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**SC SUPREME COURT**

STATE OF SOUTH CAROLINA  
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY  
Court of Common Pleas

The Honorable Letitia H. Verdin, Guilty Plea Judge  
The Honorable Eugene C. Griffith, Jr., Post-Conviction Relief Judge

Appellate Case No. 2015-001439

Frank Daniel Simpson, ..... Respondent,

v.

State of South Carolina, ..... Petitioner.

**SUPPLEMENTAL APPENDIX**

ALAN WILSON  
Attorney General

KAREN C. RATIGAN  
Senior Assistant Attorney General  
S.C. Bar # 68331  
Post Office Box 11549  
Columbia, S.C. 29211  
(803) 734-3737

ATTORNEY FOR PETITIONER

E. CHARLES GROSE, JR.  
Grose Law Firm  
404 Main Street  
Greenwood, S.C. 29646

ATTORNEY FOR RESPONDENT

STATE OF SOUTH CAROLINA  
In The Supreme Court

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On January 28, 2014, Mr. Simpson filed this application for post-conviction relief.

By written order dated March 18, 2014, the Honorable Edward W. Miller reduced Mr. Simpson's sentence "from a term of nine (9) years to seven (7) years" pursuant to S.C. Code Ann. §17-25-65.

### III. Statement of Facts.

This section will summarize the facts contained in the guilty plea record and the evidence that will be presented during the evidentiary hearing.

#### A. Guilty Plea Record.

The following occurred during the guilty plea colloquy:

**The Court:** And Mr. Simpson, you are here today to plead to Trafficking in Methamphetamine less than 100 grams, but greater than 28 grams second offense. That carries a minimum sentence of seven years up to 30 years and it's a violent offense and a serious offense. Is that your understanding?

**Mr. Simpson:** Yes, ma'am.

**The Court:** Okay. And a violent offense means that any active jail sentence you receive, you'll serve a greater percentage than it [sic] if were non-violent. You understand that?

**Mr. Simpson:** Yes, ma'am.

**The Court:** And serious means that if you were to get two other serious offenses, on the third, the State could seek life without the possibility of parole against you. You understand that?

**Mr. Simpson:** I do.

Guilty Plea Transcript (hereinafter "Tr.") 7, line 9 – 8, line 2. Judge Verdin never advised Mr. Simpson that state law prohibited her from suspending the minimum sentence.

Ms. Monts summarized the factual background, provided Mr. Simpson's prior record, and recommended "a cap of 15" years. Tr. 18, lines 1 – 19, 23.

Mr. Boggs provided Judge Verdin the Defendant's Sentencing Memorandum and another document "entitled Mitigating Factors and Extenuating Circumstances."<sup>2</sup> Tr. 20, lines 9-18.

During his presentation to the Court, Mr. Boggs argued:

Judge, I know there's a statutory minimum, but just as a point of reference, as you know, there's an annotated statutory provision that said any sentence can be suspended by a judge even though this says no suspended sentence. I'm not – I'm not trying to insult your intelligence in any way, Judge. He can do house arrest, Judge. He can make it. He would want it. Obviously, who wouldn't.

Tr. 26, lines 11-18. Judge Verdin never advised Mr. Simpson that house arrest was not an available sentencing option.

Mr. Simpson's mother, Ida Simpson who is "in her 80s" addressed Judge Verdin. Tr. 22, lines 14-23; 27, line 14 – 29, line 22. Mr. Simpson's fraternal twin, Robert Simpson, addressed the plea judge and requested:

Right now, my wife and I have a small daughter. I can't help my parents as they grow older. I really need Frank to help out. If this happened 10 years ago, I would no be here today. I would let him do the time and let him live his own debt. But right now, he's – I really need help.

Tr. 30, lines 17-23. Mr. Simpson addressed Judge Verdin. Tr. 31, line 4 – 33, line 9.

Judge Verdin sentenced Mr. Simpson to nine (9) years imprisonment and returned the Sentencing Memorandum to Mr. Boggs. Tr. 34, lines 13-23.

#### **B. Evidence to be Presented during the Evidentiary Hearing.**

Section II of the Sentencing Memorandum, a copy of which is attached, at p. 2, is captioned, "A Federal-esque 'Variance' is appropriate in this case." The memorandum argues,

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<sup>2</sup> The Sentencing Memorandum will be discussed in Section III(B), *infra*. Counsel for Mr. Simpson can provide the Court with a copy of the Mitigating Factors and Extenuating Circumstances.

