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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County
The Honorable Clifton Newman, Circuit Court Judge
Appellate Case No. 2022-001151

HERBERT SMALLS,

Petitioner,

vs.

THE STATE,

Respondent.

SUPPLEMENTAL APPENDIX

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PSYCHIATRIC EVALUATION

NAME: Herbert Antonio Smalls

DATE OF BIRTH: [REDACTED]

DATE OF EVALUATION: January 18, 2017

PRIMARY EXAMINER: Leonard W. Mulbry, Jr., M.D.

IDENTIFYING DATA: Mr. Herbert Antonio Smalls is a 36-year-old gentleman seen at the request of his attorney, Mr. James Falk. Mr. Smalls was convicted of Murder, Possession of a Weapon during a Violent Crime, and Armed Robbery. Mr. Falk has requested that Mr. Smalls be evaluated related to the filing of a Post-Conviction Relief Motion that was dismissed based on its late filing.

STANDARD: In *Ferguson v. State*, 677 S.E.2d 600, it was held that the tolling of PCR limitations is warranted if applicant's mental incompetence prevented timely filing.

SOURCES OF INFORMATION:

1. Clinical Psychiatric Evaluation of Mr. Smalls on January 18, 2017, lasting approximately three hours
2. Amended Application for Post-Conviction Relief, page 1.
3. Middle School Grade Card, Herbert Smalls 1996-1996.
4. Charleston County School District IEP Document, Herbert Smalls, printed May 2, 1997.
5. High School Grade Card indicating expelled November 30, 1999
6. Elementary Grade Card, Herbert Smalls, indicating grades 2, 3, and 4
7. Charleston County School District (CCSD) Placement Form, Herbert Small, October 11, 1995
8. Psychological Re-evaluation Report Herbert Smalls. It is dated October 11, 1995
9. Letters from Herbert Smalls to Attorney Falk, dated June 30, 2015, and July 1, 2015.
10. SCDC Request to Staff Member dated May 7, 2015.
11. Court Documents (12 pages).
12. Handwritten Motion to Dismiss dated May 3, 2008.
13. Letter from South Carolina Court of Appeals dated October 11, 2010.
14. Motion for Funding, undated.
15. Letter from Herbert Smalls to James Falk dated May 23, 2015.
16. Notice of Motion and Motion for Discovery and Inspection, September 18, 2007.
17. Edwards Notice dated September 18, 2007.
18. Handwritten notes by Herbert Smalls (3 pages).
19. Charleston County Indictment, December term, 2007, with affidavit.
20. Legal Documents (3 pages).
21. Charleston County Arrest Warrant F-969628, Herbert Antonio Smalls, Murder, dated April 25, 2007, with affidavit

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22. Sentencing Sheet, HAS, Murder, dated August 2, 2010.
23. Remittitur dated November 8, 2010.
24. Application for Post-Conviction Relief dated September 4, 2013.
25. Acknowledgement of Service of Notice of Intention to Seek Sentence of Life without Parole dated July 16, 2010.
26. Various Legal Documents (9 pages).
27. Documents from the South Carolina Department of Corrections for the period May 7, 2007 to September 30, 2013
28. Amended Application for Post-Conviction Relief dated February 19, 2014.
29. Legal Documents (6 pages).
30. Records from the South Carolina Department of Corrections for the period December 14, 2010 to May 29, 2015
31. Post-Conviction Relief Application dated November 4, 2015
32. There is an appeal from Charleston County Court of General Sessions, Case 2007GS-10 13708, State V. Herbert Antonio Smalls.
33. Letter from the Law Office of David Holton dated August 11, 2011, to Honorable Tanya Gee
34. South Carolina Court of Appeals Order dated October 14, 2010
35. Letter from Herbert Smalls to the Court of Common Pleas dated June 10, 2014
36. Objection to Conditional Order of Dismissal by Herbert Smalls dated March 25, 2014
37. Charleston County Court of Common Pleas Conditional Order of Dismissal dated March 13, 2014.
38. Final Order of Dismissal dated January 16, 2015.
39. SCDMH and MUSC indicate that they do not have available records for Mr. Smalls

DISCLOSURE OF NON-CONFIDENTIALITY: Prior to the evaluation, Mr. Smalls was provided information regarding the purpose and non-confidential nature of the evaluation. He was informed that any information he provided would not be confidential and would be used to prepare a report for his attorney. It was explained that, at his attorney's discretion, the report may be distributed to the court including the solicitor and the judge. He was also informed that the nature of the evaluation did not include a treatment relationship and treatment would not be provided. Mr. Smalls appeared to understand the limits of his confidentiality, signed a Release of Confidentiality Form and agreed to proceed with the evaluation.

BACKGROUND HISTORY: Mr. Smalls is 36 years old and was born on [REDACTED] in Charleston. He has always lived in the Charleston area. His father, Herbert, and mother, Linda, were married, but divorced when he was a baby. He was raised by his mother, along with his two sisters and brother. He has seen his father "every now and then." He has a sister Fadina (Mr. Smalls cannot spell and the names are given phonetically), who is 40 years old, married, has one child, and works for "The Pentagon," in Washington. He is not sure if she is in the military, or what type of

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work she does. He had a sister Patrice, who "Mom says she died of a heart attack." He has a brother Rodney, 30 years old, who "builds houses" and lives in Charleston. He reported that he is still in some communication with his brother, sister and mother. His mother never remarried. He reported that his father is deceased, but he is not sure what happened to him or when this happened. He is not sure what his father did for a living. His mother is currently disabled. He lived with his mother until 2007, and his mother had supported him, "I get a check and she gets a check." He reported that his mother was treated for mental illness, but he is not sure what this is, "You'd have to ask her. I'm not sure what it is." He thinks that she has talked to his brother and sister about this. He reported no exposure to drugs or alcohol in the home. He reported that he was never exposed to violence in the home. He never sustained any trauma, abuse, or neglect, but added, "Sometimes I can't remember."

