

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Aiken County
Edgar W. Dickson, Circuit Court Judge

RECEIVED
MAR 24 2016
SC SUPREME COURT

TORYAST J. JOHNSON

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-002099

APPENDIX

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Appellate Defender

South Carolina Commission on Indigent
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1 STATE OF SOUTH CAROLINA

2 COUNTY OF AIKEN

CIRCUIT COURT
2010-GS-02-00296

3
4 STATE OF SOUTH CAROLINA,

5 -vs-

TRANSCRIPT OF RECORD

6 TORYAST JERMAINE JOHNSON,
7 Defendant.

8
9
10 Heard on Wednesday, August 31, 2011

11 Aiken, South Carolina

12 BEFORE:

13 THE HONORABLE DOYET A. EARLY, III

14
15 APPEARANCES:

16 Counsel on Behalf of the State:
17 David W. Miller, Esq.

18 Counsel on Behalf of the Defendant:
19 Ola Johnson, Esq.

20
21
22 Cheri L. Young, RPR
23 Circuit Court Reporter
24 P O Box 3252
25 Aiken, SC 29804-3252

EXHIBIT INDEX

(NO EXHIBITS IDENTIFIED/INTRODUCED.)

1 ON WEDNESDAY, AUGUST 31, 2011 AT 11:27 A.M.:

2 MR. MILLER: Toryast Johnson.

3 (Defendant placed under oath.)

4 MR. MILLER: Your Honor, before the Court is Toryast
5 Jermaine Johnson.

6 He's charged in indictment 2010-GS-02-0296 with armed
7 robbery. The indictment has been true billed. He is here
8 today to plead to that armed robbery.

9 There's been no negotiation as relates to the sentence
10 in the case, however the State will be dismissing and
11 agreeing not to bring any additional charges against
12 Mr. Johnson for this incident.

13 THE COURT: The sentence sheet says it is nonviolent
14 and not serious or most serious. That is not correct; is
15 it?

16 MR. MILLER: No, sir. It should be most serious and
17 violent.

18 MR. JOHNSON: I'm sorry. I didn't catch that, Judge.
19 I'm sorry.

20 (Document handed back to defense counsel, returned to
21 Judge.)

22 MR. JOHNSON: Thank you, Judge.

23 THE COURT: All right. Does this man have a record?

24 MR. MILLER: He does, Your Honor. His prior record is
25 an armed robbery conviction on March the 8th of 1999, for

1 which he received 12 years. There was a receiving stolen
2 goods that was concurrent with that.

3 THE COURT: So '99, 1999, a 12-year sentence. When
4 did you get out of jail on that, sir?

5 THE DEFENDANT: 2008.

6 THE COURT: 2008?

7 THE DEFENDANT: Yes, sir

8 THE COURT: This occurred on?

9 MR. MILLER: November the 7th of 2009.

10 THE COURT: When in 2008?

11 THE DEFENDANT: December 1st.

12 THE COURT: So you made it less than a year?

13 THE DEFENDANT: Yes, sir.

14 THE COURT: I assume you are on parole?

15 THE DEFENDANT: Be on supervision.

16 THE COURT: So that would violate that; would it not?

17 MR. JOHNSON: Your Honor, I believe he's been released
18 from that.

19 THE COURT: He was released when this occurred?

20 MR. JOHNSON: He's been released off of that. He
21 served 660 days. They terminated that.

22 THE COURT: Mr. Miller, are there any other pending
23 charges against him that we're going to nolle pros?

24 MR. MILLER: Your Honor, I can get into the facts a
25 little bit but this was an armed robbery with a number of

1 people that were herded into a cooler in the restaurant.
2 And there were several kidnapping charges that were
3 brought as well that we will be dismissing. We're
4 dismissing everything against him in Aiken County.

5 THE COURT: Well, if he was sentenced in '99, 1999, to
6 armed robbery, that would have been a most serious. This
7 is a most serious. That would be two strikes.

8 MR. MILLER: That is correct, Your Honor.

9 THE COURT: So y'all are, not necessarily a
10 negotiation but to get the plea you're not noticing him
11 for life without parole?

12 MR. MILLER: That was a substantial part of the
13 negotiation, Your Honor, that we would not seek life
14 without parole for this offense because of the fact that
15 he was cooperative with law enforcement whenever he was
16 arrested and helped secure convictions on the other two
17 co-defendants.

18 And each of those co-defendants pled in 2010 and
19 received 25-year sentences. They did not have prior
20 records.

21 THE COURT: The co-defendants received 25 with no
22 prior record?

23 MR. MILLER: They had minor prior records. CDV for
24 one of them, Your Honor. And the other one had a, I
25 believe a magistrate's-level offense but they didn't have

1 any kind of violent record at all.

2 THE COURT: All right. Mr. Johnson, you represent
3 Mr. Johnson; is that correct?

4 MR. JOHNSON: Yes, sir.

5 THE COURT: Mr. Johnson representing Mr. Johnson. All
6 right.

7 First of all, have you advised your client, sir, that
8 armed robbery carries a minimum of 30 years up to 30 -- a
9 minimum of 10 years up to 30?

10 MR. JOHNSON: Yes, sir.

11 THE COURT: Have you advised him that it's classified
12 as violent and most serious and the ramifications of those
13 classifications?

14 MR. JOHNSON: Yes, sir.

15 THE COURT: Have you advised him that this is now his
16 second most serious and obviously if the State chose to
17 they could have noticed him to the possibility of life in
18 prison without parole?

19 MR. JOHNSON: Yes, sir.

20 THE COURT: Obviously if he gets out, when he gets out
21 same situation now, another serious or most serious, he's
22 subjecting himself to the possibility of life in prison
23 without parole.

24 MR. JOHNSON: Yes, sir.

25 THE COURT: Have you advised him that this is what we

1 call an 85 percent, no-parole sentence? That he has to do
2 85 percent of his sentence?

3 MR. JOHNSON: Yes, sir.

4 THE COURT: Have you advised him when he's released
5 he'll be released to a community supervision program?

6 MR. JOHNSON: Yes, sir.

7 THE COURT: Have you advised him to his right to trial
8 by jury?

9 MR. JOHNSON: Yes, I have.

10 THE COURT: In your opinion, does he understand the
11 charges, the classifications, what the enhancement means,
12 the fact that it's an 85 percent, no-parole sentence?

13 MR. JOHNSON: Yes, sir.

14 THE COURT: Does he understand all of that?

15 MR. JOHNSON: Yes, sir.

16 THE COURT: And after having advised him of his right
17 to trial by jury, does he wish to plead guilty?

18 MR. JOHNSON: Yes, sir.

19 THE COURT: Did you agree with that decision?

20 MR. JOHNSON: Yes, I do.

21 THE COURT: Mr. Johnson, good morning.

22 THE DEFENDANT: Good morning.

23 THE COURT: You're back before the Court on another
24 armed robbery case. That's what you're charged and
25 indicted with. Do you understand those charges?

1 THE DEFENDANT: Yes, sir.

2 THE COURT: Do you understand that it carries a
3 minimum of 10 years, a maximum of 30 years?

4 THE DEFENDANT: Yes, sir.

5 THE COURT: Do you understand that it's a no-parole
6 sentence or crime and that you'll do 85 percent of
7 whatever sentence I give you and once you're released
8 you'll be released to a community supervision program?

9 THE DEFENDANT: Yes, sir.

10 THE COURT: Do you understand that it's classified as
11 violent and that may have some affect on where you're
12 housed and how you're housed in the Department of
13 Corrections?

14 THE DEFENDANT: Yes, sir.

15 THE COURT: Do you understand it's also classified as
16 most serious. Now you have two most-serious charges.
17 Even though the State is not seeking life in prison
18 without the possibility of parole here, if and when you're
19 released from incarceration you become involved in
20 criminal activity classified as serious or most serious in
21 the future, you'll be subjecting yourself to the
22 possibility of life in prison without parole.

23 THE DEFENDANT: Yes, sir.

24 THE COURT: Understand all of that?

25 THE DEFENDANT: Yes, sir.

1 THE COURT: Understanding the range of sentence, the
2 classification of serious, the classification of violent,
3 the fact that this is a no-parole sentence, that you do 85
4 percent of it, understanding all of that, sir, how do you
5 wish to plead to these charges; guilty or not guilty?

6 THE DEFENDANT: Guilty.

7 THE COURT: Mr. Johnson, when you enter a plea of
8 guilty you will be forfeiting or giving up your right to
9 remain silent. You'll have to admit to me your
10 involvement in this crime, armed robbery. Do you
11 understand that?

12 THE DEFENDANT: Yes, sir.

13 THE COURT: If you plead guilty you'll also be giving
14 up your right to a jury trial. Obviously if you asked for
15 a jury trial the State would give you one at which time
16 you would have the right to confront or cross-examine
17 everyone who testified against you.

18 You would have the right to present your own defense
19 by calling witnesses to testify in your defense, by
20 introducing relevant exhibits, and by testifying in your
21 own defense if you chose to testify.

22 If you exercised your constitutional right to remain
23 silent, I will tell the jury that they could not hold the
24 fact that you did not testify against you at all, and I
25 would instruct them that they could not even consider the

1 fact that you did not testify when they deliberated your
2 guilt or innocence.

3 You would have the constitutional protection of being
4 presumed to be innocent throughout the trial and the State
5 of South Carolina would have the burden of proving your
6 guilt beyond a reasonable doubt to a jury of 12 people.

7 And in order for that jury to convict you, all 12
8 people would have to unanimously agree that you were in
9 fact guilty. And even if you were found guilty you would
10 still have the right to an appeal.

11 Now, do you understand your rights to trial by jury?

12 THE DEFENDANT: Yes, sir.

13 THE COURT: Understanding those rights, Mr. Johnson,
14 do you still wish to plead guilty or do you wish me to
15 provide a jury trial for you?

16 THE DEFENDANT: Guilty.

17 THE COURT: Mr. Johnson, has anyone promised you
18 anything, held out any hope of reward or threatened you in
19 any manner in order to make you plead guilty?

20 THE DEFENDANT: No, sir.

21 THE COURT: Mr. Johnson, are you satisfied with the
22 representation provided to you by Attorney Ola Johnson?

23 THE DEFENDANT: Yes, sir.

24 THE COURT: In your opinion has he had enough time to
25 spend with you, enough time to research the law, and

1 enough time to investigate the facts so that he can
2 properly defend you here today?

3 THE DEFENDANT: Yes, sir.

4 THE COURT: Is there anything else you wish for him to
5 do for you today before going forward other than speak up
6 on your behalf?

7 THE DEFENDANT: No, sir.

8 THE COURT: And I ask you again: Are you totally and
9 completely satisfied with his legal services?

10 THE DEFENDANT: Yes, sir.

11 THE COURT: Sir, are you today under the influence of
12 any alcoholic beverages, drugs or prescription
13 medications?

14 THE DEFENDANT: No, sir.

15 THE COURT: Sir, are you today aware of any mental,
16 nervous or emotional conditions which would keep you from
17 understanding these proceedings?

18 THE DEFENDANT: No, sir.

19 THE COURT: Sir, are you today pleading guilty to
20 these charges of your own free will?

21 THE DEFENDANT: Yes, sir.

22 THE COURT: Sir, did you here in Aiken County on
23 September 9th -- strike that.

24 Did you here, sir, in Aiken County on November 7,
25 2009, while armed with a handgun, take from one David

1 Tinsley at the Burger King, goods and moneys, US currency,
2 while using a weapon? Did you do that?

3 THE DEFENDANT: Yes, sir.

4 THE COURT: Did you commit an armed robbery at the
5 Burger King taking from one David Tinsley money?

6 THE DEFENDANT: Yes, sir.

7 THE COURT: Or participate in that armed robbery?

8 THE DEFENDANT: Yes, sir.

9 THE COURT: Are you pleading guilty because you did in
10 fact rob the Burger King with the use of a gun?

11 THE DEFENDANT: Yes, sir.

12 THE COURT: You're pleading guilty because you are
13 guilty?

14 THE DEFENDANT: Yes, sir.

15 THE COURT: All right. Mr. Johnson, I find your
16 decision to plead guilty to be freely, voluntarily and
17 intelligently made. You've had the representation of a
18 lawyer, Mr. Johnson, with whom you say you're satisfied
19 and I will accept your plea.

20 If you disagree with these proceedings or the
21 sentence, you have 10 days from today's date to file a
22 notice of intent to appeal. Do you understand that?

23 THE DEFENDANT: Yes, sir.

24 THE COURT: Mr. Miller?

25 MR. MILLER: Thank you, Your Honor. May it please the

1 Court.

2 Shortly before noon on November the 11th -- or excuse
3 me, November 7th of 2009, the Defendant, an individual
4 named Robert Mills, an individual named Sean Rodriguez,
5 and a fourth defendant named Richard Simmons all came to
6 Aiken from the Columbia area in a stolen four door Mercury
7 SUV. They went to the Burger King on York Street in the
8 City of Aiken where they went into the building with
9 masks, armed, and essentially took over the restaurant.

10 Customers and employees in the restaurant were forced
11 into a walk-in refrigerator where they were shut in with
12 the exception of one Mr. David Tinsley who was the manager
13 of the store. While three individuals were getting
14 everybody into the cooler, one individual, and we're not
15 entirely sure which one of the individuals it was, was
16 having Mr. Tinsley go around and open up the cash
17 registers so that they could take money out the cash
18 register.

19 When they came into the restaurant with the guns,
20 there were a couple of employees and at least one patron
21 that were able to flee the restaurant out the other door.
22 Those people ran to a car wash -- or, excuse me, a gas
23 station that was immediately next door and they used a pay
24 phone to call 9-1-1.

25 Aiken Public Safety Officers arrived when they were

1 still in the store. The first officer on the scene got
2 there and he secured the door closest to the highway with
3 his rifle. He basically took up a position outside the
4 store. As other officers were arriving, they were trying
5 to set a perimeter, apparently the suspects saw the police
6 officers outside so they ran out the opposite door and
7 into the tree line into the woods. They kind of
8 scattered.

9 One of the suspects was caught almost immediately,
10 Mr. Robert Mills. He was behind a house on Aldrich Street
11 which is right there in that neighborhood. And he had a
12 black handgun in his possession when he was apprehended.
13 He was taken into custody by Sergeant Odenthal.

14 Detective Glover who is a well-known detective in the
15 neighborhood for Aiken Public Safety was one of the people
16 who responded and he received information from an
17 anonymous tip that there was a suspect hiding in a vacant
18 residence on Croft Avenue which is another street right
19 there in that area.

20 So Detective Glover got some of the other officers to
21 go around and take a look at that residence. They found
22 the back door open. And when they went inside they
23 discovered a black male wearing all black clothing hiding
24 in a closet.

25 At that point in time they arrested the second

1 suspect, Sean Rodriguez. Mr. Rodriguez was also placed in
2 a patrol car and transported to headquarters for booking.

3 THE COURT: Did he have a gun?

4 MR. MILLER: He did not have a gun, Your Honor. And
5 when he got to Public Safety, they attempted to interview
6 him. And at that time he did admit to being involved in
7 the robbery and he told them that he had thrown his gun
8 out as he was running, but he was not cooperative as to
9 any co-defendants.