“In the federal system, a variance, or reduction, from a statutory sentence is available to the defendants based on various factors set forth in 18 U.S.C. §3553(a).” After reviewing a number of justifications for treating Mr. Simpson with mercy, the Sentencing Memorandum, at p. 5, concludes:

Even when mandatory sentencing levels exist, this Court, like the federal courts across the country and in this very state, should be able to treat those before them as individuals. . . . If federal laws and cases dictate that a Court should impose a sentence that is “sufficient, but not greater than necessary,” then all sentencing courts should have greater latitude to impose a sentence that fits not only the crime, but the person before the court. Therefore, Frank [Simpson] respectfully submits that a sentence of house arrest, would be a sentence that is “sufficient, but not greater than necessary.”

Mr. Simpson will testify he expected to receive a fine, a suspended sentence, and that any active sentence could be served through home incarceration. He will also testify that he would not have plead guilty but for his plea counsel’s erroneous legal advice.

Robert Simpson will corroborate this expectation. He will testify that he was prepared to pay a substantial fine the same day as his brother’s guilty plea.

#### **IV. Argument.**

In his application for post-conviction relief, Mr. Simpson contends he “was denied the right to effective assistance of counsel during his guilty plea, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina Constitution” because “[p]lea counsel failed to prepare for Applicant’s guilty plea” by “inaccurately advis[ing him] about entering his guilty plea, the applicable penalties, and the authority of the sentencing judge.” PCR Application ¶¶ 10 and 11.

### A. Standard of Review.

In *Hill v. Lockhart*, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985), the Supreme Court applied the two part standard adopted in *Strickland* to guilty plea challenges bottomed on ineffective assistance of counsel. The Court reiterated that the defendant must show first that counsel's representation fell below the standard of reasonableness; and, that there was a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. 106 S.Ct. at 370. Specifically, the Court stated that the defendant must show that "there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." 106 S.Ct. at 370.

*Jordan v. State*, 297 S.C. 52, 54, 374 S.E.2d 683, 684 (1988). See also *Thompson v. State*, 340 S.C. 112, 115, 531 S.E.2d 294, 296 (2000) ("A defendant who pleads guilty on advice of counsel may only attack the voluntary and intelligent character of a plea by showing that counsel's representation fell below an objective standard of reasonableness demanded of attorneys in criminal cases and there is a reasonable probability that, but for counsel's errors, defendant would not have pled guilty and would have insisted on going to trial.").

### B. Plea Counsel's Ineffectiveness.

Plea counsel's performance was deficient and prejudicial. Although it is not clear exactly what legal principle plea counsel relied on in asking for a suspended sentence and house arrest, no such provision applied to Mr. Simpson.

Trafficking methamphetamine, 28-100 grams, second offense carries "a term of imprisonment of not less than seven years nor more than thirty years, no part of which may be suspended nor probation granted, and a fine of fifty thousand dollars." S.C. Code Ann. §44-53-375(C)(2)(b). Because of this specific prohibition, the plea court's general power to suspend sentences, pursuant to S.C. Code Ann. §24-21-410, does not apply. Compare *State v. Tisdale*, 321 S.C. 153, 467 S.E.2d 270 (Ct. App. 1996) (by using language "the service of the minimum

sentence is mandatory,” legislature intended for someone convicted third-offense DUI to serve actual imprisonment of at least 60 days) *with State v. Thomas*, 372 S.C. 466, 642 S.E.2d 724 (2007) (held that statute prohibiting distribution of controlled substance within proximity of school contained no provision prohibiting the suspension of a sentence imposed pursuant to the statute, and thus, trial judge had the general authority to suspend the minimum sentence). Plea counsel, therefore, was ineffective for advising Mr. Simpson to seek a fine and suspended sentence, which is not available under state law for this offense.

Additionally, the sentencing court was without authority to impose house arrest. Our General Assembly has enacted a “Home Detention Act.” S.C. Code Ann. §24-13-1510, *et. seq.* The “Home Detention Act,” however, does not apply to “charges of violating, the illicit narcotic drugs and controlled substances laws of this State which are classified as Class A, B, or C felonies.” S.C. Code Ann. §24-13-1590. Trafficking methamphetamine, 28-100 grams, second offense is a Class A felony. S.C. Code Ann. §16-1-90(A). Plea counsel, therefore, was ineffective for advising Mr. Simpson to seek house arrest, when the “Home Detention Act” expressly excludes that sentence in the situation.

Plea counsel, furthermore, was ineffective for advising Mr. Simpson to seek “a federal-esque variance,” when no such variance is available under our state’s law. The Sentencing Memorandum incorrectly relies on federal authority. The memorandum, at p. 3, cites 18 U.S.C. §3553(a), which lists facts for a federal court judge to consider prior to imposing sentence. *Koon v. United States*, 518 U.S. 81 (1996), at p. 5 of the memorandum, reviewed a downward departure under the Federal Sentencing Guidelines and *not* a state court judge’s authority to ignore statutory, mandatory minimum sentences.