When asked to describe his childhood, he described it as "I got in trouble a lot...picked on people."

Mr. Smalls did not remember any contact information for his family.

EDUCATIONAL HISTORY: Mr. Smalls reported that he left school from North Charleston High School in the ninth grade. When asked if he repeated any years he reported, "All of them." He did not know why. He went to Brentwood Middle School in Charleston and was in Special Education He remembers taking Depakote (anticonvulsant mood stabilizer) "It helps with my mood swings."

He was expelled for "I was flipping out...frustrated, couldn't progress." He reported that he received evaluations that indicated that he was a "slow learner" at about age 10 or 11. He did not know whether these were Resource, Special Education, or Learning Disabled Classes. He does think that he had an IEP. He did not remember why he left in the ninth grade. He remembers, "A lady said my IQ was low." He played football "on and off" on the team. When asked what his teachers would say about him he replied, "Mood swings." When asked what his peers would say about him he replied, "Mood swings."

COROLLARY INFORMATION:

Records from the Charleston County School System for the period approximately 1990 to 1996:

Elementary Grade Card, Herbert Smalls, indicating grades 2, 3, and 4 with the word "expelled" written for grade 3, year 1990-1991.

Middle School Grade Card Herbert Smalls, 1994-1996, indicating promoted with fifteen days absent before expulsion.

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High School Grade Card indicating expelled November 30, 1995, and entered Year Two August 26, 1996, with Discipline School September 27, 1996.

Psychological Re-evaluation Report Herbert Smalls dated October 11, 1995: It indicates class as Educational Mentally Disabled, age 15.1. It describes a Wechsler Intelligence Scale for Children - Third Edition (WISC-III) indicating that he is in the 1/10 of a percentile or lower in all categories. The IQ indexes run from 48 to 52. A Woodcock Language Proficiency Battery - Revised (WLPB-R) places his grade equivalence between 1.5 and 1.9 for all language capacities, all of which are in the 1/10 to 0.3 percentile. A Woodcock Johnson Test of Achievement (WJ-R) math indicates the first percentile with grade equivalence of 3 to 3.6. Adaptive Behavior Inventory (ABI) is indicated as very poor/below average. His Woodcock Johnson Test of Achievement (WJ-R) dated September 27, 1995, indicates grade equivalence of 1.8 for broad reading and 2.6 for broad math, both in the 1/10 of 1 percentile.

Charleston County School District (CCSD) Placement Form: Herbert Smalls, age 15-1, grade end. Indicates an intelligence test WISC-3 score V = 50, P = 52, and FS = 48. It indicates tests for adaptive behaviors and psychological functioning "commiserate with cognitive development" and tests of adaptive behavior/psychological functioning "consistent with EMD range of functioning." These are both dated October 11, 1995. There is an achievement indicated WJ-R, score R 1.8 (44), M 2.6 (49).

VOCATIONAL HISTORY: Mr. Smalls reported that he worked for about a month as a forklift driver at Cummings, but "they couldn't handle my mood swings." He worked there only about a month. He worked doing house cleaning for "a guy that worked out of his truck," for a few months, and he worked for a landscaper for "a year or two off and on." He was fired from Cummings for mood swings. He did not remember what happened, "She said something to me and I flipped out." He lives largely on SSI, but he does not know why he receives it.

RELATIONSHIP HISTORY: Mr. Smalls indicated that he has never been married. He has one child, who he named as Alazate (phonetic, Mr. Smalls could not spell it). He reported she is 19 years old and lives in Charleston by herself. He has not talked to her for "a while." When pressed, he thought that this was probably "couple of years." Her mother is Barbara, and he has not talked to her in many years and does not know how to reach either one of them. In Charleston, he has a girlfriend named "Michelle."

Mr. Smalls did not know the contact information for them.

LEGAL HISTORY: Mr. Smalls said he has had about eight charges, but he did not remember any of them, except for his index charge, which he described as "Murder."

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MEDICAL HISTORY: Mr. Smalls reported he does not have any major medical problems. He did have an operation "when I hit my head." He thinks this was treated at MUSC when he was about 12 years old, and he does not remember how long he was in the hospital or what studies were done. He does not take any medications for medical problems, but does have "sensitive skin." He has not had any seizures. He is allergic to poison ivy.

PSYCHIATRIC HISTORY: Mr. Smalls reported that he was admitted to, "Charter," but he is not sure when or for how long. He is not sure what he was treated for or why he was put in the hospital. He was treated as an outpatient at MUSC with stimulants. He does not remember ever being treated at Charleston Mental Health. He is currently taking Depakote (anticonvulsant mood stabilizer), Benadryl (sedating antihistamine), and Zoloft (antidepressant/anti-anxiety). In the past, he has taken Ritalin (stimulant for ADHD) "and another one for bipolar." When asked about suicide attempts he indicated, "Once when I was young...put a gun to my head...I was just messing around," and he reported this was not really a suicide attempt.