10 Because of the fact that he had indicated he had
11 thrown this pistol out in the neighborhood, it's a
12 residential neighborhood, officers went back out to the
13 scene to look for the pistol. And while they were looking
14 for the pistol in the area where Mr. Rodriguez told them
15 that he had thrown it, one of the officers almost stepped
16 on what later turned out to be the third suspect,
17 Mr. Simmons. He saw the suspect, saw that the clothing
18 matched what everybody else had been wearing --

19 THE COURT: All black?

20 MR. MILLER: All black. -- laying face down in the
21 woods, breathing heavily.

22 And at that point the officer made a tactical decision
23 to back out, get some more backup and get his rifle out of
24 his car. They formed a perimeter around the area. They
25 told Mr. Simmons to stay where he was and put his hands

1 up. Mr. Simmons stood up, ran deeper into the woods and
2 then killed himself with a single gunshot. He committed
3 suicide instead of being taken into custody.

4 That is significant, Your Honor, because once they
5 were able to identify Mr. Simmons, it obviously made the
6 news and got back up to Columbia. Investigators received
7 a telephone call from Mr. Simmons' mother who said that if
8 her son died and he was involved in an armed robbery, then
9 Mr. Johnson was with him. And that would have been the
10 fourth person who at that point was still unidentified.

11 Mr. Johnson was picked up in Columbia. He was picked
12 up by the SLED Fugitive Task Force in Columbia and he was
13 transported down to Aiken from Richland County where he
14 met with Investigator Glover and he -- or Detective
15 Glover, and he basically confessed to everything.

16 He told Detective Glover what had happened. He told
17 him what he had done. I believe that Mr. Simmons, the
18 deceased, may have been related to Mr. Johnson in some
19 way. They might have been cousins.

20 But he was -- he was definitely forthcoming with the
21 officers. He also helped them confirm that Sean Rodriguez
22 and Robert Mills were also involved in the armed robbery
23 and gave them some background and some details that they
24 didn't have before.

25 After talking to Mr. Johnson, Mr. Mills and

1 Mr. Rodriguez also came in and gave full confessions based
2 upon some of the information the officers were able to
3 present them with that they got from Mr. Johnson.

4 Your Honor, this was a significant event and it was a
5 significant imposition on the people at Burger King. As
6 the Court is aware, that's not a place where a lot of
7 people end up working four and five years in a row. When
8 we tried to get in touch through victim services with the
9 victims, there weren't any that were interested in coming
10 here today for the plea.

11 Specifically, Mr. Tinsley had indicated at the last
12 plea that he sought some and had received some kind of
13 counseling through Burger King for the employees that were
14 in the restaurant and they were pretty devastated by it.

15 And but for the fact that a couple of employees and
16 one customer had slid out that side door when they came
17 in, that it's very likely that they would have been out of
18 the restaurant and gone back to Columbia before anybody
19 even knew who they were.

20 But as it turned out, the work of the Aiken Department
21 of Public Safety in conjunction with Aiken County
22 Sheriff's Office and the Highway Patrol, they had
23 everybody there trying to set up a perimeter and catch
24 these guys.

25 Mr. Johnson did tell Detective Glover that he had

1 managed to get away by getting a ride from somebody at a
2 local -- at a car wash which was nearby that apparently
3 didn't know what was going on. They had given him a ride
4 and he had called one of his friends to come get him the
5 rest of the way and take him back to Columbia. That's how
6 he had gotten away. He just kind of slipped through the
7 cracks, but ultimately they were able to get him.

8 THE COURT: Mr. Johnson?

9 MR. JOHNSON: Thank you, Your Honor.

10 As Your Honor pointed out, my client's entire adult
11 life outside of prison consisted of 11 months. He went
12 into custody at the age of 17 on that original charge.

13 I would point that out because it's had a definite
14 impact on him and I think on the way he makes decisions.
15 And when you take that and combine that with a severe
16 cocaine addiction which is the basis of his problem, he
17 started using cocaine at a very young age and that has
18 followed him throughout his life.

19 Certainly not an excuse, Your Honor, but that much
20 time in prison that he put himself in, along with the
21 cocaine addiction, it definitely impacted his ability, I
22 think, to come out and be successful once he got out of
23 prison.

24 He made a bad mistake here and he does want to
25 apologize at the appropriate time for that, Judge.

1 I called his grandmother. She is elderly and did not
2 have transportation, could not be here today. I tried to
3 call his mother, could not reach her.

4 Overall, the impression that I'm getting is that even
5 as a young man he didn't have a lot of support. And I
6 would point that out, Your Honor. Considering the obvious
7 effect of that much prison time at a young age, he clearly
8 just got out and made a horrible decision and a bad
9 mistake.

10 I would point out based on all the notes from the
11 interviews, law enforcement relied, I think, pretty
12 heavily on Mr. Johnson's interviews and its details. From
13 the very beginning he was giving them all these details
14 about who drove when and where and who did what. And he
15 didn't fight them on that or try to mislead them.

16 During his interview he indicated that he was not
17 pushing people in the cooler but he was out sort of as a
18 outlook in the restaurant. But he did take part in it and
19 he admits and he admitted to that to this day.

20 I would ask the Court to consider all of that in its
21 sentencing to get as possible -- as close as possible to
22 the minimum. I know that he has a bad conviction and a
23 bad rap sheet. And that is certainly something that will
24 affect the sentence today but he was fully cooperative
25 with Detective Glover and did help them as much as he

1 possibly could, Judge.

2 The time served, it was actually a total of 660 days.
3 For the Court's information, he did 24 here. He never
4 bonded out. They took him over there and did 636.

5 THE COURT: Over where?

6 MR. JOHNSON: Richland County on those charges. He's
7 been there ever since.

8 THE COURT: What are the charges in Richland County?

9 MR. JOHNSON: He has a murder charge in Richland
10 County.

11 And it's 660 days without bonding out. So that, I
12 believe, should be a credit for time served in his case.

13 In addition to that, for the Court's information he's
14 30 years old. The majority of that time spent in jail.
15 He did work at McDonald's when he was out. Judge, he's
16 basically been struggling with this drug problem and
17 trying to fight that. He's expressed an interest in
18 training and getting his GED some day which of course is
19 something I've encouraged him to do.

20 And I think he would like to apologize at the
21 appropriate time, Your Honor.

22 THE COURT: Mr. Johnson?

23 THE DEFENDANT: I'd like to send all my apologies to
24 all my victims. I know nothing I can say, you know, can
25 change anything that happened but, you know, it definitely

1 changed my outlook on my life, on my peers and people who
2 I associate myself with when I got out. So I'd just like
3 to apologize and thank the prosecutor for working with
4 me. That's it.

5 THE COURT: Young man, you went in jail at 17. You
6 were out for nine months. Three other guys, all armed.
7 Obviously you were very well planned. You came from
8 Columbia down here and you went into the Burger King. You
9 put a lot of peoples' lives at risk.

10 I don't know what kind of kin -- how was Simmons kin
11 to you? Was he kin? Friend? What?

12 THE DEFENDANT: He was a cousin.

13 THE COURT: Cousin?

14 THE DEFENDANT: Yes, sir.

15 THE COURT: He shot himself to death over all of this,
16 I assume. Committed suicide. You got two other friends,
17 Mills and Rodriguez?

18 THE DEFENDANT: Friends.

19 THE COURT: They're doing 25 years in the Department
20 of Corrections. I don't know how to deal with people like
21 you other than protect the rest of us out here from you, I
22 mean...

23 SENTENCE OF THE COURT: YOU BE SENTENCED TO THE STATE
24 DEPARTMENT OF CORRECTIONS FOR A PERIOD OF 30 YEARS. Good
25 luck to you.

1 MR. MILLER: Thank you, Your Honor.

2 MR. JOHNSON: Thank you, Judge.

3 END OF PROCEEDINGS: 11:51 A.M.

4 * * * *

5 CERTIFICATE OF REPORTER

6 STATE OF SOUTH CAROLINA)

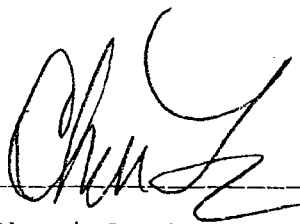
7 COUNTY OF AIKEN)

8 I, Cheri L. Young, Registered Professional Reporter
9 and Official Court Reporter for the Second Judicial
10 Circuit of the State of South Carolina, do hereby certify
11 that the foregoing is a true, accurate and complete
12 transcript of record of the proceedings had and evidence
13 introduced in the hearing of the captioned case, relative
14 to appeal, in the Court of General Sessions Sessions for
15 Aiken County, on the day of August 31, 2011.

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

18 I have hereunder set my hand this Thursday, the 16th
19 day of August, 2012.

20
21
22
23
24
25



Cheri L. Young, RPR
Official Court Reporter

2012-CP-02-01423

2010-GS-02-00296

1092096

Filed 11 June 2012

C.C.C.P. & G.S. Aiken County

Deputy Clerk: J. Am. Time 8:30 am

Trial Judge: J. Earl Hill

Trial Atty: J. L. Johnson

Court Reporter: Cheryl Young

Sec: PCR Positioner Solicitor

General Sessions Atty. Gen.

Appointed Atty.

STATE OF SOUTH CAROLINA)

In the Court of Common Pleas

County of Aiken)Toryast Jermaine Johnson #256772)

Full name and prison number, if any, of applicant.)

v.)

State of South Carolina)

Name of Respondent)

APPLICATION FOR

POST-CONVICTION RELIEF
Evidentiary Hearing RequestedINSTRUCTIONS - READ CAREFULLY

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

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

If the applicant 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 applicant was convicted.

1. Place of detention Perry Correctional Institution, 430 Oaklawn Rd., Pelzer S.C. 29669

2. Name and location of Court which imposed sentence Court of General Sessions for Aiken County

3. The indictment number or numbers (if known) upon which and the offense or offenses for which sentence was imposed:

(a) 2010-GS02-00296

(b) _____

(c) _____

4. The date upon which sentence was imposed and the terms of the sentence:

(a) August 31, 2011 30 years

(b) _____

(c) _____

5. 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 _____

6. Did you appeal from the judgment of conviction or the imposition of sentence? _____

N/A

7. If you answered "yes" to (6), list

(a) the name of each Court to which you appealed:

- i. _____
 ii. _____
 iii. _____

(b) the result in each such Court to which you appealed:

- i. _____
 ii. _____
 iii. _____

(c) the date of each such result:

- i. _____
 ii. _____
 iii. _____

(d) if known, citations of any written opinion or orders entered pursuant to such results:

- i. _____
 ii. _____
 iii. _____

8. If you answered "no" to (6), state your reasons for not so appealing:

(a) My Attorney did not advise me of my right to appeal.

(b) _____

(c) _____

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

(a) See Attachment

(b) " "

(c) " "

10. State concisely and in the same order the facts which support each of the grounds set out in (9)

(a) See Attachment

(b) " "

(c) " "

11. 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 petitions in State or Federal Courts for habeas corpus or post-conviction relief?

N/A

(c) any petitions in the United States Supreme Court for certiorari other than petitions, if any, already specified in (7) N/A

(d) any other petitions, motions or applications in this or any other Court?

N/A

12. If you answered "yes" to any part of (11), list with respect to each petition, motion or application:

(a) the specific nature thereof:

i. _____

ii. _____

iii. _____

iv. _____

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

i. _____

ii. _____

iii. _____

iv. _____

(c) the disposition thereof:

i. _____

ii. _____

iii. _____

iv. _____

(d) the date of each such disposition:

- i. _____
- ii. _____
- iii. _____
- iv. _____

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

- i. _____
- ii. _____
- iii. _____
- iv. _____

13. Has any ground set forth in (9) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed? N/A

14. If you answered "yes" to (13), identify:

(a) which grounds have been presented:

- i. _____
- ii. _____
- iii. _____

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

- i. _____
- ii. _____
- iii. _____

15. If any ground set forth in (9) 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) This is the first application that has been filed
- (b) to challenge this conviction and sentence
- (c) _____

16. 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? _____
- (e) preparation, presentation or consideration of any petitions, motions, or application with respect to this conviction, which you filed? _____

17. If you answered "yes" to one or more parts of (16), list:

(a) the name and address of each attorney who represented you

- i. _____
- ii. _____
- iii. _____

(b) the proceedings at which each such attorney represented you:

- i. plea _____
- ii. _____
- iii. _____

18. State clearly the relief you seek in filing this application.

Vacate Judgement _____

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

STATE OF SOUTH CAROLINA)

VERIFICATION

COUNTY OF Aiken)

I, Toryast Jermaine Johnson, 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.

Toryast Johnson

Sworn to and subscribed before me

This 5th day of June, 2012

Ann T. Mulcahy L.S.

open to Amend

Notary Public for South Carolina

My Commission Expires January 7 2016

**APPLICATION TO PROCEED WITHOUT PREPAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF**

I, Toryast Jermaine Johnson, 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 or 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 proceeding or give security therefor.

Toryast Johnson
Applicant

Sworn to and subscribed before me

This 5th day of June, 2012

Ann T. Mulcahy

Notary Public for South Carolina

My Commission Expires: January 7 2016

Torgast Jermaine Johnson
Aiken County Plaintiff

Clerk of Court

vs.

Liz Godard

State of South Carolina

P.C.R

I, Torgast Jermaine Johnson, certify that the original copy of the P.C.R Application has been forward to the Clerk of Court for Aiken County, by way of United States Mail through the Perry Correctional Institution's mailroom.

S/ Torgast Johnson
Torgast Johnson

Sworn To and subscribed before me
this 15th day of June, 2012

Steven T. McCutley
Notary Public

My Commission Expires: January 7 2016

Post-Conviction Relief Issues

- 10) A) Involuntary Guilty Plea
- 11) A) Plea was given under duress

Discussion

While plea agreements are matters of criminal jurisprudence, most courts have held they rest on contractual principles. Yet the analysis of the plea agreement must be conducted at a more stringent level than in a commercial contract because the rights involved are generally fundamental and constitutionally based. *Reed v. Becka*, 511 S.E.2d 396 (1999).

Moreover, under the separation of powers doctrine, which is the basis for our form of government, the Executive Branch is vested with the power to decide when and how to prosecute a case, therefore the government is held to a greater degree of responsibility than the defendant.

Here, Applicant contends he pled under duress due to the fact he was told that if he did not plead guilty he would go to trial and receive a life sentence, he also was told by his attorney Mr. OLA Johnson that Solicitor David Miller said if the Applicant beat the State at trial in Aiken county he would have to face several pending charges in other counties and it's not likely that he would win all those cases without receiving a life sentence. When in fact no one knows how the jury would have viewed the evidence of the said cases unless the trials would have been based on a sham.

Duress is define as a condition of the mind produced by improper external pressure or influence that practically destroys the free agency of a party and causes him to do an act or form a contract not of his own volition. Whether or not duress exists in a particular case is a question of fact to be determined according to the circumstances of each case. *Holler v. Holler*, 612 S.E² 469 (2005).

Thus, in acknowledging the fact that where a contract is entered into under duress is void once duress has been proven to a court with competent jurisdiction.