Because plea counsel's deficient advice to Mr. Simpson was material to his decision to plead guilty, this Court should vacate the conviction and sentence.

**VI. Conclusion.**

The Court should grant Mr. Simpson's application for post-conviction relief, vacate Mr. Simpson's conviction and sentence, and order a new trial.

Respectfully submitted,

By 

E. Charles Grose, Jr.  
The Grose Law Firm, LLC  
404 Main Street  
Greenwood, SC 20646  
(864) 538-4466

*Counsel for Applicant*

December 16, 2014  
Greenwood, South Carolina

Please Copy & Ret 8

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF GREENVILLE )

IN THE COURT OF GENERAL SESSIONS

STATE OF SOUTH CAROLINA )  
 )  
vs. )  
 )  
FRANK D. SIMPSON, )  
 )  
Defendant. )

**DEFENDANT'S PRESENTENCING  
MEMORANDUM**

Warrant I-432330

Defendant, by and through his undersigned counsel, respectfully submits the following for consideration of the Court at sentencing.

**I. BACKGROUND**

The Defendant, Frank Simpson, is forty-nine years of age. He obtained his undergraduate degree from Williams College in Williamstown, Massachusetts and was elected to Phi Beta Kappa based on his grades. He attended University of North Carolina at Chapel Hill, where he was awarded an MA degree. He next attended Duke University School of Law where he completed all but two courses for a JD degree before deciding on a career in horticulture, for which he was simultaneously studying at North Carolina State. Following completion of his work at North Carolina State, he enrolled in Harvard University's Program in Historic Landscape Design. Unfortunately, Harvard closed its program prior to Frank completing his thesis on sustainable plants in Mt. Auburn's cemetery in Cambridge, Massachusetts.

Horticulture has been Frank's passion, and he has designed and constructed gardens in the Research Triangle of Durham, Chapel Hill, and surrounding areas. In Durham, North Carolina, he gave leadership to SEEDS (a charity that provides seeds, supervision and advise to needy families) and to Habitat for Humanity by contributing plants and labor for its projects. He

has also volunteered at Raulston Arboretum in Raleigh, North Carolina. He is of the Episcopal faith and many of his volunteer efforts occurred at the Society of Saint John the Evangelist and Mt. Auburn's Cemetery, both in Massachusetts. Frank also has a strong civic interest in the restoration of historic homes. The Durham Historic Preservation Society has given Frank two awards for the restoration of some homes in Durham. He has also been involved in a historic renovation on Huckleberry Mountain in Hendersonville, North Carolina.

Although Frank is not married, his family relies on him for the care and assistance of his parents. He has a twin brother, Robert, who is married with a small child, but he and his family reside in Wilmington, Delaware and he works in Philadelphia. Since Frank has been incarcerated, he has tried to help out with his parents with difficulty. Frank's Mother, Ida Simpson, who is a Professor Emeritus of Sociology at Duke University, and his Father, Richard Simpson, a retired professor at UNC-Chapel Hill, reside in Durham, North Carolina. Frank's parents are both in their mid-eighties and in very poor health.

Frank made a serious mistake. He and his family readily admit that he has an addiction problem. He recognizes this problem and he intends to seek treatment for his addictions. Frank also has some very serious health problems related to his addiction, including Hepatitis and MERSA. He realizes that he is in no shape physically to continue to ignore his addiction; and he desires the ability to seek help from psychiatrist and medical physicians to battle his ongoing addiction. In the past, Frank has been involved with AA and psychiatric counseling and has been successful. He has so much to offer society in his involvement with church, the community and his family. His family is loving and supportive of his recovery; and are financially able to help him with the expenses of obtaining not only the medical and psychiatric care needed for his addiction, but also his chronic illnesses.

Given these circumstances, a sentence substantially less than the 15 year cap recommended by the prosecution and even less than the 7 year minimum under the statute would be "sufficient, but not greater than necessary."

## II. A FEDERAL-ESQUE "VARIANCE" IS APPROPRIATE IN THIS CASE.

In the federal system, a variance, or reduction, from a statutory sentence is available to defendants based on various factors set forth in 18 U.S.C. § 3553(a). Applying said criteria, the court is to "impose a sentence sufficient, but not greater than necessary." These factors include:

- (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
- (2) the need for the sentence imposed--
  - (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
  - (B) to afford adequate deterrence to criminal conduct;
  - (C) to protect the public from further crimes of the defendant; and
  - (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
- (3) the kinds of sentences available;
- (4) the kinds of sentence and the sentencing range established
- (5) any pertinent policy statement . . . ;
- (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and
- (7) the need to provide restitution to any victims of the offense.