When asked about depression, he described depression, as "I get real mad I want to hurt people for no reason." When pressed to describe the symptoms, he reported that he could not focus and had trouble sleeping, unless he takes his medications. He was not sure about appetite, energy, or concentration. He reported that he had never tried to commit suicide. When asked about mood disorders he reported "Don't sleep when I'm on the street, unless I take my medications...have a lot of bad dreams." When asked the longest that he ever went without sleep he replied, "A whole day." When asked how often he went a whole day without sleep he thought this actually was two or three days without sleep, and when it would happen "my mom would give me sleeping pills." He thought this probably happened about once a month when he was not taking his medications, but he was doing much better when he was taking the medications. When asked what he did during these periods of time he replied, "Running the street...I was mad at everybody...do a lot better on medications. I'm a lot calmer."

When asked about worry he reported, "I have a lot traveling through my mind." When asked what he specifically worried about he replied, "What I'm locked up for...a lot of things...don't know why I'm here...got locked up for murder I didn't commit...lawyer took me to court and railroaded me."

He reported that he does occasionally have bad dreams about people dying, but these do not relate to something that happened to him in the past. He did not report any history of avoidance of flashbacks or places he was afraid to go or be.

He reported, when asked about counting and rituals, "Count stuff...check my locker every day, and I keep things clean." He did not report any problematic cleaning behaviors that made roommates upset or interfered with his daily routine. He

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described counting his clothes and his belongings, and when pressed about why he noted, "People steal a lot of stuff around here." He reported, "I'm gonna go back and check my stuff when I get done here to see if someone took something."

When asked about panic attacks, he reported that he had one once "on top of a building ... it was too high." He reported that he did hear voices and has since he was a baby, "All types of people." He reported this was related to "I talk to myself all the time." The voices tell him to "hurt people...to go hurt this person." He does not know why the voices would tell him this, and they do not say why he should do such things. He reported the medications that he is currently taking also help the voices, specifically the Zoloft(antidepressant).

When asked about visual hallucinations, he reported that he did not see things, but had in the past seen "spirits at my grandfather's house, but they went away when I put a Bible around the bed...then they went away when I got older."

When asked about paranoia he replied, "Sometimes...I just feel like that. The voices tell me that, don't know why." It does not prevent him from going places or doing things or interfere with his day-to-day activities.

Mr. Smalls did not report any ideas of reference.

When asked about symptoms of Conduct Disorder, he acknowledged multiple.

When asked about attention deficit or hyperactivity he described, "Hyperactivity...can't keep still...always up and down...in and out of the house...teachers didn't like me...I was street smart and not book smart."

COROLLARY INFORMATION

Records from the South Carolina Department of Corrections for the period December 14, 2010 to May 29, 2015

These records begin on December 14, 2010, with a Medication Education Group. There is a Mental Health Clinic Note dated January 13, 2011, noting that the patient was seen at his own request. He was upset about receiving a charge for sexual misconduct. He was advised that he may return to MHSLU after three months disciplinary free. He indicated that he was taking his medications and they were helping.

There is a Mental Health Clinic Note dated January 14, 2011, and Medication Education Group indicating that he was doing well. There is an Encounter January 31, 2011, indicating a charge for Contraband and another note dated February 16, 2011, indicating charge for Possession of a Cell Phone.

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He was seen by the psychiatrist on February 24, 2011. He reported some mood swings, but appeared to be doing fairly well. He was assessed with "bipolar." They continued his Depakote 500 mg one tablet twice a day and Risperdal (anti psychotic mood stabilizer) 2 mg and Cogentin 1 mg twice a day.

There are a number of notes relating to his being seen on a regular basis in an Anger Management Group. He was noted to be sleepy and drowsy and unable to participate in any group discussion.

The note of April 13, 2011, indicates that his unit was locked down and he had been moved back to the Chesterfield Unit due to sexual misconduct charges. He indicated his medications were making him sleepy, but did not want them changed.

Again there is a group of weekly notes indicating attendance at Anger Management Group.

He was seen in the Mental Health Clinic again on May 19, 2011, indicating that he was doing well without side effects, and that he described some mild mood swings. His DPA (Depakote) level was 108. There is a series of notes noting attendance in group for medication education and anger management through late 2011.

On August 18, 2011, he was seen in the Mental Health Clinic, noting that the medication was working well, no mood swings or hallucinations. He noted that the Risperdal (antipsychotic mood stabilizer) made him hungry and his existing medications were continued.

A note of October 4, 2011, indicates that he was doing relatively well, but had a new charge for Class 1 Escape and possession of a "clear key." His assessment was still "bipolar," and he appeared to be doing well.

He was seen on February 6, 2012, in ASU lockup. He reported that he was doing well, spent his time talking and reading and doing word puzzles. He was taking his medications without difficulty and appeared stable. He was listed as "bipolar."

He was seen back by the psychiatrist on February 16, 2012, and felt to be doing well. His medications were unchanged. There are additional Mental Health Clinic Notes on March 2, 2012, and April 10, 2012. They suggest that he was in lockup and that he was doing well. When seen back on May 9, 2012, he was noted to be nine months charge free, but the charge of Possession of a Security Device (i.e., a key) was problematic.