10) 8) Belated Appeals

14) 8) Failure to inform of the right to appeal

Discussion

On August 31, 2011 I was sentenced and denied the right to be informed of my right to a direct appeal after my trial. However, in *Frazier v. South Carolina*, 430 F.3d 696 (2005), the Fourth Circuit ruled that counsel has the duty to consult with a defendant regarding an appeal from a guilty plea, which is distinct from the generic obligation to inform a defendant of that right. Therefore, counsel can be deficient and a defendant prejudiced when counsel fails to consult with the defendant regarding an appeal if the defendant expresses some interest in appealing. (see also *In re Anonymous member of the Bar*, 303 S.C. 306, 400 S.E.2d 483 (1991)) After the client is convicted and sentenced, trial counsel in all cases has a duty to make certain that the client is fully aware of the right to appeal. From a trial, a defendant has the right to be informed of the right to an appeal and manner and method for taking the appeal. *Frazier, Infra* (retained counsel have express duty to assist their clients to properly perfect their appeal. *Cherry v. State*, 300 S.C. 115, 386, S.E.2d 624 (1984) *Nelson v. Peyton*, 415 F.2d 1154 (4th Cir. 1969))

- (10) c) Ineffective Assistance of Counsel
 (11) c) Counsel fail to object to improperly returned indictments

Discussion

In understanding this issue one must focus their attention on the language of the procedures in which indictments are obtained. Rule 3(c)(1-2), S.C.R. Crim.P. which is as follows:

(c) Action on warrant: Within ninety (90) days after receipt of an arrest warrant from the clerk of court, the Solicitor shall take action on the warrant by (1) preparing an indictment for presentment to the grand jury, which indictment shall be filed with the clerk of court, assigned a criminal case number, and presented to the grand jury; (2) formally dismissing the warrant, noting on the face of the warrant the action taken...

After acknowledging the language of the procedures in which a case is assigned a criminal number through the grand jury procedures, we are able to approach this matter with a clear preception that an accused person can not plead guilty on indictments that has not gone through the proper procedures to be returned.

Applicant's plea attorney knew that these indictments had been through sham procedures, but failed to object just to help the state obtain this conviction. One may say this does

not prejudice accused. However, by the attorney motioning/ objecting to this indictments because of the state not following procedures would have caused a dismissal of the indictments. Thus, this conduct manifest a criminal conspiracy to obtain a conviction.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF AIKEN	)	FOR THE SECOND JUDICIAL CIRCUIT
	)	
Toryast Jermaine Johnson, #256772	)	Case No. 2012-CP-02-1423
	)	
Applicant,	)	
	)	
v.	)	RETURN
	)	
State of South Carolina,	)	
	)	
Respondent.	)	
	)	

The Respondent, making its Return to the application for post-conviction relief filed June 11, 2012, would respectfully show this Court:

I.

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Aiken County Clerk of Court. The Applicant was indicted during the February 2010 term of the Aiken County Grand Jury for Armed Robbery (2010-GS-02-0296). Applicant was represented by Ola A. Johnson, Esquire. On August 31, 2011, the Applicant pled guilty as indicted. The Honorable Doyet A. Early, III, sentenced the Applicant to confinement for a period of thirty years. The Applicant did not appeal his conviction or sentence.

Attached herewith and incorporated herein are the records of the Aiken County Clerk of Court regarding the subject convictions and the Applicant's records from the South Carolina Department of Corrections and guilty plea transcript. The Respondent reserves the right to amend this Return upon receipt of any relevant materials.

II.

In his Application, the Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. "Involuntary Guilty Plea"
 - a. "Plea was given under duress"
2. "Belated Appeals"
 - a. "Failure to inform of the right to appeal"
3. "Ineffective Assistance of Counsel"
 - a. "Counsel fail to object to improperly returned indictments"

Any claims not specifically enumerated in the post-conviction relief application or amendments will be opposed by the State at an evidentiary hearing, and the State will seek summary dismissal of vague or general claims at an evidentiary hearing. S.C. Code §17-27-50. All amendments should be made well in advance of an evidentiary hearing by counsel of record. Rule 11, SCRPC.

III.

The Respondent submits that the Applicant's allegation that his guilty plea was entered involuntarily is without merit. To be knowing and voluntary, a plea must be entered with a full understanding of the charges and the consequences of the plea. Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969); Dover v. State, 304 S.C. 433, 405 S.E.2d 391 (1991). In determining guilty plea issues, it is proper to consider the guilty plea transcript as well as evidence at the PCR hearing. Harris v. Leeke, 282 S.C. 131, 318 S.E.2d 360 (1984).

The State submits the transcript reflects that the pleas were knowingly and voluntarily entered with a full understanding of the charges and consequences of the plea. Boykin, supra; Dover, supra. Further, because a guilty plea is a solemn, judicial admission of the truth of the charges against an individual, a criminal inmate's right to contest the validity of such a plea is

usually, but not invariably, foreclosed. Blackledge v. Allison, 431 U.S. 63, 97 S.Ct. 1621, 52 L.Ed.2d 136 (1977). Therefore, statements made during a guilty plea should be considered conclusive unless a criminal inmate presents valid reasons why he should be allowed to depart from the truth of his statements. Crawford v. U.S., 519 F.2d 317 (4th Cir. 1975); Edmonds v. Lewis, 546 F.2d 566 (4th Cir. 1976). The State submits the Applicant should not be allowed to depart from the truth of the statements he made during his guilty plea hearing.

A defendant who enters a plea on the advice of counsel may only attack the voluntary and intelligent character of the plea by showing that counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's errors, the defendant would not have pled guilty, but would have insisted on going to trial. Roscoe v. State, 345 S.C.16, 546 S.E.2d 417 (2001); Richardson v. State, 310 S.C. 360, 426 S.E.2d 795 (1993). Given the Applicant's burden of proof and the analysis to be applied to this claim, the Respondent submits that the Applicant's claim of involuntary plea is, in essence, a claim of ineffective assistance of counsel, and it should therefore, be treated as such.

IV.

The Respondent submits that the Applicant's allegation that trial counsel failed to inform him of his right to appeal is without merit. 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 nonfrivolous 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 that neither the record nor the Application present any "extraordinary circumstances" that may have required trial counsel to inform Applicant of his right to appeal. However, the allegations 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 on this allegation. Sharper v. State, 305 S.E.2d 247.

V.

Finally, the Respondent submits that the Applicant's allegations of ineffective assistance of counsel are without merit. In a post-conviction relief action, the Applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. 668. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of plea counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland. Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. With respect to guilty plea counsel, the Applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed. 2d 203 (1985).

The Respondent submits that the Applicant cannot satisfy either requirement of the Strickland test. However, the allegation of ineffective assistance of counsel probably raises questions of fact that the record does not conclusively refute. Accordingly, the Respondent requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

VI.

Each and every allegation contained within the application not hereinbefore either expressly admitted, qualified or explained is hereby denied.

VII.

WHEREFORE, having made its Return, the State requests that an evidentiary hearing be held.

[Signatures to follow]

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Senior Assistant Deputy Attorney General

MEGAN E. HARRIGAN
Assistant Attorney General

By: Megan E. Harrigan
ATTORNEYS FOR RESPONDENT
Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
Telephone: (803) 734-3737

September 11, 2012

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF AIKEN	)	
	)	
	)	2012-CP-02-1423
	)	
TORYAST JERMAINE JOHNSON, 256772,	)	
	)	
Applicant,	)	
	)	
vs	)	AFFIDAVIT 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** in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Marsha M. Banks, Esquire
Banks & Associates, PC
319 Park Ave., SE
Aiken, SC 29801

DATED this 11th day of September, 2012.

Lauren Meara
 Lauren Meara, Legal Assistant
 For Respondent

STATE OF SOUTH CAROLINA
COUNTY OF AIKEN

IN THE COURT OF COMMON PLEAS
FOR THE SECOND JUDICIAL CIRCUIT

Toryast Jermain Johnson, #256772,

Case No. 2012-CP-02-1423

Applicant,

v.

ORDER OF DISMISSAL

State of South Carolina,

Respondent.

This matter comes before the Court by way of an application for post-conviction relief filed June 11, 2012. Respondent made its Return on September 11, 2012. An evidentiary hearing into the matter was convened on July 10, 2013, at the Aiken County Courthouse. Applicant was present at the hearing and was represented Marsha M. Banks, Esquire. Respondent was represented by Assistant Attorney General Daniel Gourley of the South Carolina Attorney General's Office.

PROCEDURAL HISTORY

The records before this Court indicate that the Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Aiken County Clerk of Court. Applicant was true bill indicted at the February 2010 term of the Aiken County Grand Jury for Armed Robbery (2010-GS-02-0296). Applicant was represented by Ola Johnson, Esquire. On August 31, 2011, the Applicant pled guilty as indicted. The Honorable Doyet A. Early, III, sentenced Applicant to confinement for a period of thirty years. Applicant did not appeal his conviction or sentence.

In his original application for post-conviction relief, Applicant alleges he is being held in custody unlawfully based on the following allegations:

Page 1 of 11

8-23-13
D. J. [Signature]
D.C.P. & S.
Dorothy J. [Signature]
Deputy Clerk

1. Ineffective Assistance of Counsel.
 - a. "Counsel fail[ing] to object to improperly returned indictments."
2. "Belated Appeals"
 - a. "Failure to inform of the right to appeal."
3. Involuntary guilty plea
 - a. "Plea was given under duress."

SUMMARY OF TESTIMONY PRESENTED

At the evidentiary hearing, Applicant testified on his own behalf. The State presented testimony from plea counsel, Ola Johnson, Esquire (Counsel). This Court also had before it a copy of Applicant's plea transcript, the records of the Aiken County Clerk of Court, and Applicant's records from the South Carolina Department of Corrections.

During the evidentiary hearing, Applicant called Counsel to testify. Counsel testified he was appointed to this case through a contract with the Public Defender's office. Counsel testified that another Public Defender had previously been appointed to the case. Counsel testified according to notes in his file the previous Public Defender had received and reviewed discovery with Applicant. Counsel testified he took over the case in March or April 2010. Counsel testified he meet with Applicant five or six times at the Alvin Glenn detention center in Richland County because Applicant had a pending Murder charge in Richland County. Counsel testified he had a substantial portion of the discovery material with him at his initial meeting. Counsel testified the discovery material included seven various CD's, which Counsel viewed on his laptop with Applicant. Counsel testified he did not initially have a copy of Applicant's first interview with Detective Glover, but did eventually receive a copy and reviewed it with Applicant in detail. Counsel testified that during this interview Applicant admitted to participating in the crime, but denied holding the gun to the Victim's head. Counsel testified he

explained to Applicant the hand of one is the hand of all and that he would be treated the same as his Co-Defendant.

In addition to the confession, Counsel testified Applicant was identified in a photo line-up; several eye witnesses from the Carjacking had previously identified Applicant, his Co-Defendant was his relative. Counsel testified the evidence against Applicant was "overwhelming." Counsel testified Applicant explained he was at a gas station during the time of the robbery; however Applicant could not recall the exact gas station. Counsel testified he attempted to get surveillance videos from several of the gas stations in the surrounding area. When Counsel told Applicant he could not find any such video, Counsel testified Applicant changed his story and admitted he committed the crime. Counsel testified Applicant was facing Armed Robbery, eighteen counts of Kidnapping, Car-jacking, and Possession of a Weapon During a Violent Crime. Counsel testified that the Solicitor could *nolle pross* and re-present indictments at any time. Counsel testified the Solicitor offered a plea deal requiring Applicant to plead to Armed Robbery and the remaining charges would be *nol-prossed*. Counsel testified that the Solicitor indicated in an email that he intended to seek life without parole and "strike [Applicant] out" if he did not accept the plea offer. Counsel testified he recommended that Applicant accept the plea deal because he was facing life without parole. Counsel further testified that he discussed the appellate process with Applicant prior to and after his guilty plea. Counsel testified Applicant never requested an appeal because if Applicant were to be successful he could again face the possibility of life without parole. Counsel testified in his opinion there were no meritorious issues for an appeal.

Following Counsel's testimony, Applicant was called to testify. Applicant testified he met with Counsel three times. Applicant testified that on Counsel's first visit they discussed

Applicant's version of the facts. Applicant testified he told Counsel he was at a gas station during the time of the robbery. Applicant testified he received discovery from Counsel via mail. Applicant testified that the discovery included multiple CD's and the Co-Defendant's statement. Applicant testified that he wrote multiple letters to Counsel requesting him to review discovery, however Counsel failed to review all the evidence in the case. Applicant testified Counsel advised him that he should not proceed to trial based on the evidence in the case. Applicant testified Counsel advised him of the sentencing range and the possibility that he was facing life without parole. Further, Applicant testified he fully understood the plea deal prior to accepting it. Applicant testified that he received a copy of all dismissed indictments from the Aiken County Clerk of Court after he pled guilty. Applicant testified the indictments were dismissed approximately one year prior to his plea. Applicant testified he was not aware that the Carjacking charge and two of the eighteen Kidnapping charges were never indicted. Applicant testified Counsel never reviewed all evidence and if he had, then Applicant would have been able to make a more informed decision on whether to accept the plea deal. Applicant testified that he knew he had appeal rights and he never asked Counsel to file an appeal.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony at the post-conviction relief hearing. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility and weigh their testimony accordingly. Specifically, this Court finds that Counsel's testimony is very credible while Applicant's testimony is not as credible. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (1985).

Ineffective Assistance of Counsel

In a post-conviction relief action, the Applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 286 S.C. 441, 334 S.E.2d 813 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, 286 S.C. 441, 334 S.E.2d 813 (1985). Applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. With respect to guilty plea counsel, the Applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed. 2d 203 (1985). After careful review based on the standard discussed above, the Applicant has failed to carry his burden in this action.

Counsel was ineffective for failing to object to the improperly returned indictments

This Court finds that Counsel was not ineffective for failing to challenge the Applicant's indictment. Indictments are sufficient when they allege time and place, as required by law, and charge the crime substantially in the language of the statute or the common law which prohibits the crime or so plainly that the offense charged may be easily understood and, if the offense is statutory, that the offense is contrary to the statute involved. S.C. Code Ann. § 17-19-20 (2003). All indictments must be viewed with a "practical eye" to determine whether they fulfill their function to notify the accused of the charge he must answer, notify the court of what judgment and sentence to pronounce, and present a bar to subsequent prosecution. See State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005).

This Court finds that Applicant's indictment was sufficient to give Applicant notice of the charge he must answer and to notify the court of what judgment and sentence to pronounce. This Court finds that Counsel provided credible testimony that he did not object to the time frame for the crime listed on the indictment because in his experience the time frame listed was not objectionable. This Court finds that the time frame listed on Applicant's indictment was not objectionable and was sufficient to allege time and place of the crime. Applicant has failed to carry his burden of proving that trial counsel was deficient for failing to object to his indictment.

Counsel was ineffective for failing file a direct appeal.

A defendant has the right to the effective assistance of counsel under the Sixth Amendment to the United States Constitution. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). "There is a strong presumption that counsel rendered adequate

assistance and exercised reasonable professional judgment in making all significant decisions in the case.” Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007), *cert. denied*, 552 U.S. 944, 128 S.Ct. 370, 169 L.Ed.2d 247 (2007).

In a post-conviction relief proceeding, Applicant bears the burden of establishing that he or she is entitled to relief. Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000). “In the context of a guilty plea, the court must determine whether 1) counsel’s advice was within the range of competence demanded of attorneys in criminal cases—i.e. was counsel’s performance deficient, and 2) if there is a reasonable probability that, but for counsel’s errors, the defendant would not have pled guilty.” Smith v. State, 369 S.C. 135, 138, 631 S.E.2d 260, 261 (2006) (citing Hill v. Lockhart, 474 U.S. 52, 56-58, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985)).