### A. Need for Just Punishment in Light of the Seriousness of the Offense.

The need for retribution is measured by the degree of "blameworthiness," which "is generally assessed according to two kinds of elements: the nature and seriousness of the harm caused or threatened by the crime; and the offender's degree of culpability in committing the crime, in particular, his degree of intent (*mens rea*), motives, role in the offense, and mental illness or other diminished capacity." Richard S. Frase, *Excessive Prison Sentences, Punishment Goals, and the Eighth Amendment: "Proportionality" Relative to What?*, 89 Minn. L. Rev. 571, 590 (February 2005).

**1. Frank was not motivated by greed.**

A defendant's motive is highly relevant at sentencing. Frank Simpson is a 25-plus year addict of narcotics. His addiction, which has ebbed by varying series of sobriety, some as long as 3 years, denied Frank the rational thinking attributed to non-addicts. Frank could not realize the impact of the drug trade on anyone other than himself. His view of drugs was that of a user, not a dealer. His view of obtaining drugs, was for use, not profit. His participation in this industry had no violent motive, as evidenced by his lack of violent criminal history.

**2. Frank's conduct was aberrant.**

Frank is not a drug dealer and was merely a mule in the transaction resulting in his arrest. His offense is completely uncharacteristic when viewed in the context of his entire productive adult life. Frank has no felonies on his criminal record. This Court should grant a variance based on the aberrant nature of his conduct. Aside from this conviction, Frank's criminal history has not been violent and has not involved more than possession.

**3. Frank could be punished far beyond what is just.**

This Court should consider that the statutory provisions and the Solicitor's recommendation far outweigh any reasonable punitive aspect of a drug user. Here, sustained on extended incarceration will deprive Frank of not only his liberty but a chance to seek inpatient care that is available to him only outside of the Sc Department of Corrections. Furthermore, his ability assist his elderly parents will be denied at this late stage of their lives.

**B. Need for Deterrence.**

Research has consistently shown that while the certainty of being caught and punished has a deterrent effect, "increases in severity of punishments do not yield significant (if any)

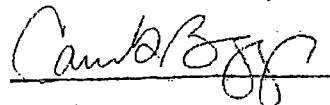
marginal deterrent effects." Michael Tonry, *Purposes and Functions of Sentencing*, 34 Crime & Just. 1, 28 (2006). The typical defendant in a drug trafficking case is one that is motivated by money and greed. Frank's action in this case is an extreme showing of the power of addiction, exemplified by the fact that he had a loaded syringe for use on the trip to NC from Georgia. Here, a sentence of house arrest would be just as much of a deterrent as incarceration.

### CONCLUSION

Even when mandatory sentencing levels exist, this Court, like the federal courts across this country and in this very state, should be able to treat those before them as individuals. See *Koon v. United States*, 518 U.S. 81, 113 (1996). ("It has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue."). If federal laws and cases dictate that a Court should impose a sentence that is "sufficient, but not greater than necessary," then all sentencing courts should have greater latitude to impose a sentence that fits not only the crime, but the person before the court. Therefore, Frank respectfully submits that a sentence of house arrest, would be a sentence that is "sufficient, but not greater than necessary".

Respectfully submitted,

BOGGS LAW FIRM, LLC



Cameron G. Boggs, Esq.  
102 West Stone Ave.  
Post Office Box 65  
Greenville, South Carolina 29602  
(864) 233-8066  
Attorney for Defendant

Greenville, South Carolina  
Dated: December 12, 2012

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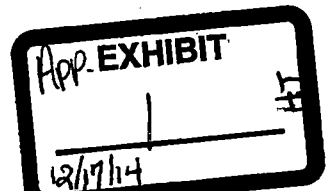
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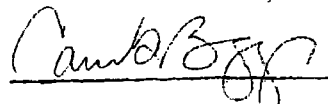
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### CONCLUSION

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Respectfully submitted,

BOGGS LAW FIRM, LLC



Cameron G. Boggs, Esq.  
102 West Stone Ave.  
Post Office Box 65  
Greenville, South Carolina 29602  
(864) 233-8066  
Attorney for Defendant

Greenville, South Carolina  
Dated: December 12, 2012

STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF GREENVILLE )  
 )  
 Frank Daniel Simpson, )  
 S.C.D.C. No. 354338, )  
 )  
 Applicant, )  
 )  
 v. )  
 )  
 State of South Carolina, )  
 )  
 Respondent. )

IN THE COURT OF COMMON PLEAS  
 C.A. No. 2014-CP-23-0531

**ORDER OF DISMISSAL**

FILED-CLERK OF COURT  
 GREENVILLE CO. S.C.  
 PAUL B. WICKENSIMMER  
 2015 MAR 16 PM 2 54

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed January 28, 2014. The Respondent made its return on March 26, 2014. An evidentiary hearing was held on December 17, 2014 at the Greenville County Courthouse. The Applicant was present and represented by E. Charles Grose, Jr., Esquire. Karen C. Ratigan, Esquire of the South Carolina Office of the Attorney General represented the Respondent.