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Additional notes through August 7, 2012 suggest that he was doing well. His moods appeared to be stable. He did not have any difficulty with thought disorders. He maintained the diagnosis "bipolar." He was noted to be compliant with his medications and was doing well. In mid-2012, he began to ask for a transfer out of Lee due to his prolonged status in SMU.

He was seen by the psychiatrist on August 13, 2012. He was complaining of some gastrointestinal side effects from the Depakote. His level was therapeutic and the same doses of medications were continued.

On September 4, 2012, he again asked for transfer based on his prolonged status in SMU.

He was seen regularly in the Mental Health Clinic through the end of 2012, again often requesting transfer to another facility based on his prolonged SMU status. He maintained the diagnosis bipolar and was kept on the same medications.

The note of December 12, 2012, indicates that he had been approved to be returned to general population. He was noted to be doing very well and was not noted to be having any psychological distress. Again, no evidence of disturbance of thought or mood was noted.

The Psychiatrist Note of February 4, 2013, indicates that he was still being seen at SMU, not having side effects. His mental status exam did not note any abnormalities. He maintained the diagnosis "bipolar," and the same doses of medications.

The notes through April 3, 2013, indicate that he was stable without disturbance of mood or thought, but was awaiting being released from SMU. He did express some anxiety about being back in general population in the note of April 3, 2013.

Again the note of April 25, 2013, indicates he had been returned to general population.

He was seen back in the Mental Health Clinic on May 3, 2013, noting that he had served two years in SMU for Possession of a Security Device. He appeared very positive without disturbance of thought or mood.

Mr. Smalls was seen back in the Mental Health Clinic on July 30, 2013, and noted not to be sleeping well with only three or four hours of sleep at night. He was not sleeping during the day. They continued the current medications, but added propranolol for side effects, 10 mg tablets twice each day.

When seen back on October 8, 2013, he complained of vomiting after most meals, but otherwise doing well. He reported he was only sleeping about two

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and a half hours a night, but did not feel tired. He retained the diagnosis "bipolar disorder," and they added trazodone (sedating antidepressant) 100 mg. When seen back on November 1, 2013, he was doing well and looking forward to regaining his family visit and canteen privileges. He did not manifest any symptoms such as disturbance of thought or mood and the same medications were maintained.

The Mental Health Clinic Note of November 14, 2013, indicates he was seen in medical and was angry about being falsely accused of masturbating on a female officer in the mental health dorm. He indicated that the officer made a mistake between him and another inmate. He was not felt to have disturbance of a psychiatric nature.

In the Mental Health Clinic Note of December 31, 2013, he was doing well and was sleeping well. He said he was still vomiting after every meal and he weighed 162. He denied any disturbance of thought or mood. He maintained the diagnosis "bipolar disorder," and the same doses of medications were continued.

When seen back in the Mental Health Clinic on March 22, 2014, he was noted to have poor sleep refractive to trazodone, but was noted to have stable mood and thought with no abnormalities noted. He maintained the diagnosis "bipolar disorder." They stopped the trazodone and started doxepin (sedating antidepressant) 25 mg.

In the mental health clinic note of April 30, 2014, he appeared to be doing well.

There is a Mental Health Clinic Note dated May 19, 2014, for 90-day follow-up. He indicated that on the Sinequan (sedating antidepressant) he had been experiencing bad headaches in the morning and wanted to be changed back to liquid Benadryl. He reported that he was having decreased AVH, which he described as "people" telling him "people gonna...die" and seeing people dying. He reported when the AVH did occur it was usually at night. He denied experiencing any auditory commands or harm/kill himself or others. He reported his troubles with sleep and described his appetite as good, but he indicated he was still having trouble holding down food. He presented with some anxiety. They were suspicious about his request for liquid Benadryl.

A Mental Health Note of June 30, 2014, indicates he felt that the doxepin was not helpful and wanted to get off doxepin. They stopped it and started Benadryl Liquid 50 mg twice each day, for the side effects of Risperdal. They continued the Risperdal 2mg, Depakote 500 twice a day, and propranolol (used for anxiety and side effects) 10 mg twice a day.

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There is a note dated September 18, 2014, indicating that he was seen in SMU indicating that he had nothing to do with the cell phone. They did not describe any disturbance of mood or thought.

The note of October 21, 2014, indicates his frustration about being stuck in lockup. He described being depressed, though the symptoms were not described, and he denied hallucinations. They added Zoloft 100 mg to his medications.

The note of November 6, 2014, includes his belief that he could not return to Lee general population. The clinical impression was IED.

The note of November 21, 2014, indicates that he was seen at McCormick CI. He was described as an intake and he was 34 years old, serving a 50-year sentence. He described being on mental health since a child, but was not sure why. His presenting problem was hearing a male voice at least three days a week. The voice was unfamiliar and had been present for years. He stated that he had two sisters and three brothers and he was married with three children that he communicated with, and he stated that he worked in the kitchen in the past. He did not have any medical issues and that his mood was "level." He denied disturbance of sleep or thought. He was given the diagnosis Bipolar Disorder NOS and had an unremarkable mental status exam.

He was seen back on January 22, 2015. He had recently been transferred from Lee, and they noted his past treatment of "bipolar disorder." He denied any significant symptoms of disturbance of thought or mood, and there was discussion of discontinuing the Risperdal. This was because his glucose was elevated. Dr. Ferlato noted that there was no evidence of genuine bipolar disorder.