“[C]ounsel has a constitutionally imposed duty to consult with the defendant about an appeal when there is reason to think either (1) that a rational defendant would want to appeal (for example, because there are nonfrivolous grounds for appeal), or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing.” Roe v. Flores-Ortega, 528 U.S. 470, 480, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000). “Even in cases when the defendant pleads guilty, the court must consider such factors as whether the defendant received the sentence bargained for as part of the plea and whether the plea expressly reserved or waived some or all appeal rights.” Id. Absent extraordinary circumstances, there is no constitutional requirement that a defendant be informed of the right to a direct appeal from a guilty plea. Turner v. State, 380 S.C. 223, 224, 670 S.E.2d 373, 374 (2008). “One extraordinary circumstance which would require counsel to advise a defendant of the right to appeal from a guilty plea would arise when the defendant inquires about an appeal.” Weathers v. State, 319 S.C. 59, 61, 459 S.E.2d 838, 839 (1995).

After careful review based on the standard discussed above, Applicant has failed to carry his burden on this issue. Specifically, this Court finds Counsel's testimony credible that Applicant never requested a Notice of Appeal be filed and Counsel had no reason to believe that Applicant wished to file an appeal, as Applicant's sentence was in line with the plea offer Applicant accepted. Additionally, Counsel testified that he did not believe Applicant had any meritorious ground on which an appeal could be sought. This Court finds that Counsel's performance was reasonable and effective. Therefore, this Court finds that this issue must be denied and dismissed.

Involuntary guilty plea

Applicant's third allegation is that his guilty plea was entered involuntarily. To find a guilty plea voluntary and knowingly entered into, the record must establish the Applicant had a full understanding of the consequences of his plea and the charges against him. Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709 (1969); Dover v. State, 304 S.C. 433, 405 S.E.2d 391 (1991). In determining guilty plea issues, it is proper to consider the guilty plea transcript as well as evidence presented at the post-conviction relief hearing. Harris v. Leeke, 282 S.C. 131, 318 S.E.2d 360 (1984).

The transcript reflects that the guilty plea was knowingly and voluntarily entered with a full understanding of the charges and consequences of the plea. Because a guilty plea is a solemn, judicial admission of the truth of the charges against an individual, [an Applicant's] right to contest the validity of such a plea is usually, but not invariably, foreclosed. Blackledge v. Allison, 431 U.S. 63, 97 S.Ct. 1621 (1977). Statements made during a guilty plea should be considered conclusively, unless an [Applicant] presents valid reasons why he should be allowed to depart from the truth of his statements. Crawford v. United States, 519 F.2d 347 (4th Cir.

1975) *overruled on other grounds by United States v. Whitley*, 759 F.2d 327 (4th Cir. 1985).

This Court finds that the Applicant presented no reasons to show that he should be allowed to depart from the truth of the statements he made during his guilty plea hearing. During his guilty plea, Applicant freely admitted his guilt to the plea court and admitted that he committed Armed Robbery at the Burger King by taking money from David Tinsley (Victim). Applicant also told the plea court under oath that he understood his plea was without any negotiations or recommendations from the State, but the State would be dismissing and agreeing not to bring any additional charges against Applicant as a result of this incident. Additionally, during the evidentiary hearing, Applicant testified that he admitted to police that he did in fact commit this crime.

An Applicant who enters a plea on the advice of counsel may only attack the voluntary and intelligent character of the plea by showing that trial counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for trial counsel's errors, the defendant would not have pled guilty, but would have insisted on going to trial. *Roscoe v. State*, 345 S.C.16, 546 S.E.2d 417 (2001); *Richardson v. State*, 310 S.C. 360, 426 S.E.2d 795 (1993). This Court finds that Counsel is a trial practitioner who has extensive experience in the trial of serious offenses. Counsel conferred with the Applicant on numerous occasions. During conferences with the Applicant, Counsel discussed the pending charges, the elements of the charges and what the State was required to prove, Applicant's constitutional rights, Applicant's version of the facts, and possible defenses or lack thereof. The record reflects that Applicant's plea was entered freely, voluntarily, knowingly, and intelligently. Applicant acknowledged that he was guilty of these offenses. Applicant told the plea court that no one had threatened him or promised him anything to plead guilty. This Court finds that Applicant

understood the terms of his guilty plea. Therefore, this allegation must be denied and dismissed with prejudice.

ALL OTHER ALLEGATIONS

As to any and all allegations that were raised in the application or at the hearing in this matter and not specifically addressed in this Order, this Court finds the Applicant failed to present any evidence regarding such allegations. Accordingly, this Court finds the Applicant waived such allegations and failed to meet his burden of proof regarding them. Therefore, they are hereby denied and dismissed.

CONCLUSION

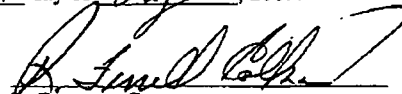
Based on all the foregoing, this Court finds and concludes that the Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

This Court notes that Applicant must file and serve a Notice of Appeal within thirty days from the receipt by Counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides that if the Applicant wishes to seek appellate review, post-conviction relief counsel must serve and file a Notice of Appeal on the Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for the appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and
2. The Applicant must be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 19 day of Aug, 2013.


R. FERRELL COTHAN
Presiding Judge
Second Judicial Circuit


_____, South Carolina

1 State of South Carolina) In the Court
2 County of Aiken) Of Common Pleas
3
4 Docket No. 2014-CP-02-00558
5
6 Toryast J. Johnson,)
7 Applicant,)
8 vs.) TRANSCRIPT OF RECORD
9
10 State of South Carolina,)
Respondent.)

11
12 July 10, 2013
13 Aiken, South Carolina
14

15 B E F O R E:

16 The Honorable R. Ferrell Cothran, Jr., Judge.
17

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

19 Marsha Banks, Esquire
20 Attorney for the Applicant

21 Daniel Gourley, Assistant Attorney General
22 Attorney for the Respondent
23

24 Brenda J. Sigwald, Circuit Court Reporter
25 To The Honorable R. Knox McMahon
P.O. Box 206, Jackson, South Carolina 29831

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(REPORTER'S NOTE: There were no exhibits
entered during this hearing.)

1 MR. GOURLEY: Your Honor, the next case is Toryast
2 Johnson versus the State of South Carolina, Docket Number
3 2012-CP-02-1423. The applicant is presently confined to
4 the South Carolina Department of Corrections pursuant to
5 Orders of Commitment through the Aiken County Clerk of
6 Court.

7 The applicant was true-bill indicted at the
8 February 2010 by the Aiken County Grand Jury for armed
9 robbery. The applicant was represented by Ola Johnson,
10 Esquire. On August 31, 2011 the applicant pled guilty as
11 indicted. The Honorable Doyet A. Early, III sentenced the
12 applicant to 30 years imprisonment. He did not appeal the
13 sentence or conviction.

14 Applicant filed a timely application for
15 post-conviction relief on February 9th, 2012 alleging that
16 he's being held in custody unlawfully based on ineffective
17 assistance of counsel for failing to challenge the
18 indictment, involuntary guilty plea for -- stating that he
19 would get life without parole if he did not plead guilty
20 and for failure to file a direct appeal.

21 The State made its return on September 11th, 2012.
22 He is represented here today by Marsha Banks Esquire.

23 THE COURT: Okay. Yes, ma'am.

24 MS. BANKS: Good morning, Your Honor. May it
25 please the Court. We would like to present on behalf of

Ola Johnson - Direct Examination by Ms. Banks

1 Mr. Johnson some issues that he's brought to my attention
2 regarding his guilty plea back in 2012.

3 If he's in the courtroom, we'd like to call Mr. Ola
4 Johnson to the stand.

5 OLA JOHNSON,

6 having been sworn, testified as follows:

7 THE CLERK: Have as seat. State your name for the
8 Court after you are seated.

9 THE WITNESS: My name is Ola Johnson.

10 **DIRECT EXAMINATION**

11 BY MS. BANKS:

12 Q Good morning, Mr. Johnson.

13 A Good morning.

14 Q Can you tell me, did you engage in the
15 representation of the defendant in your capacity as public
16 defender for Aiken County, South Carolina?

17 A Well I -- I contract with the public defender's
18 office. I was in private practice. So as a private
19 attorney who had contracted with the PD's office, I did
20 represent him.

21 Q Okay. And what -- and can you give us a time frame
22 for that?

23 A Well, I received the file I believe it was March or
24 April 2010 I got the file; I got a big batch of files
25 including Mr. Johnson's file and I think that was, it might

Ola Johnson - Direct Examination by Ms. Banks

1 have been in March and I think that was 2010.

2 Q Okay. And do you know what your first point of
3 contact with Mr. Johnson was at, once you were assigned to
4 his case?

5 A I believe it was at the jail and I think it was he
6 was held over in Richland County. It looks like -- well I
7 have a note that says I met with him June 1st at Alvin S.
8 Glenn Detention Center. I think he was being held there on
9 a murder charge. So I went over there. I went over there
10 to talk to him because he was being held on a murder charge
11 in Richland County.

12 Q Okay. And when you spoke with him at that time,
13 did you have any information to provide to him on the
14 charges he was facing in Aiken County?

15 A I believe I had all the discovery or a substantial
16 portion of it and I talked to him about that. I know I
17 went back and discussed -- if you want me to go into some
18 of the details of the evidence, I discussed his interview
19 with the Detective Glover. He gave one or possibly two
20 interviews with Detective Glover and he admitted his
21 involvement after Miranda so that was one of the strongest
22 pieces of evidence against him.

23 There was also evidence of him being selected from
24 a photo lineup by a relative co-defendant and we talked
25 about that and other things.

Ola Johnson - Direct Examination by Ms. Banks

1 Q All right. Just to jog your recollection a little
2 bit --

3 MS. BANKS: May I approach the witness, Your Honor?

4 THE COURT: Yes, ma'am.

5 BY MS. BANKS:

6 Q I have some correspondence from Mr. Johnson to you.
7 Your timing with respect to, requesting that you visit him
8 and/or bring and/or discuss discovery; if you'll look over
9 those for a moment please.

10 A Okay. Well, he states in here, if you want me to
11 recite what he stated in his letters from March of 2010,
12 August 2010, October 2010, and December that he wants me to
13 bring him discovery and that he wants me to, he keeps
14 repeating that request, but --

15 Q So do you know when you honored that request?

16 A Well, I believe I had discovery when I went and saw
17 him because this case originated and I got the files from
18 the public defender's, being served; this is an '09 case.
19 I -- I can look through my notes and see if there's an
20 exact date I had discovery. I thought I went over this on
21 our first visit. Let's see.

22 I've got a note here where I didn't have a copy of
23 the interview with Detective Glover and I was looking for
24 that and I know eventually I did get a copy of that I
25 believe.

Ola Johnson - Direct Examination by Ms. Banks

1 Apparently there was another public defender or
2 there was a public defender that discussed evidence with
3 him as well. I don't know the date. I just have notes.

4 Q So, Mr. Johnson, can you testify with any certainty
5 when you discussed the discovery information with Mr.
6 Johnson?

7 A I'm just trying to read over the notes. Let's see.

8 Just from the notes where a public defender was
9 assigned, they just discussed something with him; they had
10 a detailed discussion on February the 3rd. I don't know
11 about giving discovery to him at that point, but the, I
12 guess I don't have an exact date where I gave him
13 discovery, but we talked about it and I showed him the
14 interview with Detective Glover and that was sort of the
15 biggest piece of evidence that I remember from the case
16 because it was something I think would be admissible.

17 Q So is -- it's your -- so would you clear that --
18 clarify that with me one more time; when did you discuss
19 discovery with Mr. Johnson?

20 A Well, I started discussing it June the 1st. I
21 could look at, try to look at the different dates where I
22 met with him that I recorded, but I had more than one
23 conversation with him about the discovery. At some point,
24 I talked to him about this interview with Detective Glover
25 and indicated to him that it was something that could

Ola Johnson - Direct Examination by Ms. Banks

1 possibly be admissible against him, to be used against him
2 and he had admitted to his involvement. So, I don't, I
3 don't --

4 Q So June 1st of what year?

5 A I have a note here where I met with him June 1st,
6 2010. I don't know if I discussed -- it says here to get a
7 copy of defendant's interview. So I didn't have Detective
8 Glover's interview at that time. So I didn't talk to -- I
9 didn't show it to him at that point because I didn't have
10 it.

11 Q Do you acknowledge receipt of the letters that were
12 presented to you earlier in this hearing?

13 A Well, I'm going to have to compare to what's in the
14 file. It's a little disorganized.

15 MR. GOURLEY: Your Honor, may I see those letters?

16 MS. BANKS: Oh, certainly. I apologize.

17 THE WITNESS: I guess I would have to compare them.
18 I've got some letters here, but I don't know if they're the
19 same ones you just showed me. I've got three letters in
20 the file. And just -- do you want me to list the times
21 that I have noted when I met with him, all of the times, or
22 do you want me to --

23 BY MS. BANKS:

24 Q No, I'm just trying to put -- I'm just trying to
25 get a timeline for everybody. I'm trying to actually

Ola Johnson - Direct Examination by Ms. Banks

1 discover or determine when you went over Mr. Johnson's
2 discovery with him.

3 A Well, I did on June 1st, I did it on August 26th,
4 2011, and then I met with him -- let's see, do you want me
5 to --

6 Q June 1st, what year?

7 A 2010.

8 Q And then August 26th?

9 A That was -- I'm just trying to sort all this.
10 Let's see, 2011. August 26th, 2011, was one date I have on
11 an interview and I met with him July 5th, 2011, I called
12 his family at different times, July. I spoke with the
13 defendant and met with him it looks like November -- well
14 this is just notes about the interview with Glover. I
15 don't know when I met with him. In the letters you gave
16 me --

17 THE COURT REPORTER: You're going to have to speak
18 up.

19 THE WITNESS: I'm sorry.

20 The letters you gave me, I've got one dated
21 12/16/2010. It appears to be the same one that you gave me
22 and I've got one from January 18th, 2010 to Justin Mimms,
23 who was the public defender, and that was one you gave me
24 and then one on March the 8th, 2010, which that looks like
25 one you gave me and those are the only ones I have. So two

01a Johnson - Direct Examination by Ms. Banks

1 were to me and I guess one was to Justin Mimms.

2 BY MS. BANKS:

3 Q All right. And you didn't get the fourth letter?

4 A How many -- are there four or five?

5 Q 1/18, 12/16/10, 3/8/10, 8/16/10 and 10/7/10.

6 A Okay. I've got January 18th where he wrote January
7 18, 2010.

8 Q Uh-huh (affirmative response). That was to Justin
9 Mimms.

10 A To Justin Mimms and I got December 16th, 2010 to
11 me.

12 Q Uh-huh (affirmative response).

13 A And then I've got March the 8th, 2010 to me.

14 Q Uh-huh (affirmative response)?

15 A And those are the three that I have in the file.

16 Q So you do not have 8/16/2010 nor 10/7/2010?

17 A I could check the file again; it's pretty messy,
18 let me double-check. (Looking)

19 I'm not showing any other letters from the
20 defendant in the file.

21 Q Okay.

22 MS. BANKS: We would offer the letters in.

23 BY MS. BANKS:

24 Q When you had your discussions with Mr. Johnson, do
25 you recall what -- what -- which charges he was facing?

Ola Johnson - Direct Examination by Ms. Banks

1 A He was facing armed robbery; it's a pretty lengthy
2 list here. He's got one, two, three, four, five, six,
3 sixteen counts of kidnapping; possession of a weapon during
4 the commission of a violent crime; carjacking; and then
5 there's another count, another two counts of kidnapping; so
6 I guess it'd be eighteen counts of kidnapping plus the
7 armed robbery.