The Applicant testified at the PCR hearing. Also testifying were Robert Simpson and the Applicant's plea counsel, Cameron G. Boggs, Esquire. The Court had before it the transcript of the guilty plea hearing, the Greenville County Clerk of Court records, the Applicant's South Carolina Department of Corrections records, the PCR application, the return, and Applicant's Exhibit 1.

**PROCEDURAL HISTORY**

The Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Greenville County Clerk of Court. The Applicant was indicted at the December 2011 term of the Greenville County Grand Jury for trafficking methamphetamine (2011-GS-23-9272). He was represented by Cameron G. Boggs, Esquire.

1  


On February 13, 2013, the Applicant pled guilty to trafficking methamphetamine (28-100 grams), first offense. The Honorable Letitia H. Verdin sentenced the Applicant to nine years imprisonment. The Applicant did not appeal.

### ALLEGATIONS

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

1. Ineffective assistance of counsel:
  - a. "Plea counsel failed to prepare for Applicant's guilty plea.
  - b. "~~Plea counsel inaccurately advised Applicant about entering his guilty plea, the applicable penalties, and the authority of the sentencing judge.~~"
  - c. "Plea counsel failed to present accurately available mitigation during the guilty plea and sentencing proceedings."

### 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 and arguments presented at the PCR hearing. This Court has further had the opportunity to observe each witness who testified at the hearing, and closely pass upon their credibility. This Court has weighed the testimony accordingly. Set forth below are the findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80 (2003).

#### Ineffective Assistance of Counsel

The Applicant alleges he received ineffective assistance of counsel. In a PCR action, "[t]he burden of proof is on the applicant to prove his allegations by a preponderance of the evidence." Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002).

For an applicant to be granted PCR as a result of ineffective assistance of counsel, he must show both: (1) that his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by his counsel's ineffective

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performance. See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006). When there has been a guilty plea, the applicant must prove that counsel's representation was below the standard of reasonableness and that, but for counsel's unprofessional errors, there is a reasonable probability that he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 58-59, 106 S. Ct. 366, 370 (1985); Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001).

The Applicant stated he had numerous meetings with plea counsel. The Applicant stated he and plea counsel reviewed the State's evidence and his prior criminal record. The Applicant stated plea counsel told him the State had a strong case against him. The Applicant stated plea counsel asked if his family could pay any of his fines (the Applicant stated his brother could do so). The Applicant stated he knew the sentence to which he was pleading guilty carried a mandatory minimum seven-year sentence. The Applicant stated plea counsel said he would ask for a sentence of house arrest and GPS monitoring. The Applicant stated he was under the impression this was a possibility but not that he would receive such a sentence. The Applicant stated he would not have pled guilty if he had known he would not receive house arrest. The Applicant stated he was unhappy with plea counsel's performance but admitted he sent him an Easter card after the plea hearing.

Robert Simpson, the Applicant's twin brother, stated the Applicant had asked him whether he would be able to pay a fine on his behalf. Simpson stated he was at the Applicant's plea hearing.

Plea counsel testified he was the Applicant's second attorney. Plea counsel testified he met with the Applicant more than any other client that he did not take to trial. Plea counsel testified the Applicant was extremely intelligent and a drug abuser, not a dealer. Plea counsel

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testified this case was never going to trial and that his role was to obtain the best deal possible and make a mitigation argument. Plea counsel testified he was able to negotiate a reduction of the second offense to a first offense. Plea counsel testified he prepared a sentencing memorandum for the plea judge (as well as another document listing mitigating factors) in which he requested a sentence of house arrest. Plea counsel testified both he and the Applicant were aware the Applicant's charge carried a mandatory minimum sentence of seven years but that he had seen sentences suspended before and that he would have to make this request if he had any hope for such a suspension. Plea counsel testified he never told the Applicant he would receive house arrest and that the Applicant would not have expected to receive a sentence of less than seven years. Plea counsel testified he did not tell the Applicant to rely upon the possibility of an illegal sentence and that the Applicant never expected anything other than a chance. Plea counsel testified the Applicant's family had the financial ability to pay any fines.