In the note of February 18, 2015, he was seen for daily headaches. He stated that he was having mood swings and was staying to himself, but was not suicidal. He was given the diagnosis bipolar disorder, and he reported that he was hearing a voice twice a week.

The note from McCormick on April 16, 2015, indicates "bipolar by history." They noted that they had stopped the Risperdal due to elevated glucose, but continued the Zoloft, Depakote, Inderal, and Benadryl, and he was doing well. His fasting glucose returned to normal. He was felt to be doing well and those medications were continued.

The note of May 29, 2015, indicates that he was seen for a counseling session by his coordinator. He was doing okay, but asked questions about the diagnosis of "bipolar disorder." There was a discussion of DSM-5 and they read the criteria for bipolar disorder. He reported that he experienced these symptoms before, but he had been without symptoms for over six months. He reported that he still

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had fluctuations in mood. They discussed behavioral coping mechanisms. He was not having side effects. He was given the diagnosis "bipolar disorder." His mental status exam was essentially normal and he denied hallucinations.

SUBSTANCE USE HISTORY: Mr. Smalls reported that he never drank alcohol and never used any drugs. He did report that he went to a rehabilitation center on Dorchester Road "to see if I was doing drugs." He did not remember the name of it or why he was sent there, or who sent him there.

MENTAL STATUS EXAM: Mr. Smalls was seen at the conference room at McCormick Correctional Institution. He was appropriately dressed and groomed in correctional attire. He was somewhat guarded, particularly during the early part of the evaluation, and deflected many of the questions related to specific times, dates, and places.

He described his mood as "worried." He appeared generally euthymic ("normal" mood). His speech was of normal rate, volume, and prosody. His thought processes were linear, goal-direct, and appropriate. His thought content did not suggest suicidality, homicidality, or unseen others. He described auditory hallucinations and paranoia. These, however, were quite atypical in nature. His concentration was very good. His attention was good. His insight was impaired and his judgement was fair.

On cognitive exam, notably Mr. Smalls indicated that he cannot read or write. When asked to spell the word "world," he spelled it "w-a-o-l-d" and spelled it backward "d-o-l-w." He was able to spells the word "Smalls" and spelled it correctly backwards. He registered three unrelated items but remembered none after four minutes. It took a few moments to develop the concept of identifying similarities between unrelated items, but once that was done he was able to do so fairly well, indicating a fork and a spoon as "you can eat with them," a boot and a hat as "wear them," and an airplane and a bicycle as "ride." When asked the similarities between a watch and a ruler he replied, "You can time it."

When asked to subtract \$0.65 from \$1.00 he got \$0.55, and when asked to do it a second time he got \$0.50. When asked who the President of the United States was, he replied that he did not know, but indicated that the last one was "the black dude." He could not name any other Presidents. When asked the direction to New York he did not know, indicating "never left Charleston." When asked to interpret the proverb heart of gold he replied, "She'll bring you some gold." When asked to interpret goes around comes around he replied, "You'll come back around to him." When asked to interpret book by its cover he replied, "Don't look at the book and think that it is garbage."

He subtracted 7 serially from 100, but got each step wrong and did it on his fingers. He subtracted 3 serially from 20, giving the answers as "18, 16, and 14." He gave a concrete, but reasonably good answer to a commonsense question. When asked to

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name the colors on the American flag he replied, "Black, blue, and white." When asked why we put stamps on letters he replied, "To make sure it gets to the destination." When asked why policemen wear uniforms he replied, "To help other people." When asked why we should not tell lies he replied, "You don't need to. It doesn't get you anywhere." When asked why we should not get in fights with people smaller than ourselves he replied, "It's a good thing. You can beat them up easier." When asked how many legs on a cow he replied, "Four."

EVALUATION:

Mr. Smalls had some difficulty providing a linear temporal discussion of his attempts at applying for post-conviction relief. He indicated that this was because "Jerome did most all of it." He reported that his charges occurred in about 2007. He did not receive any bond and was charged with the three charges, Murder, Possession of a Weapon during a Violent Crime, and Attempted Robbery. He was convicted "in about 2008 or 2009." He described this as "lawyer made me plead to get a light sentence." He reported that his lawyer was "David Hilton." He was sentenced to 40 years. When asked if he filed an appeal he replied, "I told them to file an appeal and they didn't do it." When asked what an appeal was, he replied that he did not know, "Everything you see comes from Jerome Long."

He went to R&E and then was transferred to Lee County. There, "the white dude...Frank" was working on his case. He is not sure what "his case," was based on, other than "they didn't pay attention to my mental health." At the same time, he had been talking to his cousin, Jerome Long, who is at McCormick. He then went on to explain that "the white guy," was not communicating with Jerome, but his uncle who lived in Virginia, "Something about a PCR...the white guy did the writing and my uncle helped." He reported that much of the time that he was in Lee County he was in lockup. When he got out of lockup, he transferred from Lee County to McCormick, and there his cousin Jerome took over. He reported, "Jerome picked up upon the fact that the lawyer didn't file an appeal...I let him handle it...Jerome did everything. Jerome did it all." He reported, "Once I came down here, Jerome just took over." When asked what an appeal was, he replied that he did not know, "I wouldn't even know the paperwork." When asked what PCR stood for, he reported that he did not know, "My white boy told me." When asked why a PCR was filed he replied, "It might get me a new trial, but I don't know what it is." When asked the basis of the PCR, he knew only that it had to do with his lawyer not filing an appeal. He did not know the basis for either a PCR or an appeal. When asked if his attorneys did anything wrong at the time of his trial he indicated, "Jerome says the lawyer didn't file the appeal on time...it was filed late." He reported, "I've never seen any papers...I let Jerome deal with it. I never did any legal work at all...Jerome does all of it...Jerome gets a lot of people home...I don't know anything about the legal work. I don't know what the papers look like. Jerome does everything..." He reported that he arrived at McCormick in 2014, and that is when Jerome took over. We reviewed a number of documents in his record, and he reported that he did not recognize any of them,