8 Q Okay. And when you went over the discovery that
9 you had with Mr. Johnson, do you recall exactly how that
10 conversation or how that review of discovery -- since it's
11 obviously a lot of charges, a large file -- how you went
12 through that with him?

13 A Well, I reviewed, I wanted to review primarily the
14 interview and to let him know that I think he had one or
15 two interviews with Detective Glover and we talked about
16 that. And the identification from the relative of the
17 co-defendant and he asked me about if there was any video
18 from a gas station that I could get that might be an alibi
19 and I told him I would try. And he gave me a general
20 description of where that gas station would be.

21 I started calling gas stations in the area and
22 everybody I reached said that their security videos from
23 that date were not available. But he said that and then I
24 talked to him some more and at some point, he said well,
25 you know, he admitted he gave the statement and he started

Ola Johnson - Direct Examination by Ms. Banks

1 to tell me that he, I think he said he wasn't the guy that
2 put the shotgun to the owner or the manager's head because
3 that was in the report and he admitted that he had gone
4 along, but he said that he didn't know it was going to be a
5 robbery until they got in the car and started heading to
6 Aiken.

7 And then he just wanted to make it clear that he
8 wasn't the guy that put the gun to the manager's head and I
9 told him that based on the law, if he's there with them
10 helping with this armed robbery, he'd be charged whether he
11 had a pistol in his hand or not under hand of one, hand of
12 all; and we talked about that and we talked about the
13 carjacking and the witnesses to that. But since he had
14 confessed his involvement in the armed robbery, obviously
15 that was the strongest case the Solicitor had and they
16 offered a plea to that.

17 Q Okay. When you went through each count with Mr.
18 Johnson -- and did you come to an agreement with the State
19 as to a potential plea bargain in his case?

20 A I think what Mr. Miller, the Solicitor, told me
21 was -- he could plead straight up to avoid getting served
22 with LWOP notice because of the prior -- I think he had a
23 prior armed robbery -- and to avoid getting struck out and
24 getting life, he could plead straight up, but I could
25 review the transcript of the plea if you want me to do

Ola Johnson - Direct Examination by Ms. Banks

1 that.

2 Q I have a transcript.

3 A Let's see, I think the -- the -- it looks like he
4 was facing the 10 to 30. He had time served 660 days
5 adding in the Richland County time. I think he'd been
6 offered something in Richland County about 25 concurrent on
7 the murder.

8 I think Mr. Miller indicates on the transcript that
9 basically he's just agreeing not to LWOP it.

10 Q Okay. So LWOP'ing means take life without parole
11 off the table?

12 A Right. He agreed not to serve him with notice so
13 that he would receive mandatory life if he pled guilty or
14 was convicted at trial.

15 Q Okay. I have an e-mail here from Mr. David Miller
16 to yourself that reflects that. I would ask that you
17 review it and see if it's accurate; see if it's accurate?

18 A It says he'd try him for armed robbery and strike
19 him out; he's got some Bamberg stuff he's threatening him
20 with. The solicitor has indicated he'll strike him out if
21 he goes to trial and that I could try to find some
22 discovery if you want?

23 Q No, I'm just asking if that -- if this is an
24 accurate depiction of your discussion with Mr. Miller
25 regarding Mr. Johnson's plea?

Ola Johnson - Direct Examination by Ms. Banks

1 A That sounds like it. That sounds accurate.

2 Q Okay. And at the top, would you confirm the
3 e-mail, who it's to and from please? At the top.

4 A It looks like it's to me.

5 Q From?

6 A From David Miller, message.

7 Q Thank you.

8 Okay. When you presented this offer that's
9 depicted in this e-mail to Mr. Johnson, what charges was he
10 facing at that time; do you know?

11 A In Aiken?

12 Q In Aiken.

13 A He was facing all those kidnappings, armed robbery,
14 and carjacking. And I think he had something in the
15 tri-county in Bamberg somewhere, some other cases that I
16 didn't represent him on.

17 Q And -- and that's what you -- and that's what you
18 related to Mr. Johnson that those were the charges he was
19 facing at that time?

20 A I could double-check the file to see if there was
21 any other warrants. I think that's -- let's see if it's
22 stuck in -- that's what I have. That's what they gave --
23 the solicitor's gave me. And to my knowledge, that's what
24 he was charged with.

25 Q Okay. Do you know which charges he was indicted

Ola Johnson - Direct Examination by Ms. Banks

1 for?

2 A I don't think I had copies of indictments in here,
3 but I discussed the indictment with him before he pled
4 guilty, but I don't think I have copies of the indictments
5 in the file unless they're on the discs that are in the
6 file.

7 Q And would -- would those be disks similar to this
8 that were provided to me in discovery?

9 A Well I -- from this range I can't tell what disk
10 you're holding up. I've got --

11 Q Okay.

12 A -- I've got five, it looks like, one, two, three,
13 four, some of them are double-sided. I got one, two,
14 three, four, five, six, seven discs in the discovery and
15 those are marked with -- as video and interviews, the video
16 from Burger King, victims' interviews, pics, another one
17 marked pics, more interviews, pics of guns.

18 MS. BANKS: I'm going to approach if it pleases the
19 Court.

20 BY MS. BANKS:

21 Q And ask you if -- if these disks are marked --
22 labeled the same as those, but if this is the disks that
23 the public defender's office gave us as a copy of the file.

24 A Well, I mean they're copies; they're not the exact,
25 I don't know. It says photos of guns, Burger King victims

Ola Johnson - Direct Examination by Ms. Banks

1 on the ones you gave me. It says store and something and
2 pics, store surveillance and pics, defendants interviews,
3 which seem to match what I had; victims interviews, then
4 pics and another one that says pics. I don't know if
5 they're the same, but they seem to have the same words on
6 the outside of them as my video or my disks.

7 Q As best as you can tell that would generally be the
8 same information that the public defender gave me that they
9 gave you?

10 A I assume it is. I don't know if it is.

11 Q Mr. Johnson, did you ever view the CD's with your
12 client?

13 A I did. I went down, I took my laptop and showed
14 him. I think we focused mostly on Glover's interview
15 because I wanted him to see it, but I just took a laptop
16 and showed it to him and that's one of our discussions
17 about the case.

18 Q And what location did you do this?

19 A I think I did it in Richland, but I'm not a hundred
20 percent sure if it was Richland or Aiken, but I assume it
21 was Richland. He spent most of his time there.

22 Q Okay. Do you know what date?

23 A No, I don't have that, I don't think I have that
24 marked down in my notes.

25 Q When you had dropped -- when you -- did you

Ola Johnson - Direct Examination by Ms. Banks

1 recommend to your client that he take the plea?

2 A Well, I recommended that if he wanted to avoid
3 potential for mandatory life, I asked him what he wanted --
4 what he wanted. And he made it very clear that he did not
5 want to spend life in prison. And I said well, if you go
6 to trial and they've got your interview and you get up
7 there and they play it for the jury of you confessing to an
8 armed robbery, you could do life if you get served with a
9 proper notice.

10 So he indicated to me he wanted to take a shot and
11 plead guilty facing 10 to 30. So I said well, if that's
12 what you want, then I certainly wouldn't advise going to
13 trial and rolling the dice if you don't want to have the
14 risk of getting a life sentence.

15 Q Did you advise your client prior to his -- the day
16 he made his plea that the carjacking and the two
17 kidnappings associated therewith had not been indicted;
18 they had been dismissed without indictment?

19 A I just -- I think I just told him that the other
20 charges were going to be dismissed and that obviously the
21 solicitor couldn't cut any kind of a deal in relation to
22 Richland County, he'd just have to deal -- because I never
23 got any callback or communication back from them. So
24 basically he would have to deal with Richland County
25 because if he wants to go forward, I don't have any deals

Ola Johnson - Direct Examination by Ms. Banks

1 on the table. Richland County is not going to show up;
2 they're not here, so if you want to go forward with Aiken,
3 that's the deal and everything else is going to be
4 dismissed.

5 Q Maybe I didn't state my question clearly. I'm
6 speaking of Aiken County charges.

7 A Yeah, I don't -- I don't know the exact date they
8 were dismissed. I just know that I told him that if he
9 pleads guilty to armed robbery, it's my understanding the
10 other charges would be dismissed.

11 Q Did you make your client aware that he was never
12 indicted for carjacking and for those two kidnappings?

13 A I don't have any notes about that. I know he was
14 charged and served with a warrant and we talked about that,
15 but I don't -- I don't have notes about that. I can't
16 really give you an accurate answer.

17 Q So your testimony is, you don't know if you told
18 your client.

19 A I really don't know. I told him he had been
20 arrested for it and he had warrants and he could be
21 indicted, but I honestly don't know that I told him that.
22 It's just that I did tell him those would be dismissed if
23 he pled guilty though.

24 Q Do you know if that information was in the
25 discovery that was made available to you by the county?

Ola Johnson - Direct Examination by Ms. Banks

1 A I don't have copies of indictments or I don't think
2 there's anything in there unless you found something
3 indicating a note from the solicitor saying we never
4 indicted. I mean I don't -- I don't have any memory of the
5 solicitor specifically telling me that, that he said that
6 he was going to go forward with everything that he could.
7 If he didn't plead guilty, he was going to try to strike
8 him out. I think he talks about that in the e-mail that
9 you showed me. He gives a detailed account of how he's
10 going to go after him and he says if he lucks up on this
11 one, I'm going to go after him on this one and then I'm
12 going to go after him on this one because he had multiple
13 charges.

14 Q Prior to going into the courtroom with your client
15 and prior to -- and in your preparation for your client
16 getting ready to go into the courtroom on the date, on his
17 court date, did you have access to the Aiken County
18 Judicial website to find out what your client had been
19 indicted for and what he had not been indicted for?

20 A I'm sure I did.

21 Q Did you have access to this throughout the time
22 that -- during his representation?

23 A I'm sure I did.

24 MS. BANKS: If you'll give me just one moment to
25 speak with my client, Your Honor?

Ola Johnson - Cross-Examination by Mr. Gourley

1 THE COURT: Okay.

2 MS. BANKS: That's all I have for this witness,
3 Your Honor.

4 THE COURT: Okay.

5 CROSS-EXAMINATION

6 BY MR. GOURLEY:

7 Q Mr. Johnson, how long have you been practicing
8 criminal law?

9 A About 11 and a half years.

10 Q You said you were retained sometime around March --

11 A Yes, sir.

12 Q -- of 2010?

13 A Yes, sir.

14 Q And how many times did you meet with the applicant
15 prior to his guilty plea?

16 A Approximately -- I could look at the notes again if
17 you want me to?

18 Q Just a rough estimate?

19 A If I had an estimate, I'd probably say I met with
20 him I guess five or six times, if I had to guess.

21 Q And that's in-person meetings?

22 A Yes, sir.

23 Q And then you talked to him over the phone or have
24 any other form of communication with him?

25 A Well correspondence, but I -- I talked with his

Ola Johnson - Cross-Examination by Mr. Gourley

1 family over the phone.

2 Q Okay. How many times did you speak with his
3 family?

4 A Several times. I think I talked with the
5 grandmother or mother, I could look at my notes if you want
6 me to count them up, but probably saying four or five
7 times, something like that.

8 Q I know we went over discovery. You received
9 discovery in this case, correct?

10 A Yes, sir.

11 Q And you did review it with the applicant prior to
12 his guilty plea?

13 A Yes.

14 Q You don't have an exact date as to when you
15 reviewed it?

16 A Well, I have -- I have dates where I did review
17 discovery, I just don't know which discovery I reviewed at
18 what time, but I did review the discovery with him. I took
19 my laptop to the jail. I showed him the video with
20 Detective Glover and all of his discovery, because I don't
21 think he had access to any way to look at a disk so I would
22 show him the stuff on the disks and give him the paper
23 discovery that I'd get, but I just don't know the exact
24 date that I did that.

25 Q Did he ever say he didn't understand something or

Ola Johnson - Cross-Examination by Mr. Gourley

1 have any questions about discovery?

2 A No.

3 Q And I believe you mentioned, well did he give you
4 any witnesses or videos to investigate?

5 A I think he just mentioned the gas station. When I
6 first started talking to him he started talking about being
7 at a gas station and he's on video so I should check that
8 out because that's the same time as the robbery. I called
9 a bunch of gas stations. I couldn't find anybody that had
10 video of that date and time and then he basically kind of
11 told me that well, you know, I was there; I did it, but I
12 didn't have the shotgun and I didn't put it to the guys
13 head.

14 And I said well, you know, let's talk about it and
15 he started telling me about his involvement and said he
16 didn't know it was going to be a robbery until he got in
17 the car on the way to Aiken with his co-defendants and I
18 said well, did you get out and go in the Burger King; and
19 he told me the same thing he told Detective Glover, that he
20 went in there and tried to minimize the fact he said he was
21 not the guy who got to the manager and threatened his life
22 with a gun, but I explained it still qualifies as an armed
23 robbery. So --

24 Q Along those same lines, can you kind of briefly
25 describe this case evidence in this case?

Ola Johnson - Cross-Examination by Mr. Gourley

1 A Well, they had lots of witnesses. They've got a
2 lady who was, I think a mother or grandmother of the
3 co-defendant, who picked Mr. Johnson out as being involved
4 with this group. And then he gave one or two statements to
5 the city police after Miranda and said that he went in. I
6 believe he mentioned it was for drug money; I can't really
7 remember that much about it. It was something to do with
8 cocaine, but they had -- they had -- they had a carjacking
9 where there were independent witnesses and I'd have to look
10 into this and find out, I don't know.

11 I can't remember offhand the status of that
12 identification from the witnesses from the carjacking where
13 he was accused of carjacking, but that would be additional
14 testimony. They found guns. I'd have to review a little
15 bit more to give you a more detailed description about
16 exactly where all the guns were found. I know that they
17 found one of the co-defendants killed himself at the scene,
18 near the scene when they approached him and I think they
19 caught my client over in Columbia after he got away. That
20 was the reason for the carjacking I guess, to get away.

21 Q Would you characterize the State's evidence as
22 overwhelming?

23 A I would say so with a confession on video. I would
24 say that he would face a strong potential of getting
25 convicted. I don't think there was anything that would

Ola Johnson - Cross-Examination by Mr. Gourley

1 keep that admission, that confession, out of evidence once
2 it looked to be admissible. The officer, Detective Glover,
3 he was available to testify. I think he still works there;
4 he's worked there forever. So I think it's pretty
5 overwhelming when you have the videotaped confession.

6 Q And regarding the indictments, he was facing 18
7 counts of kidnapping, correct?

8 A That's what it looks like on the warrants that I've
9 got.

10 Q Okay. And he could be indicted at any point up to
11 trial, correct?

12 A Correct.

13 Q So it was your understanding that he could
14 potentially be indicted unless he pled guilty and had no
15 way of knowing what the solicitor was going to do, correct?

16 A That's correct. The solicitor sent me this e-mail,
17 and he just kind of laid out the different ways that he was
18 gone go after my client, indicating that -- I don't know if
19 he specifically said I'm going to indict him on this or
20 indict him on that, but he made it clear that, you know, if
21 the armed robbery doesn't work, somehow I think he says he
22 uses some terms as if my guy lucks up he's going to go
23 after him on this and that and he's got stuff in the
24 tri-county.

