

STATE OF SOUTH CAROLINA  
In The Court of Appeals

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CERTIORARI TO YORK COUNTY  
Court of Common Pleas

The Honorable John C. Hayes, III, Circuit Court Judge

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Appellate Case No.: 2012-213515

Odis Dwayne Simonds.....Respondent,

v.

State of South Carolina.....Petitioner.

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**BRIEF OF PETITIONER**

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ATTORNEYS FOR RESPONDENT

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## STATEMENT OF ISSUES ON APPEAL

- I. Whether the PCR Court erred by granting the Respondent's time-credit claim when this issue was a direct appeal issue and not proper for the PCR Court to decide?
  
- II. Whether the PCR Court erred by granting the Respondent's time-credit claim when this issue is proper for the Department of Corrections and the Administrative Law Judge Division to decide under Al-shabbaz v. State?

## STATEMENT OF THE CASE

Odis Dwayne Simonds, (Respondent), was indicted at the August 2003 term of the York County Grand Jury with nine (9) counts of Criminal Sexual Conduct (“CSC”) with a Minor, first degree (2003-GS-46-2812, -2813, -2814, -2815, -2816, -2817, -2818, -2819, -2824), and four (4) counts of Lewd Act Upon a Child (2003-GS-46-2820, -2821, -2822, -2823). After he was arrested on January 26, 2002, Respondent was found not competent to stand trial. On September 15, 2003, the State dismissed the indictments against Respondent, but reserved the right to restore them if he regained competency. The charges were restored on March 13, 2009, after the Department of Mental Health declared Respondent to be competent. He was represented on these charges by Harry A. Dest, Esquire.

On March 15, 2010, Respondent appeared before the Honorable Thomas Russo for a plea hearing. Respondent pled guilty but mentally ill to three (3) counts of CSC with a Minor, first degree (2003-GS-46-2812, -2816, -2824), and one (1) count of Lewd Act Upon a Child (2003-GS-46-2820). He also pled guilty but mentally ill pursuant to N.C. v. Alford to two (2) counts of CSC with a Minor, first degree (2003-GS-46-2817, -2819), and one (1) count of Lewd Act Upon a Child (2003-GS-46-2823).<sup>1</sup> He was sentenced to thirty (30) years suspended upon service of fifteen (15) years for each of the five (5) CSC charges, and fifteen (15) years suspended upon service of 964 days<sup>2</sup> to five (5) years’ probation for both of the lewd act charges. All sentences were run concurrent with the exception of the five (5) year probationary sentence on 2003-GS-

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<sup>1</sup> In exchange for Respondent’s plea, the State dismissed four (4) counts of CSC with a Minor, first degree (2003-GS-46-2813, -2814, -2815, -2818), and two (2) counts of Lewd Act Upon a Child (2003-GS-46-2818, -2821).

<sup>2</sup> Respondent was given credit for time served in the amount of 964 days for each sentence.

46-2820, which was run consecutive to all other sentences. Respondent did not appeal his conviction or sentences.

Respondent filed an application for post-conviction relief on March 14, 2011. Petitioner made its Return on August 16, 2011. An evidentiary hearing into the matter was convened on August 13, 2012 at the Moss Justice Center in York, SC. The record was reopened on August 14, 2012 for additional argument from Petitioner. Respondent was present at the hearing and represented by Tommy Thomas, Esquire. J. Rutledge Johnson of the South Carolina Attorney General's Office represented the State. By Order filed on October 15, 2012, the Honorable John C. Hayes, III granted post-conviction relief in the form of credit for time confined in Just Care. Counsel for Respondent filed a Motion to Alter or Amend Judgment pursuant to SCRPC 59(e) on November 5, 2012. Judge Hayes issued an amended Order on October 21, 2012 and filed on November 5, 2012.

Petitioner filed a timely Notice of Appeal on December 4, 2012. Petitioner filed its Petition for Writ of Certiorari on April 4, 2013. Respondent filed its Return to Petition for Writ of Certiorari on July 3, 2013. This Court granted Certiorari and ordered the parties to file briefs on September 24, 2014. This Brief of Petitioner follows.

## ARGUMENTS

### **I. The PCR Court erred by granting the Respondent's time-credit claim as this issue should have been raised on direct appeal and is not proper for the PCR Court to decide.**

The PCR Court found Respondent was entitled to additional credit for time served at Just Care, a facility run by the South Carolina Department of Mental Health. Respondent was held at Just care pursuant to the State's required action in petitioning the Probate Court after a Blair<sup>3</sup> finding that Respondent was incompetent. The PCR Court held this action was tantamount to pre-trial detention.

The proper standard for reviewing a PCR evidentiary hearing is whether "any evidence of probative value" exists to sustain the post-conviction relief judge's findings. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). S.C. Code § 17-27-20(b) states "[a post-conviction relief] remedy is **not a substitute** for nor does it affect any remedy incident to the proceedings in the trial court, or of **direct review of the sentence or conviction.**" (1985) (emphases added). "[E]rrors which can be reviewed on direct appeal may not be asserted for the first time, or reasserted, in post-conviction proceedings." Drayton v. Evatt, 312 S.C. 4, 8, 430 S.E.2d 517, 519 (1993). Post-conviction relief is not a substitute for a direct appeal. Simmons v. State, 264 S.C. 417, 215 S.E.2d 883 (1974).