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reminding me that he could not read. When I indicated that one of them was an application for Post-Conviction Relief he replied, "I don't know, I can't read it." He does not know what the document alleges, other than "lawyer didn't file an appeal." Again, he reported that he did not recognize any of the paperwork.

There is a Motion to Dismiss, dated May 3, 2008. He reported, "My homeboy wrote this one...they were trying to get me a bond."

We reviewed a handwritten letter dated February 26, 2010, which indicated that it was from the Charleston County Detention Center. He reported, "it was written by my homeboy...my homeboy wrote that from the county." He did not know what the letter said and did not remember why it was written.

We reviewed an Application for Post-Conviction Relief. He reported, "That was written by the white dude...Frank." I asked if he signed it, and he thought he had not. I pointed out that it was notarized and he accepted that they would not notarize documents without one's ID, but he reported that he did not fill it out. He recognized the handwriting as "the white dude."

We reviewed the Amended Application for Post-Conviction Relief dated February 19, 2014. He did not recognize it, but recognized the handwriting, indicating, "The white dude wrote this. I didn't know what it was about."

We looked at a handwritten letter dated May 23, 2015, to Mr. James Falk, and he reported that his uncle wrote the letter and he was not sure what it said. He did indicate that he and his uncle had discussed the fact that with post-conviction relief there was a chance that he could get a new trial, that he thought he should get a new trial because his lawyer did not file a timely appeal. He did not know what an appeal was and did not know the basis for the appeal, though once or twice he alluded to "my mental health."

We reviewed two other handwritten letters, the first dated May 7, 2015, and titled "Report to Staff" and a second "Affidavit of Service" dated July 3, 2015. He indicated that both of these documents were written by Jerome, "Jerome just said sign it." He recognized that to get it notarized you had to show your ID and reported that they were typically notarized by someone in the administrative building.

COROLLARY INFORMATION:

Post-Conviction Relief Application dated November 4, 2015. This document is signed by Mr. Smalls. It indicates, "Trial council failed to filed an appeal." It indicates the name of the attorney as David Hilton in Charleston, South Carolina, who represented him "at my pleads, arraignment, and sentence." It indicates that his goals were "conviction should be reversed and his case remanded for a new trial or acquittal."

Herbert Antonio Smalls
[REDACTED]

South Carolina Forensic Psychiatry
L. William Mulbry Jr. M.D.

There is an appeal from Charleston County Court of General Sessions, Case 2007GS-10 13708, State V. Herbert Antonio Smalls. This document indicates that the defendant made clear a wish to appeal his sentence. It was submitted on September 28, 2010, by David Holton, attorney for the defendant/appellant.

Letter from the Law Office of David Holton dated August 11, 2011, to Honorable Tanya Gee. It indicates that Mr. Smalls asked him to file an Intent of Appeal.

South Carolina Court of Appeals Order dated October 14, 2010. This dismissed the appeal because appellant did not raise this issue to the sentencing judge to rule on the question.

DIAGNOSTIC FORMULATION: Based on the above data, the following is opined regarding Mr. Smalls' psychiatric diagnoses according to the *Diagnostic and Statistical Manual of Mental Disorders, 5th Edition*, (DSM V).

Psychiatric:

1. Intellectual Disability, Mild to Moderate
2. Unspecified Bipolar and Related Disorder.
3. History of Attention Deficit Hyperactivity Disorder

Medical:

1. Adult Onset Diabetes Mellitus

The diagnosis Intellectual Disability, Mild to Moderate, is given based on Mr. Smalls' history of significant difficulty in school, his presentation and his mental status exam. This is verified by his testing done in 1995 suggesting an IQ in the Moderate Mentally Retarded range when measured by DSM IV criteria. By DSM V criteria this would be diagnosed as Intellectual Disability either Mild or Moderate. That determination would require further objective testing and observation of life skills (adaptive skills) to determine.

He was 15 years old at the time of achievement testing, and scored verbally at the second grade level and in mathematics at the third grade level. He was classified as Educationally Mentally Disabled (EMD). Additional testing, including the Woodcock Language Proficiency Battery, appears to verify this. Adaptive behavior inventories were consistent with that level of functioning. These suggest a very limited level of intellectual functioning for Mr. Smalls. The modifier moderate may be appropriate here. This would significantly impair his capacity for planning.

The diagnosis Unspecified Bipolar and Other Related Disorder is given based on Mr. Smalls' history of significant anger, irritability, and mood dysregulation. As others have noted, there is not enough detailed information to conclusively meet the

Herbert Antonio Smalls
[REDACTED]

South Carolina Forensic Psychiatry
L. William Mulbry Jr. M.D.

criteria for Bipolar Affective Disorder Type 1 or 2, but there are atypical variations of mood disorders that manifest primarily as irritability. He is much improved on mood stabilizing medications, either Risperdal or Depakote.