25 Q And the applicant was facing life without, well

Ola Johnson - Cross-Examination by Mr. Gourley

1 life without parole, correct?

2 A I believe so if he had been served with that notice
3 it would have been automatic if he was convicted.

4 Q He had a previous strike in 1999 for a previous
5 armed robbery, correct?

6 A I believe so.

7 Q And in his application, he alleged that you had
8 failed to file an appeal is it your practice to discuss the
9 right to appeal with your client?

10 A Yes, sir, we discussed it before the plea and after
11 the plea. The Judge, I think, advised him on the record of
12 his right and I let him know that if he wants to file, he's
13 got to let me know to file within ten days because if he
14 files it and it works, they could come back with everything
15 and then he, once again, could potentially be facing LWOP,
16 life, automatic life, and indicated to me that he didn't
17 want to face life and we talked about, you know, that as a
18 consequence, a potential consequence if he files an appeal
19 in the timeframe.

20 Q So he never actually filed an appeal?

21 A No, sir.

22 Q Were there any objections made at the guilty plea?

23 A No, sir, we just went through the plea.

24 Q There really wasn't any basis for an appeal was
25 there?

01a Johnson - Redirect Examination by Ms. Banks

1 A No, sir. We went through it. Everything went
2 normal and he was advised of his rights, I think, by the
3 judge as well.

4 Q And then in regard to the indictment of the armed
5 robbery, did you feel that you had any basis to challenge
6 that indictment?

7 A I don't remember any. I know that if there was a
8 problem with the indictment and we had a hearing, the
9 solicitor -- unless the jury had been sworn -- I mean if it
10 was a situation where they had a bad indictment they could
11 nolle pros it and bring another indictment.

12 Q That was true billed, correct?

13 A Yes.

14 MR. GOURLEY: No further questions, your Honor.

15 THE COURT: Okay. Anything further?

16 MS. BANKS: Briefly, Your Honor.

17 **REDIRECT EXAMINATION**

18 BY MS. BANKS:

19 Q Mr. Johnson, you said one of the determining facts
20 when you were discussing the case with Mr. Johnson was, and
21 please correct me if I didn't get it all right, okay, that
22 the grandmother of the co-defendant had ID'd Mr. Johnson as
23 one of the participants in the robbery?

24 A I think there was a relative, either mother or
25 grandmother, who had ID'd him. I'm not 100 percent sure; I

Ola Johnson - Redirect Examination by Ms. Banks

1 can look at the report and see what capacity. I thought
2 she had ID'd him, going off of memory. If you want me to
3 review it, I'll be glad to.

4 Q I'm just recapping what you testified to, to make
5 sure I'm correct. And that he, Mr. Johnson, gave a couple
6 of statements to the Aiken County Police; is that correct?

7 A He did give a statement to Detective Glover and I
8 believe it was after Miranda.

9 Q And you characterized that as a confession?

10 A Well he indicated, I thought he indicated to
11 Detective Glover of his involvement and he, I think he
12 tried to mitigate and limit it in some ways, but that's my
13 understanding.

14 Q Okay. And then you said that there was testimony
15 that was going to be given by the carjacking --

16 A Well, there were witnesses. I don't know the
17 status. I can't remember offhand the status of that. I'd
18 have to check and see. I can look through the report and
19 see. I know that there were, I know there was a
20 carjacking; there was a charge, but offhand I don't
21 remember the status of that if he was identified or not.
22 I'd have to check the discovery. I don't remember. It's
23 been a little while.

24 Q Well, at this point that's kind of important since
25 the carjacking, 18 kidnappings, and another associated

Ola Johnson - Redirect Examination by Ms. Banks

1 carjacking, never indicted, several, did not go forward, it
2 is not mentioned in Mr. Miller's e-mail to you with regard
3 to the plea, and Mr. Johnson was under the impression the
4 entire time that that was part of the package or part of
5 what he was facing?

6 A Well, he was facing a carjacking charge initially
7 for that.

8 Q He was arrested, but he was not indicted?

9 A Well, I can review the evidence and I don't know if
10 he was picked out by those victims. I'm just saying that
11 existed. I don't know for sure. I mean, we could look for
12 the statements on the disks. I don't remember offhand what
13 the victims of that carjacking said.

14 Q Do you know what you told Mr. Johnson?

15 A I know that I told him that he facing a carjacking
16 charge. I didn't tell him whether or not he had been
17 indicted. I don't remember discussing an indictment, I
18 just said that this is the charge you're facing along with
19 all these other charges and we discussed the evidence. I,
20 to be honest with you, I can't remember that far back and
21 tell exactly what day I said that or I just know that the
22 charge existed and then eventually it was dismissed, but
23 that's what I can tell you.

24 Q Okay. Thank you for that. That's all I have.

25 MR. GOURLEY: Just briefly, Your Honor.

01a Johnson - Recross-Examination by Mr. Gourley

1 RECCROSS-EXAMINATION

2 BY MR. GOURLEY:3 Q Mr. Johnson, can you recap what the defendant or
4 the applicant was charged with very briefly?5 A Eighteen counts of kidnapping, one count of armed
6 robbery, one count of carjacking and I think that's it.7 Q And you never explained to him that he was actually
8 indicted; you just explained to him that he was charged
9 with those charges?10 A Right, I just, I told him the penalties and we
11 discussed the evidence.12 Q And in regards to the applicant's confession, he
13 actually identified two of his co-defendants, correct?14 A I believe so. I believe there were some
15 co-defendants making ID's in the case.16 Q And he also gave the police some specific facts
17 that they had not discovered regarding the crime?

18 A The solicitor mentioned that I think.

19 MR. GOURLEY: That's all the questions I have, Your
20 Honor?

21 THE COURT: Okay. You can step down.

22 MS. BANKS: I'd like to call the applicant to the
23 stand.24 TORYAST JOHNSON,
25 having been duly sworn, testified as follows:

Toryast Johnson - Direct Examination by Ms. Banks

1 THE CLERK: Have a seat in the witness stand and
2 state your full name for the record.

3 THE WITNESS: Toryast Jermaine Johnson.

4 THE COURT REPORTER: You have to speak up.

5 THE WITNESS: Toryast Jermaine Johnson.

6 **DIRECT EXAMINATION**

7 BY MS. BANKS:

8 Q Mr. Johnson?

9 A Yes, ma'am.

10 Q Do you know why you're here today?

11 A Yes, ma'am.

12 Q Could you explain to the Court why you're here
13 today.

14 A I'm here today to seek some type of relief
15 pertaining to my PCR that I filed.

16 Q And what does that mean to you?

17 A PCR? PCR basically means that we're here to
18 discuss the procedures when I pleaded and to discuss the
19 evidence pertaining to that.

20 Q Okay. And what expectations do you have if we
21 prevail today; what do you think will happen?

22 A That basically the Judge will rule either in my
23 favor or the State's favor.

24 Q Right, and if the Judge rules in your favor, what
25 do you think's going to happen to you?

Toryast Johnson - Direct Examination by Ms. Banks

1 A And I'll be granted a new trial and we can start
2 all over.

3 Q So do you understand that by pursuing this PCR, you
4 will be vacating your plea agreement with the State?

5 A Yes, ma'am.

6 Q And that you'll be facing the charges that you were
7 indicted for?

8 A Yes, ma'am.

9 Q And at that point, you'll have a right to a jury
10 trial?

11 A Yes, ma'am.

12 Q Okay. I want to make that very clear on the record
13 so you know what you're doing.

14 Do you remember meeting with Mr. Johnson?

15 A Yes, ma'am.

16 Q And the letters we discussed earlier, do you need
17 to review them?

18 A No, ma'am.

19 Q All right. You're familiar with them?

20 A Yes, ma'am.

21 Q Did you write them?

22 A Yes, ma'am.

23 Q And what did you request in those letters?

24 A That Mr. Johnson come visit me at Alvin S. Glenn
25 and go over my discovery with me and discuss the status of

Toryast Johnson - Direct Examination by Ms. Banks

1 the investigation.

2 Q Okay. And did that happen?

3 A No, ma'am.

4 Q Did that ever happen?

5 A We -- we talked based on the -- the basics of what
6 I was facing and what was going to happen if I didn't go
7 through with this plea and that was basically all I
8 remember discussing.

9 Q Did Mr. Johnson bring you your discovery?

10 A No, he mailed it.

11 Q Did you receive your discovery?

12 A Yes, ma'am.

13 Q Did Mr. Johnson come to the jail and review these
14 CD's or the CD's in his possession with you on his laptop
15 computer?

16 A No, ma'am.

17 Q Have you ever viewed these CD's?

18 A Once.

19 Q And when was that?

20 A When I had a visit with you a couple of days ago.

21 Q During your discussion with Mr. Johnson regarding
22 your plea, what was your understanding what you were
23 pleading guilty to?

24 A My understanding that I was pleading guilty to the
25 armed robbery in Aiken and the armed robbery in Denmark

Toryast Johnson - Direct Examination by Ms. Banks

1 will be ran together and all the other charges will be
2 dismissed and I was facing a 10 to 30 based upon that deal
3 with those charges.

4 Q Okay. And what benefit would you get out of
5 pleading guilty to those charges?

6 A That they wouldn't give me life without parole.

7 Q Okay. Did you understand that plea bargain?

8 A Yes, ma'am.

9 Q At any point in time, did you and Mr. Johnson
10 discuss the evidence against you?

11 A He -- the first -- the first visit, he asked me a
12 couple of questions pertaining to, you know, what happened;
13 and I went over like -- he said that I was at a gas station
14 during the same timeframe that they was saying I was in
15 Aiken County and he said that he would see what he could do
16 about, you know, developing and receiving those evidence
17 and that's basically all I knew about my case, getting to
18 know with the conversation that we had, I -- that's all I
19 knew.

20 Q Did you discuss any other pieces of evidence with
21 Mr. Johnson about your discovery packet that you received
22 in the mail?

23 A He -- he said that a my co-defendants would testify
24 and supposedly they wrote a statement or whatever. So he
25 wanted me to think on that and, you know, understand that

Toryast Johnson - Direct Examination by Ms. Banks

1 those were evidence that the State could use against me and
2 that was it.

3 Q Did you receive copies of the statements that were
4 written, the statements?

5 A I got like one.

6 Q I'm sorry?

7 A Like one statement.

8 Q Okay. And where did you receive that statement;
9 where did you get that one?

10 A It was -- it was inside my motion discovery.

11 Q It was inside your discovery packet?

12 A Yes, ma'am.

13 Q Okay. Did you discuss any other evidence the State
14 might have against you with Mr. Johnson?

15 A No, ma'am.

16 Q What other questions did you ask Mr. Johnson
17 regarding your case?

18 A Well I only -- I only had a visit from Mr. Johnson
19 three times for the record. The third visit was me and him
20 going over the plea bargaining and, in fact, I was
21 contemplating going to trial, but by him being my lawyer, I
22 asked his advice, you know, asked him would that be, you
23 know, a smart move for me to go on with trial, you know,
24 being that they didn't have a lot of evidence on me and he
25 advised me saying you -- you know, these victims of the

Toryast Johnson - Direct Examination by Ms. Banks

1 carjacking and my co-defendants is, they done wrote
2 statements and they coming to testify so that will be a
3 heavy good bit of evidence to prove me guilty and they
4 would find me guilty and I would receive life without
5 parole.

6 So, you know, that was, that was how that
7 conversation went and I just went ahead and told him I
8 would accept the plea once he told me that.

9 Q And do you know or can you recall how far or how --
10 what timeframe prior to you entering into your plea, you
11 had that last discussion with Mr. Johnson?

12 A I mean like six or seven days; I'd say a week.

13 Q Okay. And you pled guilty when?

14 A On the 11th, August the 11th; no, August the 31st.

15 Q Of what year?

16 A 2011.

17 Q 2000 --

18 A 2011.

19 Q 2011. Okay. Did -- at any time did Mr. Johnson
20 inform you that the public, that the solicitor had
21 dismissed the carjacking and the two kidnappings against
22 you on February 3rd, 2010?

23 A No, ma'am, that information was given after I
24 received the plea and was incarcerated. The clerk, the
25 Aiken Clerk of Court sent me a copy of all the dismissed

Toryast Johnson - Direct Examination by Ms. Banks

1 indictments and that's when that was discovered that that
2 indictment was dismissed a year before I even entered the
3 plea.

4 Q Was that your motivation for filing for PCR?

5 A One of them.

6 Q Okay. What were your other motivations?

7 A I don't know a lot about the law and I was under
8 the impression that going over my motion and discovery with
9 him would be more in detail than what it was and I didn't
10 find that out until I had got incarcerated and started
11 doing a little bit of studying myself and I found out that,
12 you know, we were supposed to go over all the evidence
13 completely, you know, 100 percent, me and him. And I never
14 got that chance. And I truly believe if I got that chance,
15 I would have had enough, you know, facts to -- to determine
16 whether me pleading would be the right thing or going to
17 trial. And I just wanted that chance.

18 Q Okay. So what are you asking the judge for today?

19 A That he give me a chance to, you know, go all back
20 over, you know, the evidence and receive a fair trial.

21 MS. BANKS: That's all I have for this witness,
22 Your Honor.

23 THE COURT: Okay.

24 ///

25 ///

Toryast Johnson - Cross-Examination by Mr. Gourley

CROSS-EXAMINATION

1
2 BY MR. GOURLEY:

3 Q Mr. Johnson, you said that you met with your
4 attorney approximately three times?

5 A Yes.

6 Q Okay. And you did go over the discovery with him?

7 A Yeah, briefly.

8 Q You reviewed it with him? You received discovery
9 and you reviewed it with Mr. Johnson?

10 A No.

11 Q You did not review it with Mr. Johnson?

12 A No, sir. No, sir.

13 Q Did you give him any witnesses or leads to
14 investigate on your behalf?

15 A Just basically the -- the camera on the store I was
16 at. I explained, you know, asked could he get in contact
17 with them and, you know, receive some type of evidence
18 pertaining to that, but that was it.

19 Q Okay. And you told, I believe it was Judge Early,
20 that you were satisfied with Mr. Johnson's services,
21 correct?

22 A Yes.

23 Q And you told him that there was nothing more that
24 you wanted him to do? You wanted Mr. Johnson to be on your
25 case, right?

Toryast Johnson - Cross-Examination by Mr. Gourley

- 1 A Yes.
- 2 Q You were completely and totally satisfied with his
3 services?
- 4 A Yes.
- 5 Q And you had a previous conviction for armed robbery
6 in 1999, right?
- 7 A Yes, sir.
- 8 Q So you were potentially facing life without parole
9 if you went forward with a trial on these charges, correct?
- 10 A Yeah, that's what he said.
- 11 Q And you knew you could get life without parole,
12 right?
- 13 A Yes.
- 14 Q So you pled guilty to avoid getting life without
15 parole?
- 16 A No -- not -- no, I didn't.
- 17 Q Well, why did you plead guilty?
- 18 A Because my attorney told me that was the right
19 thing to do; that was the advice he gave me and it wasn't
20 no other facts that I could defend and get to prove him
21 wrong and, you know, he was my attorney so I just went with
22 what he said.
- 23 Q And you confessed to the police about -- about
24 robbing Burger King, right?
- 25 A Not at first I didn't.