At Respondent's guilty plea, Mr. Dest (Counsel), during mitigation, argued Respondent was entitled to credit for time served in Just Care. "...I would respectfully submit, Your Honor, that being confined in a Department of Mental Health facility is still tantamount to pretrial prevention(sic)." (App. p. 52 lines 8-10). Counsel also argued, while Just Care is a different environment than a detention center, "[i]t's confinement based upon state action whether it be

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<sup>3</sup> State v. Blair, 275 S.C. 529, 273 S.E.2d 536 (1981).

following the charges or the probate court or through his inability to being incompetent at the time at a period of time.” (App. p. 52 lines 15-18). Counsel then asked the plea court to consider giving Respondent credit for time served at Just Care. (App. p. 52 lines 18-19). Counsel further asked if the plea court did not find giving Respondent credit for time served appropriate that it tailor its sentence so Respondent receive the time credit. (App. p. 52 lines 20-22). However, the Honorable Thomas Russo ruled Respondent was not entitled for credit for time served at Just Care as he was there for mental health treatment. (App. p. 65 line 18- p. 66 line 2).

At the PCR hearing, Counsel testified he made the argument that Respondent was entitled to credit for time served at Just Care at the guilty plea, but Judge Russo ruled against Respondent. (App. p. 110 lines 4-23). Once again, Counsel articulated because Respondent’s confinement was based on State action, albeit mandatory, it was his opinion the time at Just Care was tantamount to pre-trial detention, and thus, Respondent should be entitled to credit for time served. (App. p. 113 line 22- p. 114 line 4). Additionally, Counsel articulated that Judge Russo factored into his ultimate sentence that while Respondent was in Just Care, he voluntarily sought sex-offender treatment, and this made a tremendous difference in Respondent. (App. p. 117 line 7- p. 118 line 6). However, while Counsel testified it is his practice to advise clients concerning their right to appeal, Respondent did not ask him to appeal his conviction and sentence. (App. p. 115 lines 2-15; p. 120 line 1).

Respondent, in this case, is essentially claiming Judge Russo erred by not giving him credit for time served while in Just Care. Counsel specifically requested Judge Russo give Respondent credit for time served more than once during the guilty plea. Judge Russo, after due consideration, agreed with the State’s position that time served at Just Care was not tantamount

to pre-trial detention as charges were dropped while Respondent was in Just Care. However, as Counsel articulated his position and Judge Russo ruled on this issue, this issue was preserved for direct appeal. Because Respondent is alleging judicial error, he must have raised this issue on direct appeal. Pursuant to Drayton, supra, Respondent may not assert this claim for the first time on PCR. Thus, the PCR Court committed a reversible error of law by ruling on this issue as it was not properly before the PCR court. Because there is no evidence to sustain the PCR court's findings, this Court should reverse.

**II. The PCR Court erred by granting Respondent's time-credit claim as this issue is proper for the Department of Corrections and Administrative Law Judge Division to decide under Al-shabbaz v. State.**

Nevertheless, Respondent's time-credit claim is proper for the Department of Corrections and Administrative Law Judge Division (ALJ) to decide, not the PCR Court.

Aside from two matters specifically mentioned in the statute, post-conviction relief is a proper avenue of relief only when the Respondent mounts a collateral attack challenging the validity of his conviction or sentence. Al-Shabazz v. State, 338 S.C. 354, 527 S.E.2d 742 (2000). Credit-related claims are administrative matters and, thus, cannot be raised in a post-conviction relief proceeding. Id.

The statutory right to sentence related credits is a protected "liberty" interest under the Fourteenth Amendment, entitling an inmate to minimal due process to ensure the state-created right was not arbitrarily abrogated. Wolff v. McDonnell, 418 U.S. 539, 94 S.Ct. 2963 (1974). Because SCDC's disciplinary and grievance procedures are consistent with the standards delineated in Wolff v. McDonnell, supra, inmates may seek review of such claims under the Administrative Procedures Act (APA). Al-Shabazz, 338 S.C. 354.

Here, Respondent's only claim was that he was not given credit for time served at Just Care. There was no claim of ineffective assistance of counsel. *See* App. p. 108 lines 6-13. This is clearly a credit-related claim, and as such is not proper for PCR. Respondent must file his claim first within SCDC and then, if unsuccessful, file it with the ALJ. As this was a credit-related claim which is properly filed with SCDC and the ALJ, the PCR Court committed a reversible error of law by granting Respondent relief under the PCR statute. Because there is no evidence to sustain the PCR court's findings, this Court should reverse.

**CONCLUSION**

For the reasons stated above, this Court should reverse the PCR Court and direct Respondent to file his credit-related claim with SCDC and the ALJ.

Respectfully submitted,

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November 24, 2014

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Certiorari to York County

The Honorable John C. Hayes, III, Circuit Court Judge

ODIS DWAYNE SIMONDS,

Respondent,

STATE OF SOUTH CAROLINA

Petitioner.

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**PROOF OF SERVICE**  
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I, CHANDRA E. YOUNG, certify that I have served the Brief of Petitioner on opposing counsel by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Tommy A. Thomas  
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Irmo, South Carolina 29063

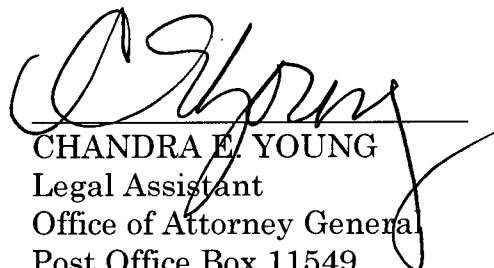
I further certify that all parties required by Rule to be served have been served.

This 24<sup>th</sup> day of November, 2014.

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**SC Court of Appeals**

  
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