on the record so it was clear why we didn't put
19 witnesses up to take testimony at that time.

20 THE COURT: Okay.

21 MS. BROWDER: And then, Your Honor, I have written
22 down for your ruling that the mission of both the other
23 robberies is appropriate because the state intends to use
24 evidence to show ID and intent. The state has clear and
25 convincing evidence that he was involved, as well as res

1 gestae, which makes it also admissible, and that the
2 probative value outweighs the prejudicial effect.

3 MS. SAMPSON: And I have the same in my notes as far
4 as that went.

5 THE COURT: Okay. Glad you do because I have no
6 recollection.

7 (MS. SAXON CONFERS WITH MR. KIRK.)

8 THE COURT: Does anyone else have anything else on
9 this matter?

10 MS. SAXON: Yes. I'm sorry, Your Honor. Mr. -- I was
11 asking Mr. Kirk if there was anything else that he
12 recalled, and he was asking me about my initial question of
13 whether or not there was any hesitation or equivocation,
14 and I didn't -- he -- I don't know if he wants to speak to
15 that matter.

16 PETITIONER: Yes, ma'am. Like I said, initially it
17 was based on her speaking to my parents and she said they
18 spoke. It, it would be ten years. So, my mom spoke. My
19 girlfriend at the time, she spoke as well, and that's the
20 reason that I accepted the plea. We was going through with
21 trial. I had active role in picking out my jury. So, we
22 made it to the second day of trial, and we were going
23 through until she spoke with my parents, and that's when
24 they informed me that maybe you don't need to do this, and
25 it was supposed to be a ten year negotiated plea, and

1 that's what I recall.

2 As far as equivocation goes, the only way I could have
3 went through with the plea is answer what supposed to be
4 answer to the questions that you asked.

5 THE COURT: Okay, and when you say she, you mean Ms.
6 Goode?

7 PETITIONER: Yes, ma'am.

8 THE COURT: Ms. Browder, your attorney at the time,
9 okay. So Mr. Kirk's recollection, I have no way to address
10 that one way or another aside from the comments that I've
11 previously made about equivocation and the jury being here
12 and ready to try the case.

13 Anybody else have anything else?

14 PETITIONER: As far as the admission of guilt, I'm
15 pretty sure we could have raised a alibi defense. Even
16 though you're saying the codefendants were saying that I
17 was there at the time, I mean, we ain't have -- I don't
18 recall going through too much of a defense or a trial
19 strategy.

20 And as far as her statement that she made, I remember
21 her saying, like, the -- Ms. Sampson that the crimes were
22 interrelated or it was some type of common scheme, she only
23 got to speak one time. As far as all the other stuff, to
24 put it all together, I ain't sure about all that. But as
25 far as the common scheme and motive, that she did say, and

1 then after that it was don't, don't go through with it
2 because you might get all this time and whatever.

3 THE COURT: Okay, and the alibi that you mentioned, is
4 that something that you said to me, or you're talking about
5 some ---

6 PETITIONER: No. I'm just ---

7 THE COURT: --- conversations with ---

8 PETITIONER: --- saying, like, as far as defense
9 strategy goes that that's, that's the defense strategy that
10 we could have used even though that you're saying you had
11 the codefendants willing to testify and all that.

12 THE COURT: But it's nothing that you said to me on
13 that day ---

14 PETITIONER: No, ma'am.

15 THE COURT: --- that you pled guilty? Okay.

16 MS. SAMPSON: And as far as I remember, there was no
17 notice of alibi from the defense, no -- there would
18 normally have to be the ten days notice prior to trial, and
19 I never received a notice of alibi from the defense.

20 THE COURT: Right. So, that may be a PCR issue but
21 not an issue in the recreation of this guilty plea.

22 Anything else, Ms. Sampson?

23 MS. SAMPSON: No, ma'am.

24 THE COURT: Ms. Browder?

25 MS. BROWDER: No, ma'am.

1 THE COURT: And?

2 MS. SAXON: It's fine. Saxon, Ms. Saxon.

3 THE COURT: Saxon.

4 MS. SAXON: No. I just believe a ruling from Your
5 Honor on whether you believe that a record has been
6 properly reconstructed for appellate review or not is all
7 that is required.

8 THE COURT: I believe that the record has been
9 constructed, reconstructed as accurately as it could be
10 with the court lacking notes, but clearly Ms. Browder has
11 fairly thorough notes, as does Ms. Sampson. The only
12 people that I'm sort of worried about are myself and Mr.
13 Kirk without any notes and, you know, just the passage of
14 time, but that's the best we've got. Thank you.

15 --- END OF TRANSCRIPT OF RECORD ---

CERTIFICATE

I, THE UNDERSIGNED ELIZABETH B. HARRIS, CERTIFIED
VERBATIM OFFICIAL COURT REPORTER FOR THE FIFTH
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 CAUSE, RELATIVE TO APPEAL, IN THE
CIRCUIT COURT FOR RICHLAND COUNTY, SOUTH CAROLINA, ON
THE 15TH DAY OF DECEMBER, 2023.

I DO FURTHER CERTIFY THAT I AM NEITHER OF KIN,
COUNSEL, NOR INTEREST IN ANY PARTY HERETO.

/S/Elizabeth B. Harris, CVR-M-CM
CERTIFIED VERBATIM REPORTER - MASTER
CERTIFICATE OF MERIT

COLUMBIA, SOUTH CAROLINA

MARCH 12TH, 2024