Toryast Johnson - Redirect Examination by Ms. Banks

1 Q But you did eventually?

2 A Eventually.

3 Q And you apologized to the Court for the crimes that
4 you committed?

5 A Yes.

6 Q You actually thanked the prosecutor for working
7 with you in this case, right?

8 A Yes.

9 Q For the plea deal that you were offered.

10 And with regards to the appeal on Mr. Johnson, the
11 judge advised you that you could be facing -- that you had
12 ten days to file an appeal, right?

13 A Yes.

14 Q And then did you watch your interview with
15 Detective Glover with Mr. Johnson?

16 A No, sir.

17 Q You never saw it?

18 A No, sir.

19 Q And you never discussed it with your attorney?

20 A No, sir.

21 MR. GOURLEY: No further questions, Your Honor.

22 THE COURT: Anything further, Ms. Banks?

23 REDIRECT EXAMINATION

24 BY MS. BANKS:

25 Q Mr. Johnson, at the time that you made your plea

Toryast Johnson - Redirect Examination by Ms. Banks

1 and all the representations to the Court that we just went
2 over and you were under oath when you made those
3 representations to the Court and make those statements to
4 the Court, were you aware that you had not ever been
5 indicted for the carjacking or the two kidnappings
6 associated with this?

7 A No, ma'am, I wasn't aware.

8 Q Were -- were you under the impression at that time
9 that there were witnesses related to that incident that
10 were going to be testifying against you if you went forward
11 with trial?

12 A Yes, my lawyer told me that they would testify.

13 Q That those particular witnesses --

14 A Those, yeah.

15 Q -- would testify?

16 A Yes, ma'am.

17 Q Was that one of the motivating factors in your
18 decision to plea?

19 A Yes, ma'am.

20 Q So when you pled guilty in front of Judge Early,
21 you thought you were pleading guilty to that carjacking and
22 those two kidnappings as well as the armed robberies and
23 the other kidnappings?

24 A Yes, ma'am.

25 MS. BANKS: That's all I have of this witness, Your

Toryast Johnson - Recross-Examination by Mr. Gourley

1 Honor.

2 MR. GOURLEY: Your Honor, just briefly.

3 RECROSS-EXAMINATION

4 BY MR. GOURLEY:

5 Q Mr. Johnson, your previous testimony was that you
6 understood the plea deal that you received and that's why
7 you pled guilty and if you pleaded guilty, you weren't
8 going to seek -- that the prosecutor wasn't going to seek
9 life without parole and you were pleading guilty to armed
10 robbery; that was your previous testimony. So I'm just a
11 little bit confused when you're saying that you pleaded
12 guilty to carjacking.

13 A Well, Ola told me that those -- the charges other
14 than the armed robbery would be dismissed. I mean --

15 Q And they were.

16 A -- but when, when I found out about the carjacking,
17 it was dismissed a year before he gave me that -- that
18 information. So that information was being withheld. He
19 never discussed what indictment would be dismissed. He
20 just said that the armed robbery was what I was pleading
21 to.

22 Q How did you find out that it was dismissed a year
23 before your guilty plea?

24 A The Aiken Clerk of Court sent me a copy of it.

25 MR. GOURLEY: No further questions --

1 BY MR. GOURLEY:

2 Q Do you have a copy of that here today?

3 A No, my attorney --

4 Q Do you have a copy?

5 A My attorney has it.

6 MR. GOURLEY: No further questions, Your Honor.

7 THE COURT: Okay. You may step down.

8 Anything further from the applicant.

9 MS. BANKS: Just briefly in closing, Your Honor.

10 We'd like to ask the Court --

11 THE COURT: Are you going to present any evidence?

12 MR. GOURLEY: No, Your Honor.

13 MS. BANKS: We'd ask the Court to consider that at
14 the time Mr. Johnson made his plea, he was not in full
15 possession of the facts. He was under the misconception --
16 I don't think it was intentional -- I don't think it was
17 anyone's intention to put him under the misconception, but
18 he was under the misconception that he was facing charges
19 that had already been basically dismissed and not indicted
20 by the assistant solicitor and that information wasn't
21 passed on. And then -- and he thought he was facing
22 kidnapping, carjacking, along with the kidnapping
23 associated with the armed robbery.

24 So I feel like he did not make a knowing plea. He
25 voluntarily pled guilty to armed robbery, but he also

1 thought as part of that deal, he was facing witnesses from
2 a carjacking and a kidnapping that had already been
3 dismissed and was not going to be pursued by the State.

4 And under those facts and under those circumstances
5 and also because there was obviously a discrepancy in the
6 factual testimony with regard to reviewing the discovery,
7 which is extensive, from the public defender's office and
8 whether or not he actually reviewed all of his discovery
9 with his attorney.

10 We would ask that the Court grant his request and
11 allow him a new trial.

12 THE COURT: Okay. Thank you.

13 MR. GOURLEY: Your Honor, just briefly. Mr.
14 Johnson's testimony today was that he knew of the plea deal
15 and he was only going to be pleading guilty to armed
16 robbery facing 10 to 30. The solicitor wasn't going to
17 LWOP him. He understood that. He never mentioned that he
18 was pleading guilty to a carjacking charge or any other.
19 Furthermore, he was facing 18 counts of kidnapping, 6
20 counts of carjacking and if I'm not mistaken, and one
21 possession of firearms. He was well aware of what he was
22 charged with. The indictments never went through as part
23 of his guilty plea.

24 It's been the testimony today, it was stated that
25 that if he were to pursue trial, the solicitor would have

1 been going forward potentially on the indictments and it's
2 our -- it's our position that Mr. Johnson was well aware of
3 what he was pleading guilty to when he pled guilty.

4 THE COURT: Thank you. I will review the file and
5 let y'all know something.

6 MS. BANKS: Thank you, Your Honor.

7 * * * * * END OF TRANSCRIPT * * * * *

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1 State of South Carolina)
2 County of Aiken) **Certificate of Reporter**

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5
6 I, THE UNDERSIGNED, Brenda J. Sigwald,
7 Official Court Reporter for the Eleventh Judicial Circuit
8 of the State of South Carolina, do hereby certify that I
9 reported the proceedings in the captioned case in the Court
10 of Common Pleas in and for the State of South Carolina on
11 the 10th day of July, 2013.

12 I FURTHER CERTIFY that the foregoing pages,
13 constitute a true, accurate and complete transcript of said
14 hearing.

15 I FURTHER CERTIFY that I am neither kin, counsel,
16 nor of interest to any party hereto.

17 IN WITNESS WHEREOF, I have hereunto set my hand and
18 seal at Aiken County, this 24th day of December, 2015

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23
24
25

Brenda J. Sigwald
Brenda J. Sigwald,
Court Reporter and Notary Public
For the State of South Carolina
My commission expires
January 4, 2020

FORM 5

I 092096

STATE OF SOUTH CAROLINA)

COUNTY OF Aiken)Torgast J. Johnson)

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

v.)

State of South Carolina)

IN THE COURT OF COMMON PLEAS

APPLICATION FOR

POST-CONVICTION RELIEF

INSTRUCTIONS - READ CAREFULLY

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

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

If the application is taken in forma pauperis it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay 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 Perry Correctional Institution 430 Oaklawn rd
2. Name and location of Court which imposed sentence Aiken County General Sessions
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) 2010 GS-02-00296

(b) _____

(c) _____

5. The date upon which sentence was imposed and the terms of the sentence: _____
- (a) August 31, 2011
- (b) _____

2014-02-08-005502010-02-02-00296Filed 5/16/14 in 14CCCP & GS - Aiken County 2/10/142010-02-02-00296Deposition 2/10/14 Trial Judge Charles G. GentryTrial Atty. Michael Gentry Court Reporter Debra GentrySec. PCR Petitioner General Sessions Solicitor Atty. Gen.Appointed Atty. Revised 3/2003

- (c) _____
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty _____
- (b) after a plea of not guilty _____
- (c) after a plea of nolo contendere _____
7. Did you appeal from the judgment of conviction or the imposition of sentence?
No
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
- i. _____
- ii. _____
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. _____
- ii. _____
- iii. _____
- (c) the date of each such result:
- i. _____
- ii. _____
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. _____
- ii. _____
- iii. _____
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) _____
- (b) _____
- (c) _____
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

- (a) Ineffective assistance of "Post-Conviction Relief" counsel
 (b) _____
 (c) _____

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

- (a) Failed to file a timely Notice of Intent to Appeal
 (b) "See Exhibits A-C"
 (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? No
 (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? No
 (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? _____
 (d) any other petitions, motions or applications in this or any other Court? _____

13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:

- (a) the specific nature thereof:
 i. _____
 ii. _____
 iii. _____
 iv. _____
 (b) the name and location of the Court in which each was filed:
 i. _____
 ii. _____
 iii. _____
 iv. _____
 (c) the disposition thereof:
 i. _____
 ii. _____
 iii. _____

- iv. _____
- (d) the date of each such disposition:
- i. _____
- ii. _____
- iii. _____
- iv. _____
- (e) if known, citations of any written opinions or orders entered pursuant to each such disposition:
- i. _____
- ii. _____
- iii. _____
- iv. _____
14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?
- _____
15. If you answered "yes" to (14) identify:
- (a) which grounds have been presented:
- i. _____
- ii. _____
- iii. _____
- (b) the proceedings in which each ground was raised:
- i. _____
- ii. _____
- iii. _____
16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:
- (a) _____
- (b) _____
- (c) _____
17. Were you represented by an attorney at any time during the course of:

- (a) your arraignment and plea? _____
 - (b) your trial, if any? _____
 - (c) your sentencing? _____
 - (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? _____
 - (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? _____
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. _____
 - ii. _____
 - iii. _____
 - (b) the proceedings at which each such attorney represented you:
 - i. _____
 - ii. _____
 - iii. _____
19. State clearly the relief you seek in filing this application:
Appellate Review
20. Are you now under sentence from any other court that you have not challenged?
No



State of South Carolina
The Circuit Court of the Third Judicial Circuit

R. FERRELL COTHRAN, JR.
JUDGE

16 NORTH BROOKS STREET
MANNING, SOUTH CAROLINA 29102
TELEPHONE: (803) 435-2450
FAX: (803) 435-2461
E-MAIL: rcothran@scocourts.org

February 3, 2014

Mr. Toryast Johnson #256772
P.C.I. Q4B #211
430 Oaklawn Road
Pelzer, SC 29669

Re: Toryas Jermain Johnson, # 256772 vs. State of South Carolina
Case No.: 2012-CP-02-1423

Dear Mr. Johnson:

Thank you for your recent letter. I am enclosing a copy of the Order of Dismissal in your case. Please be advised that you will need to consult your attorney regarding legal advice.

Sincerely yours,

R. Ferrell Cothran, Jr.

jgb

Enclosures

STATE OF SOUTH CAROLINA)

VERIFICATION

County of)

I, , 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.

Forrest John

SWORN to and subscribed before me this 24
day of February, 2014.

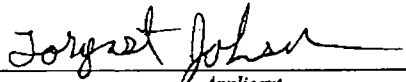
Jamarcus Conwell (L.S.)
Notary Public

My Commission Expires
September 25, 2023
My Commission Expires: _____

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

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:

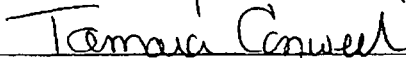
- (1) I am the applicant in this action and I believe I am entitled to redress.
- (2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.



Applicant

SWORN or affirmed to and subscribed before me this

24 day of February, 2014.



Notary Public

My Commission Expires
September 25, 2023

My Commission Expires: _____

Ms. Marsha Banks,

I'm writting this letter regarding to the letter you wrote me saying that the court denied my P.C.R request. I've notice in your letter you didn't mention that you filed a notice of appeal; I do not wish to give up that right. In fact at this moment I'm asking a few things from you; if you haven't already filed an appeal I'm asking that you do so and I would also like a copy of my case file. I know you said that my case file consisted of alot of paper work but I really do need it and I will appreciate your time and effort that you put forth in my case. I thank you so much for your help through out my whole situation.

Date: August, 7 2013

Sincerely,

Isyaiah Johnson

RECEIVED

AUG 07 2013

P.C.I. MAT. ROOM

A.

Banks & Associates PC

P.O. Box 2455
319 Park Avenue, SE
Aiken, South Carolina 29802

Telephone: (803) 648-5777

Fax: (803) 648-5228

August 1, 2013

Mr. Toryast Johnson 256772
430 Oaklawn Road
Pelzer, SC 29669

Dear Mr. Johnson:

In response to your letter of August 7, 2013, this is to advise that I was only appointed to represent you in your PCR proceeding. As of today's date, as best as I can ascertain, an Order has not been issued in regard to your case although a ruling has been made in accordance with the rules (Rule 203(b1)).

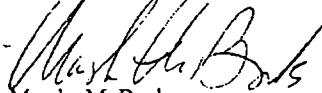
Upon receipt of entry of written notice, I will forward same to you immediately so you can file a timely Notice of Intent to Appeal. Copies of the other applicable rules (Rule 243, Rule 203, and Rule 207) have been included for your convenience. This is by no means intended to be a complete list of the Rules of Criminal and/or Civil Procedure you will need to perfect an appeal to your **Denial of Post Conviction Relief**. A copy of your complete file to follow shortly.

We hope that we have been of assistance and wish you the best in your future endeavors.

With regards, I remain

Sincerely Yours,

BANKS & ASSOCIATES, INC.


Marsha M. Banks
Legal Counsel

MMB/bb

Marsha M. Banks
amblaw@gmail.com

Bradford M. Owensby
bmbankslaw@gmail.com

B.

MS. Marsha Banks,

I'm writting this letter to you in regards to the letter you wrote to me saying that once you send me the order from the judge it is up to me to file an appeal. According to S.C. Code ANN 17-27-100, it's up to you to review the denial of my P.C.R and properly file the notice of appeal. This letter is sent with all due respect towards you and the experience you have with the law, if I am wrong please help me to understand. I thank you for all your help and concern with my case.

Sincerely,

Forrest Johnson

RECEIVED

SEP 24 2013

RCI MAILROOM

C.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF AIKEN	)	FOR THE SECOND JUDICIAL CIRCUIT
	)	
Toryast J. Johnson, # 256772,	)	2014-CP-02-00558
	)	
Applicant,	)	
	)	
v.	)	RETURN AND MOTION TO DISMISS
	)	ALL CLAIMS BEYOND <u>AUSTIN</u>
State of South Carolina,	)	REVIEW
	)	
Respondent.	)	
	)	

In response to the post-conviction relief application filed March 10, 2014, Respondent would show this Court:

I.

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Aiken County Clerk of Court. The Applicant was indicted during the February 2010 term of the Aiken County Grand Jury for Armed Robbery (2010-GS-02-0296). Applicant was represented by Ola A. Johnson, Esquire. On August 31, 2011, the Applicant pled guilty as indicted. The Honorable Doyet A. Early, III, sentenced the Applicant to confinement for a period of thirty years. The Applicant did not appeal his conviction or sentence.

Applicant subsequently filed for post-conviction relief on June 11, 2012 (2012-CP-02-1423). In his application, Applicant asserted claims of ineffective assistance of counsel, Belated Appeal, and Involuntary Guilty plea. An evidentiary hearing was convened on July 10, 2013, at the Aiken County Courthouse before the Honorable R. Ferrell Cothran, Jr. Applicant was present at the hearing and was represented by Marsha M. Banks, Esquire. By written Order filed August 23, 2013, Judge Cothran denied and dismissed Applicant's post-conviction relief action.

Attached herewith and incorporated herein are the records of the Aiken County Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, and the prior post-conviction relief record. Respondent reserves the right to amend this Return upon receipt of any relevant materials.