Initially, this Court notes the Applicant acknowledged to the plea judge that he was aware the sentence range for this offense was 7-30 years. (Plea transcript, p.7). The Applicant did not dispute the facts recited by the assistant solicitor. (Plea transcript, pp.18-19). The Applicant also told the plea judge that he understood the trial rights he was waiving in pleading guilty, was satisfied with counsel, and had not been coerced. (Plea transcript, pp.8-11). Specifically, the Applicant stated he was not made any promises in exchange for his guilty plea. (Plea transcript, p.9). This Court finds there is no evidence in the guilty plea transcript to support the Applicant's assertion that he had been misadvised (or made any promises) about the sentence he would receive; therefore the transcript has refuted this allegation. See Stalk v. State, 375 S.C. 289, 300, 652 S.E.2d 402, 407 (Ct. App. 2007); see also Rayford v. State, 314 S.C. 46, 48-49, 443 S.E.2d 805, 806 (1994) (where transcript of guilty plea proceeding refuted applicant's claim that he did

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not understand the terms of a plea bargain, grant of PCR was inappropriate notwithstanding applicant's claim lawyer misadvised him).

This Court finds the Applicant failed to meet his burden of proving plea counsel was ineffective. Plea counsel testified he had more contact with the Applicant than with any other guilty plea client. Plea counsel testified the Applicant was extremely intelligent and aware of the sentence he was facing. Plea counsel testified he explained to the Applicant that he would request the plea judge suspend his sentence to house arrest and that the Applicant understood this was merely a request. Plea counsel testified the Applicant knew not to expect to receive a sentence of less than seven years. This Court finds plea counsel's testimony is credible. This Court finds plea counsel explained the sentencing scheme to the Applicant, as well as his strategy to ask the plea judge to depart from that scheme (as happens in federal court) in order to receive a sentence of house arrest. Plea counsel testified he had seen this particular plea judge depart from mandatory sentences in the past and that he prepared a sentencing memorandum to help persuade the plea judge to do so in this case. Plea counsel testified you cannot receive such a sentence unless you request it. This Court finds plea counsel articulated a valid reason that he asked for a departure from the mandatory minimum sentence in this case. See Roseboro v. State, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995) (finding where trial counsel articulates a valid reason for employing a certain strategy, such conduct should not be deemed ineffective assistance of counsel). This Court finds the Applicant was aware of this strategy – as well as the fact that he must assume he would still receive a sentence of at least seven years. This Court finds plea counsel was a zealous advocate for his client and presented a compelling mitigation argument to the plea judge. (Plea transcript, p.20-27). While the Applicant may have hoped for a sentence of house arrest, plea counsel did not promise that he would receive such. See Holden

v. State, 713 S.E.2d 611, 617, 393 S.C. 565, 575-76 (2011) (citation omitted) (“Wishful thinking regarding sentencing does not equal a misapprehension concerning the possible range of sentences, especially where one acknowledges on the record that one knows the range of sentences and that no promises have been made.”).

This Court finds the Applicant’s testimony that he would have gone to trial if he had realized he would not receive house arrest is not credible. The Applicant was aware of the sentence range (including the mandatory minimum sentence of seven years) for his offense. The Applicant also admitted that, while house arrest was presented as a possibility, it was never promised that he would receive this sentence. The Applicant failed to present any credible evidence or testimony that he would have chosen to proceed to a jury trial. See Hill v. Lockhart, 474 U.S. at 58-59, 106 S. Ct. at 370.

This Court also finds the Applicant cannot prove he was prejudiced as a result of plea counsel’s representation. Plea counsel’s strategy to request a departure from the mandatory minimum sentence (in favor of house arrest) cannot be viewed as having prejudiced the Applicant because the State had overwhelming evidence<sup>1</sup> of the Applicant’s guilt. See Geter v. State, 305 S.C. 365, 367, 409 S.E.2d 344, 346 (1991) (concluding reasonable probability of a different result does not exist when there is overwhelming evidence of guilt).

Accordingly, this Court finds the Applicant has failed to prove the first prong of the Strickland test – that plea counsel failed to render reasonably effective assistance under prevailing professional norms. The Applicant failed to present specific and compelling evidence that plea counsel committed either errors or omissions in his representation of the Applicant. This Court also finds the Applicant has failed to prove the second prong of Strickland – that he

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<sup>1</sup> Plea transcript, pp.18-19.

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was prejudiced by plea counsel's performance. This Court concludes the Applicant has not met his burden of proving counsel failed to render reasonably effective assistance. See Frasier v. State, 351 S.C. at 389, 570 S.E.2d at 174.

#### 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 testimony, argument, or evidence at the hearing regarding such allegations. Accordingly, this Court finds the Applicant has abandoned any such allegations.

#### CONCLUSION

Based on all the foregoing, this Court finds and concludes the Applicant has not established any constitutional violations or deprivations before or during his guilty plea and sentencing proceedings. Counsel was not deficient in any manner and the Applicant was not prejudiced by counsel's representation. Therefore, this PCR application must be denied and dismissed with prejudice.