The fact that he continues to take this medication despite the side effects and risks, and finds that he does better on the medication suggests that there is a significant underlying mental illness.

The diagnosis 'History of Attention Deficit Hyperactivity Disorder' is given based on Mr. Smalls' history of ADHD for which reportedly was treated with stimulants as a child. We have few records of this, but there is little reason to question the veracity of the history given. It is possible that these symptoms are due to early onset Bipolar Affective Disorder.

OPINION: Mr. Smalls indicates that he has minimal capacity to read or write, and has very little understanding of the legal process of appeals. He alludes to the fact that he believes that his mental health may have a basis for appeal, and recognizes that a delay in applying for appeal might offer him legal recourse. He, however, is not able to describe it in greater detail.

His testing from school would appear to support this contention, suggesting that he is quite significantly impaired. Though there is no corollary information from family, and only limited information from outside sources, the records from the South Carolina Department of Corrections suggest that he has significant difficulty with executive function (planning, reasoning, making thoughtful decisions) and impulse control, further impairing his capacity to make reasoned judgments and to plan. This suggests that, indeed, his intellectual disability, and the unstable mood impair his ability to recognize and meet deadlines, make appropriate applications, other than as managed by those around him. The available information indicates that his mental capacity is impaired to such an extent that he would have difficulty recognizing and meeting deadlines and executing appropriate legal documents in a timely fashion.

SUMMARY: Mr. Herbert Antonio Smalls is a 36-year-old gentleman seen at the request of his attorney, Mr. James Falk. Mr. Smalls was convicted of Murder, Possession of a Weapon during a Violent Crime, and Armed Robbery. He has the psychiatric diagnoses Intellectual Disability, Mild to Moderate, Unspecified Bipolar and Other Related Disorder and History of Attention Deficit Hyperactivity Disorder. It is my opinion, to a reasonable degree of medical certainty, that Mr. Smalls' intellectual deficiencies and mood disorder would impair his capacity to recognize deadlines, execute legal instruments, and meet the deadlines for executing legal instruments.


Respectfully submitted,

W Mulbry 04/24/17

Leonard W. Mulbry, Jr., M.D.

Herbert Antonio Smalls
[REDACTED]

South Carolina Forensic Psychiatry
L. William Mulbry Jr. M.D.

Herbert Antonio Smalls


Δ = in jail 39 months since - 5/7/2007

> 2007
~~2010~~

N/P - Att. AR

Plea Form

- David present }
- Alex present }
Terri & 2 victims
2 sisters

Defendant: Herbert Smalls

Plea Arrangement: Murder without any recommendations or negotiations. Pursuant to the plea negotiations between the State and the Defendant, the State is allowing the Defendant to plead without seeking LWOP, as originally noticed to the Defendant. However, the State believes the minimum sentence is not appropriate in this case.

Charges and Penalty Range: Murder - 30 years to Life

Aug 2, 2010, Judge Young

Defendant's Record with Dates: 1997 - Attempted Robbery, ABWIK (10 years concurrent)

40 years

Defense Attorney: David Holton

Victim: James Terry Stewart. Members of Mr. Stewart's family are present and would ~~would~~ not like to address the court at the appropriate time.

Synopsis of Facts:

On April 25, 2007 police responded to Rivers Avenue located in Charleston County, SC due to area residents hearing a gun shot and that a man was lying on the ground and had been shot. Upon police's arrival, they found James Stewart lying on his back on the ground, with a gun shot wound to his upper left chest. He died at the scene. James Terry's ex-wife was with him at the time and told police that they were walking down Rivers Avenue with their bike and two black males approached them. James and his ex-wife tried to sell them their bike and then one of the men pulled out a gun and shot James in the chest at close range and then took off on the victim's bike.

That when I gave the victim the drugs, the victim leave as it to pay me and I shot him

It was later determined through police investigation that James Terry and his ex-wife were trading the bike for drugs with the defendant and co-defendant in this case.

Once police responded, they canvassed the area, spoke with local residents, spoke with the victim's ex-wife and obtained descriptions of the two defendants. The police were able to obtain a video of the defendants and their area of travel from Morning Side Elementary School. The police later located a jacket, worn by one of the defendants and located the victim's bike (his fingerprints were lifted off of the bike to confirm it belonged to the victim) and the other bike that the defendants had with them prior to the incident.

The medical examiner conducted an autopsy and recovered the projectile from the victim and determined the victim died from a close contact single gunshot wound to the upper left chest that perforated his lung and he ~~bleed~~ ^{bleed} out internally, approximately 2 liters of blood inside of his chest cavity.

The case came to a standstill until ~~June~~ ^{May} of 2007 when an attempted armed robbery was reported in the city of Charleston. The co-defendant and defendant were arrested on June 8, 2007. The co-defendant requested to speak to North Charleston Police to tell them about a murder that had happened on Rivers Avenue. Post Miranda, the co-defendant gave a written confession to the facts surrounding the death of James Stewart



and implicated the defendant's involvement. The defendant gave a similar statement to police indicating his presence at the incident location.