II.

In his current Application, the Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. Ineffective Assistance of PCR Counsel
 - a. "Failed to file a timely Notice of Appeal of Intent to Appeal."

III.

There is no constitutional right to appointed counsel for collateral review of a conviction. Pennsylvania v. Finley, 481 U.S. 551, 107 S.Ct. 1990, 95 L.Ed.2d 539 (1987). The Sixth Amendment right to effective assistance of counsel does not extend to state post-conviction relief actions. Coleman v. Thompson, 501 U.S. 722, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991). Therefore, "the contention that prior PCR counsel was ineffective is not *per se* a 'sufficient reason' warranting a successive PCR application under §17-27-90." Aice, 305 S.C. at 451, 409 S.E.2d at 394.

The only recognized exception to the rule barring claims of ineffective assistance of post-conviction relief counsel is found in Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991). Austin recognizes a general exception to this rule where prior post-conviction relief counsel fails to appeal the denial of the application. Id. Austin "is limited to its particular factual situation" Aice, 305 S.C. at 452, 409 S.E.2d at 394. Pursuant to Austin, a post-conviction relief applicant may petition the South Carolina Supreme Court for discretionary review of the

dismissal of their application. Respondent requests an evidentiary hearing solely on the matter of the Applicant's entitlement to an Austin Review.

IV.

The Respondent denies each allegation that is not expressly admitted, qualified or explained.

V.

WHEREFORE, with the exception of Applicant's allegation that he is entitled to a review of his first PCR application pursuant to Austin v. State, Respondent moves to summarily dismiss the application because it is successive to the Applicant's prior PCR action and was filed after the statute of limitations had expired. Respondent requests an evidentiary hearing solely on the matter of the Applicant's entitlement to an Austin Review.

Respectfully submitted,

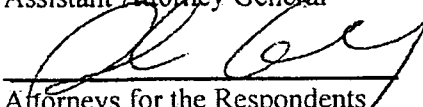
ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

KAREN C. RATIGAN
Senior Assistant Deputy Attorney General

DANIEL GOURLEY
Assistant Attorney General

By:


Attorneys for the Respondents
Post Office Box 11549
Columbia, South Carolina 29211

May 28, 2014.

STATE OF SOUTH CAROLINA

COUNTY OF AIKEN

TORYAST J. JOHNSON, #256772,

Applicant,

vs

STATE OF SOUTH CAROLINA,

Respondent.

IN THE COURT OF COMMON PLEAS

2014-CP-02-00558

AFFIDAVIT OF SERVICE BY MAIL

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the **Return and Motion to Dismiss all Claims beyond Austin Review** in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Lance S. Boozer, Esquire
 The Boozer Law Firm, LLC
 1331 Park Street
 Columbia, SC 29201

DATED this the 28th day of May, 2014.



Caroline Kaiser, Legal Assistant
 For Respondent

1 STATE OF SOUTH CAROLINA

2 COUNTY OF AIKEN

CIRCUIT COURT
2014-CP-02-00558

3
4
5 TORYAST J. JOHNSON,
Applicant,

6 -vs-

TRANSCRIPT OF RECORD

7 STATE OF SOUTH CAROLINA,
8 Respondent.

9 Post Conviction Relief Hearing

10 Heard on Friday, September 11, 2015

11 Aiken, South Carolina

12
13 BEFORE:

14 THE HONORABLE EDGAR W. DICKSON

15
16
17 APPEARANCES:

18 Counsel on Behalf of the Applicant:
Daniel F. Gourley, II, Esq.

19 Counsel on Behalf of the Respondent, State of SC:
20 Lance S. Boozer, Esq.

21
22
23 Cheri L. Young, RPR
Circuit Court Reporter
24 P O Box 5232
Aiken, SC 29803-5232
25

EXHIBIT INDEX

(NO EXHIBITS IDENTIFIED/INTRODUCED.)

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1 ON FRIDAY, SEPTEMBER 11, 2015 AT 9:52 A.M.:

2 MR. GOURLEY: It's Torvast Johnson.

3 THE COURT: Who is it?

4 MR. GOURLEY: Torvast Johnson. It's just a
5 belated appeal denial of his PCR, Judge.

6 THE COURT: All right. This is
7 Mr. Johnson?

8 MR. GOURLEY: Yes, Your Honor.

9 THE COURT: Okay. 249-CP-02-558?

10 MR. GOURLEY: Yes, Your Honor.

11 THE COURT: He needs a belated appeal?

12 MR. GOURLEY: Yes, Your Honor.

13 THE COURT: You've consented to him?

14 MR. GOURLEY: Yes, Your Honor.

15 THE COURT: All right. Bring me the order.

16 MR. GOURLEY: Just for the record, I've
17 talked to Ms. Banks about it and we're all in
18 agreement that Mr. Johnson didn't knowingly and
19 intelligently waive his right to appeal and
20 denial of PCR.

21 THE COURT: Okay.

22 MR. GOURLEY: If you want a consent order
23 with all the parties signed or would you prefer
24 an order?

25 THE COURT: Is everybody in agreement with

1 that?

2 MR. BOOZER: Yes, Your Honor.

3 THE COURT: If you'd Just do the order.

4 MR. GOURLEY: Yes, sir, Judge.

5 MR. BOOZER: Thank you, Judge.

6 THE COURT: Thank you.

7 END OF PROCEEDINGS: 9:54 A.M.

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1 ***

2 CERTIFICATE OF REPORTER

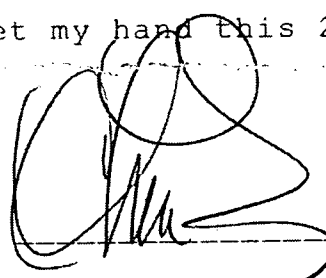
3 STATE OF SOUTH CAROLINA)

4 COUNTY OF AIKEN)

5 I, Cheri L. Young, Registered Professional Reporter
6 and Official Court Reporter for the State of South
7 Carolina, Second Circuit-At Large, do hereby certify that
8 the foregoing proceedings were written stenographically
9 by me using computer-aided translation; further, that the
10 foregoing is a true, accurate and complete record, to the
11 best of my skill and ability, of all the proceedings had
12 and evidence introduced in the hearing of the captioned
13 case, relative to appeal, in the Court of Common Pleas
14 for Aiken County, on the 11th day of September, 2015.

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

17 I have hereunder set my hand this 28th day of
18 December, 2015.



21 Cheri L. Young, RPR
22 Official Court Reporter
23
24
25

STATE OF SOUTH CAROLINA
COUNTY OF AIKEN

Toryast J. Johnson, # 256772,

Applicant,

v.

State of South Carolina,
Respondent.

IN THE COURT OF COMMON PLEAS
FOR THE SECOND JUDICIAL CIRCUIT

2014-CP-02-00558

**ORDER GRANTING AN APPEAL
PURSUANT TO AUSTIN V. STATE¹**

This matter comes before the Court by way of an application for post-conviction relief filed March 10 2014. The Respondent made its Return on May 28, 2014, requesting an evidentiary hearing solely on the issue of whether Applicant was entitled to an appellate review of his first post-conviction relief action pursuant to Austin. An evidentiary hearing on the matter was convened on September 11, 2015, at the Aiken County Courthouse. Applicant was present at the hearing and represented by Lance Boozer, Esquire. Assistant Attorney General Daniel Gourley of the South Carolina Office of the Attorney General represented the Respondent. Also present was Marsha Banks, Esquire.

PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Aiken County Clerk of Court. The Applicant was indicted during the February 2010 term of the Aiken County Grand Jury for Armed Robbery (2010-GS-02-0296). Applicant was represented by Ola A. Johnson, Esquire. On August 31, 2011, the Applicant pled guilty as indicted. The Honorable Doyet A. Early, III, sentenced the Applicant to confinement for a period of thirty years. The Applicant did not appeal his conviction or sentence.

¹ Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991).

FILED 10.5.15
10.5.15
1238
Deputy Clerk

Applicant subsequently filed for post-conviction relief on June 11, 2012 (2012-CP-02-1423). In his application, Applicant asserted claims of ineffective assistance of counsel, Belated Appeal, and Involuntary Guilty plea. An evidentiary hearing was convened on July 10, 2013, at the Aiken County Courthouse before the Honorable R. Ferrell Cothran, Jr. Applicant was present at the hearing and was represented by Marsha M. Banks, Esquire. By written Order filed August 23, 2013, Judge Cothran denied and dismissed Applicant's post-conviction relief action.

ALLEGATIONS

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

1. Ineffective Assistance of PCR Counsel
 - a. "Failed to file a timely Notice of Appeal of Intent to Appeal."

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Applicant alleges that he was denied the right to appeal the dismissal of his previous post-conviction relief application. Pursuant to Austin, a post-conviction relief applicant may petition the South Carolina Supreme Court for discretionary review of the dismissal of his prior application. Prior to the start of the evidentiary hearing, the State indicated to this Court that they would be consenting to the grant of an Austin appeal. The State explained that they were consenting based off of their discussion with prior PCR Counsel, a review of various letters written to prior PCR Counsel by Applicant, and discussion with Applicant's current PCR Counsel.

After review of the facts and circumstances surrounding the waiver of the Applicant's right to appeal the denial of his post-conviction relief application, this Court finds that the Applicant is entitled to appeal the denial of his first post-conviction relief application (2012-CP-

02-1423) pursuant to Austin v. State. This Court finds that Applicant did not voluntarily waive his right to appeal the post-conviction relief court's denial and dismissal of his prior post-conviction relief action.

Based upon the foregoing, this Court finds that the granting of an appeal of the Applicant's first post-conviction relief action (2012-CP-02-1423) pursuant to Austin v. State is warranted.

IT IS THEREFORE ORDERED:

1. That the Applicant be granted an appeal of case 2012-CP-02-1423 pursuant to Austin v. State; and
2. That the Applicant remain in the custody of the South Carolina Department of Corrections.

AND IT IS SO ORDERED this 21st day of Sept., 2015.



EDGAR W. DICKSON
Presiding Judge
Second Judicial Circuit

Orangeburg, South Carolina.

STATE OF SOUTH CAROLINA)

COUNTY OF AIKEN)

TORYAST J. JOHNSON, #256772)

Plaintiff,)

vs.)

STATE OF SOUTH CAROLINA)

Defendant.)

IN THE COURT OF COMMON PLEAS
SECOND JUDICIAL CIRCUIT

CASE NO.: 2014-CP-02-00558

MOTION AND ORDER INFORMATION
FORM AND COVERSHEET

Plaintiff's Attorney:

Lance S. Boozer, Bar No. _____

Address:

807 Gervais Street, Suite 203
Columbia, SC 29201

Phone: _____ Fax: _____

E-mail: _____ Other: _____

Defendant's Attorney:

Daniel Gourley, Bar No. _____

Address:

PO Box 11549
Columbia, SC 29211

Phone: _____ Fax: _____

E-mail: _____ Other: _____

- ☐ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)
☒ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)
☒ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)

SECTION I: Hearing Information

Nature of Motion: _____

Estimated Time Needed: _____ Court Reporter Needed: ☐ YES ☒ NO

SECTION II: Motion/Order Type

- ☐ Written motion attached
☒ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for ☐ Plaintiff ☒ Defendant

September 16, 2015

Date submitted

SECTION III: Motion Fee

- ☐ PAID - AMOUNT: \$ _____
☒ EXEMPT: (check reason)
☐ Rule to Show Cause in Child or Spousal Support
☐ Domestic Abuse or Abuse and Neglect
☐ Indigent Status ☐ State Agency v. Indigent Party
☐ Sexually Violent Predator Act ☒ Post-Conviction Relief
☐ Motion for Stay in Bankruptcy
☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
☐ Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions
Name of Court Reporter: _____
☐ Other: _____

JUDGE'S SECTION

- ☐ Motion Fee to be paid upon filing of the attached order.
☐ Other: _____

JUDGE CODE _____

Date: _____

CLERK'S VERIFICATION

Collected by: _____ Date Filed: _____

☐ MOTION FEE COLLECTED: \$ _____☐ CONTESTED - AMOUNT DUE: \$ _____

FILED

105.2015




FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF AIKEN
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2014CP0200558

Toryast J Johnson

South Carolina State of

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

Attorney for: ☐ Plaintiff ☐ Defendant
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.
- ☐ ACTION DISMISSED (CHECK REASON): ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit);
☐ Rule 43(k), SCRPC (Settled); ☐ Other: _____
- ☐ ACTION STRICKEN (CHECK REASON): ☐ Rule 40(j) SCRPC; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____
- ☐ DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other:

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order; (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.

Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

10/5/2015

Circuit Court Judge

Judge Code

Date

For Clerk of Court Office Use Only

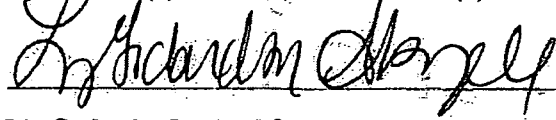
This judgment was entered on **10-5-15**, and a copy mailed first class or placed in the appropriate attorney's box on 10-5-15, to attorneys of record or to parties (when appearing pro se) as follows:

Lance S. Boozer 807 Gervais Street Suite 203 Columbia, SC
29201

ATTORNEY(S) FOR THE PLAINTIFF(S)

Daniel Francis Gourley II P.O Box 11549 Columbia, SC
29211

ATTORNEY(S) FOR THE DEFENDANT(S)



Liz Godard - Clerk of Court

Court Reporter

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

WITNESSES

Aiken Department Of Public Safety

Anthony Glover

Law Enforcement Case #: 10-16828

DOCKET NO. 2010GS0200296

The State of South Carolina

County of Aiken

DWM

ARREST WARRANT NUMBER

1092096

FILED February 4, 2010

L. J. Goddard
REC'D & S.Sharon D. Brown, County
Deputy ClerkCOURT OF GENERAL SESSIONS

FEBRUARY TERM 2010

THE STATE

vs.

TORYAST JERMAINE JOHNSON

ACTION OF GRAND JURY*For Bill**My H. R.*

Foreperson of Grand Jury

Date: February 4, 2010

VERDICT

CDR #: 0139

Indictment for

ARMED ROBBERY

§ 18-11-0330(A)

Foreperson of Petit Jury

Date:

J. STROM THURMOND, SOLICITOR

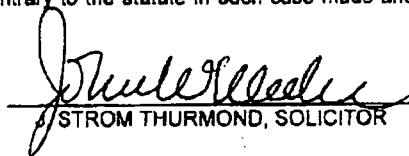
STATE OF SOUTH CAROLINA)
)
COUNTY OF AIKEN)
)

INDICTMENT FOR
ARMED ROBBERY
§ 16-11-0330(A)

At a Court of General Sessions, convened on February 8, 2010, the Grand
Jurors of Aiken County present upon their oath:

That **TORYAST JERMAINE JOHNSON** did, along with others, in Aiken County,
South Carolina on or about November 7, 2009, while armed with a deadly weapon or
while alleging either by action or words that he was armed, or while using a
representation of a deadly weapon or an object which a person present during the
commission of the robbery reasonably believed to be a deadly weapon, to wit: a black in
color handgun, feloniously take from the person or presence of [REDACTED] by means
of force or intimidation goods or monies of Burger King, such goods or monies being
described as follows: United States Currency, all in violation of §16-11-330, Code of
Laws of South Carolina (1976), as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and
provided.


STROM THURMOND, SOLICITOR