This Court advises the Applicant that he must file a notice of intent to appeal within thirty (30) days from the receipt of this Order if he wants to secure appropriate appellate review. His attention is also directed to Rules 203, 206, and 243 of the South Carolina Appellate Court Rules for the appropriate procedures to follow after notice of intent to appeal has been timely filed.

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**IT IS THEREFORE ORDERED:**

1. That the application for post-conviction relief be denied and dismissed with prejudice; and
2. That the Applicant be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 10<sup>th</sup> day of May, 2015.



Eugene C. Griffith, Jr.  
Residing Judge  
Thirteenth Judicial Circuit

Newberry, South Carolina.

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

JUDGMENT IN A CIVIL CASE

CASE NO: 2014CP230053

FILED - CLERK OF COURT  
GREENVILLE CO., S.C.  
PAUL B. WICKENSIMER  
2015 MAR 16 PM 2:54

Frank Daniel Simpson vs. South Carolina State Of

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.

- ACTION DISMISSED (CHECK REASON):
  - Rule 12(b), SCRCP;
  - Rule 41(a),
  - SCRCP (Vol. Nonsuit);
  - Rule 43(k), SCRCP (Settled);
  - Other: \_\_\_\_\_

- ACTION STRICKEN (CHECK REASON):
  - Rule 40(j) SCRCP;
  - 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;  Statement of Judgment by the Court;  
Dated at Greenville, South Carolina, this 16<sup>th</sup> day of March, 2015 .

Court Reporter:

PRESIDING JUDGE - Eugene C Griffith, Jr

This judgment was entered on the , and a copy mailed first class this , to attorneys of record or to parties (when appearing pro se) as follows:

E Charles Grose Jr. 404 Main Street Greenwood, SC 29646

Karen Christine Ratigan PO Box 11549 Columbia, SC 29211

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Paul B. Wickensimer Greenville County Clerk Of Court  
- Clerk of Court



## II. Procedural History.

As a result of a traffic stop on March 24, 2011, the State charged Mr. Simpson with trafficking methamphetamine, 28-100 grams, second offense. On February 13, 2013, the State called Mr. Simpson's case before the Honorable Letitia H. Verdin for a guilty plea.<sup>2</sup> Joyce L. Monts represented the State. Cameron G. "Bozzie" Boggs represented Mr. Simpson. Judge Verdin sentenced Ms. Simpson to nine (9) years imprisonment.

On January 28, 2014, Mr. Simpson filed this application for post-conviction relief.

By written order dated March 18, 2014, the Honorable Edward W. Miller reduced Mr. Simpson's sentence "from a term of nine (9) years to seven (7) years" pursuant to S.C. Code Ann. §17-25-65.

This Court convened a PCR hearing on December 17, 2014. By email dated January 15, 2015, the Court informed counsel:

The Post-Conviction Relief application regarding the above styled case is respectfully denied. Please prepare an order denying the applicants request for relief and copy the opposing counsel for review.

A copy of this email is attached. The Court did not provide any rationale for its decision.

By email dated February 9, 2015, the Attorney General's Office submitted a proposed order. Copies of this email and the proposed order are attached. On February 10, 2015, the Court signed the Attorney General's proposed order. This order was filed on March 16, 2015. Counsel received notice that this order had been signed after it was mailed by the Clerk of Court.

Prior to receiving notice of the written order signed on February 10, 2015 and filed on March 16, 2015, by email dated February 12, 2015, counsel for Mr. Simpson objected to the proposed order:

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<sup>2</sup> At the same time, the State called four other unrelated cases for guilty pleas.

I have had a chance to review the proposed order, which appears to address the issues raised at the PCR hearing. Because we plan to appeal, I will have to make a Rule 59(e) motion.

I also want to make sure this order really reflects Your Honor's view of the facts. Specifically, I call your attention to this portion of page five:

This Court finds plea counsel explained the sentencing scheme to the Applicant, as well as his strategy to ask the plea judge to depart from that scheme (as happens in federal court) in order to receive a sentence of house arrest. Plea counsel testified he had seen this particular judge depart from mandatory sentences in the past and that he prepared a sentencing memorandum to help persuade the plea judge to do so in this case. Plea counsel testified that you cannot receive such a sentence unless you request it. The Court finds plea counsel articulated a valid reason that he asked for a departure for the mandatory minimum sentence in this case.

This portion is essentially a finding of fact that Judge Verdin violated in the past (and might do so again in the future) Rule 501, Cannon 3(B)(2) of the Code of Judicial Conduct, which provides, "A judge shall be faithful to the law and maintain professional competence in it. A judge shall not be swayed by partisan interests, public clamor or fear of criticism."

I am concerned this finding of fact might have consequences for Judge Verdin. I want to be on record as objecting to this finding because I don't think there is any credible evidence to support a belief that she would ignore enactments of the General Assembly.