OFFICE OF THE SOLICITOR
NINTH JUDICIAL CIRCUIT

INDICTMENT/WARRANT STATUS CHANGE FORM
(One Defendant and One Warrant/Indictment per Form)

Name: HERBERT ANTONIO SMALLS Indictment #: 2007GS1009171

Race: B Sex: M Case Number: 20070507345

SSN: [REDACTED]

Date of Birth: [REDACTED] Warrant Number: K222259

Disposition (Check One)

Reason (Optional):

4A Dismissed

Reason: _____

4B Nolle Prosequi

Reason: Pleaded guilty to murder.

7 Remanded

Charge: _____

Municipal Court:

Magistrate Court:

Judge: _____

8B No Bill

9 Failure to Appear

Date Bench Warrant Issued: _____

Trial/Plea Docket Week: _____ Case Pre-filed with _____ Grand Jury.

Authorized by: [Signature] Date: 8/4/10
Gregory Voigt

CLERK OF COURT'S DATE/TIME STAMP:	RECEIVED BY: <u>[Signature]</u>
	DATE: _____

Defense Attorney: _____

JULIE J. ARMSTRONG
CLERK OF COURT

2010 AUG -5 AM 9:46

FILED

IN THE COURT OF GENERAL SESSIONS

STATE OF SOUTH CAROLINA)
COUNTY OF Charleston)
STATE VS.)
MARCUS U QUARLES)
AKA:)
Race: B Sex: M Age: 34)
DOB: [redacted] SS#: [redacted])
Address: [redacted])
City, State, Zip: NORTH CHARLES, SC 294180000)
DL#: [redacted] SID#: SC01044467)

INDICTMENT/CASE#: 2007GS1009164
A/W#: K222260
Date of Offense: 5/6/2007
S.C. Code § : 16-11-0330(B)
CDR Code #: 0026

SENTENCE SHEET

CONVICTED OF or PLEADS

*CDL Yes No CMV Yes No Hazmat Yes No
In disposition of the said indictment comes now the Defendant who was
TO: Attempted Armed Robbery

in violation of § 16-11-0330(B) of the S.C. Code of Laws, bearing CDR Code # 0026
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.
The plea is: Without Negotiations or Recommendation. Negotiated Sentence. Recommendation by the State.
ATTEST: [Signature] 75786 SC Bar# [Signature] 4499 Defendant [Signature] Judge [Signature] 5128 SC Bar#

WHEREFORE, the Defendant is committed to the State Department of Corrections, County Detention Center,
for a determinate term of 4 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.
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

PTUP 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:

Table with 3 columns: Description, Amount, Total. Includes items like § 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, § 44-53-450(C) (Conditional Discharge) \$350, 3% to County (if paid in installments) \$, TOTAL \$133.40

Condition Discharge, § 44-53-450(C) requires \$350 be paid to the Clerk prior to case disposition
Appointed PD or appointed other counsel, § 47.12 requires \$500 be paid to Clerk during probation.

Clerk of Court/ Deputy Clerk [Signature]
Court Reporter: Amanda Hartenden
SCCA/217 (06/2010)

Presiding Judge [Signature]
Judge Code: 2134
Sentence Date: 8/14/10

STATE OF SOUTH CAROLINA)
 COUNTY OF Charleston)
 STATE VS.)
HERBERT ANTONIO SMALLS)
 AKA: _____)
 Race: B Sex: M Age: 29)
 DOB: _____ SS#: _____)
 Address: _____)
 City, State, Zip: NORTH CHARLES, SC 294050000)
 DL#: _____ SID#: SC01058652)
 *CDL Yes No CMV Yes No Hazmat Yes No

IN THE COURT OF GENERAL SESSIONS
 INDICTMENT/CASE#: 2007GS1013708
 A/W#: F969628
 Date of Offense: 4/25/2007
 S.C. Code §: 16-03-0010, 0020
 CDR Code #: 0116

SENTENCE SHEET

CONVICTED OF or PLEADS

In disposition of the said indictment comes now the Defendant who was
 TO: Murder
 in violation of § 16-03-0010, 0020 of the S.C. Code of Laws, bearing CDR Code # 0116
 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: Julie J. Armstrong for 71975 Herbert Small 11676
 Voigt, Gregory 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 40 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:
 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. Credit time beginning 5/7/2007
 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	\$ 100.00
§ 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	\$ 25.00
§ 14-1-213 (Drug Court Surcharge)	\$150	\$
§ 50-21-114 (BUI Breath Test Fee)	\$50	\$
§ 56-5-2942(J) (Vehicle Assessment)	\$40/ea	\$
Proviso 90.5 (SCCJA Surcharge)	\$5	\$ 5.00
§ 44-53-450(C) (Conditional Discharge)	\$350	\$
3% to County (if paid in installments)		\$ 3.90
TOTAL		\$ 133.90

Clerk of Court/ Deputy Clerk Callie Amador Hoffmann
 Court Reporter: _____
 SCCA/217 (06/2010)

_____ 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
 prnts. of \$ _____ beginning _____
 \$ _____ paid to Public Defender Fund

Other: **ATTEST: A TRUE COPY**
JULIE J. ARMSTRONG (SEAL)
 CLERK, C.P., G.S. & F.G.

By _____
 Condition Discharge, § 44-53-450(C) DEPUTY CLERK
 \$350 be paid to the Clerk prior to case disposition
 Appointed PD or appointed other counsel,
 § 47.12 requires \$500 be paid to Clerk
 during probation.

Presiding Judge _____
 Judge Code: 2154
 Sentence Date: 8/2/10