On March 5, 2015, the Court, through its administrative assistant, made the following request of the Attorney General's Office:

Judge Griffith is requesting an Amended order for the above styled case. Please remove the following language, located on page 5, from the proposed order:

Plea counsel testified he had seen this particular judge depart from mandatory sentences in the past and that he prepared a sentencing memorandum to

help persuade the plea judge to do so in this case. Plea counsel testified that you cannot receive such a sentence unless you request it.

If you should have any questions please contact me.

By email dated March 15, 2015, the Attorney General's Office submitted a second proposed order. Copies of the Court's email of March 15, 2015, the Attorney General's response of March 15, 2015, and the proposed order are attached.

The written order filed on March 19, 2015 is identical to the Attorney General's proposed order, except that the Court added the final paragraph on page one of the order.

### **III. Statement of Facts.**

This section will summarize the facts contained in the guilty plea record and the evidence presented during the evidentiary hearing.

#### **A. Guilty Plea Record.**

The following occurred during the guilty plea colloquy:

**The Court:** And Mr. Simpson, you are here today to plead to Trafficking in Methamphetamine less than 100 grams, but greater than 28 grams second offense. That carries a minimum sentence of seven years up to 30 years and it's a violent offense and a serious offense. Is that your understanding?

**Mr. Simpson:** Yes, ma'am.

**The Court:** Okay. And a violent offense means that any active jail sentence you receive, you'll serve a greater percentage than it [sic] if were non-violent. You understand that?

**Mr. Simpson:** Yes, ma'am.

**The Court:** And serious means that if you were to get two other serious offenses, on the third, the State could seek life without the possibility of parole against you. You understand that?

**Mr. Simpson:** I do.

Guilty Plea Transcript (hereinafter "Tr.") 7, line 9 – 8, line 2. Judge Verdin never advised Mr. Simpson that state law prohibited her from suspending the minimum sentence.

Ms. Monts summarized the factual background, provided Mr. Simpson's prior record, and recommended "a cap of 15" years. Tr. 18, lines 1 – 19, 23.

Mr. Boggs provided Judge Verdin the Defendant's Sentencing Memorandum and another document "entitled Mitigating Factors and Extenuating Circumstances." Tr. 20, lines 9-18. During his presentation to the Court, Mr. Boggs argued:

Judge, I know there's a statutory minimum, but just as a point of reference, as you know, there's an annotated statutory provision that said any sentence can be suspended by a judge even though this says no suspended sentence. I'm not – I'm not trying to insult your intelligence in any way, Judge. He can do house arrest, Judge. He can make it. He would want it. Obviously, who wouldn't.

Tr. 26, lines 11-18. Judge Verdin neither advised Mr. Simpson that house arrest was not an available sentencing option nor corrected plea counsel's assertion that the minimum sentence could be suspended.

Mr. Simpson's mother, Ida Simpson who is "in her 80s" addressed Judge Verdin. Tr. 22, lines 14-23; 27, line 14 – 29, line 22. Mr. Simpson's fraternal twin, Robert Simpson, addressed the plea judge and requested:

Right now, my wife and I have a small daughter. I can't help my parents as they grow older. I really need Frank to help out. If this happened 10 years ago, I would no be here today. I would let him do the time and let him live his own debt. But right now, he's – I really need help.

Tr. 30, lines 17-23. Mr. Simpson addressed Judge Verdin. Tr. 31, line 4 – 33, line 9.

Judge Verdin sentenced Mr. Simpson to nine (9) years imprisonment and returned the Sentencing Memorandum to Mr. Boggs. Tr. 34, lines 13-23.

**B. Evidence Presented during the Evidentiary Hearing.**

Section II of the Sentencing Memorandum, a copy of which was attached to Mr. Simpson's Memorandum in Support of his Application for Post-conviction Relief, at p. 2, is captioned, "A Federal-esque 'Variance' is appropriate in this case." The memorandum argues, "In the federal system, a variance, or reduction, from a statutory sentence is available to the defendants based on various factors set forth in 18 U.S.C. §3553(a)." After reviewing a number of justifications for treating Mr. Simpson with mercy, the Sentencing Memorandum, at p. 5, concludes:

Even when mandatory sentencing levels exist, this Court, like the federal courts across the country and in this very state, should be able to treat those before them as individuals. . . . If federal laws and cases dictate that a Court should impose a sentence that is "sufficient, but not greater than necessary," then all sentencing courts should have greater latitude to impose a sentence that fits not only the crime, but the person before the court. Therefore, Frank [Simpson] respectfully submits that a sentence of house arrest, would be a sentence that is "sufficient, but not greater than necessary."

During the PCR hearing, plea counsel identified this document as the Sentencing Memorandum he submitted to Judge Verdin.

Mr. Simpson testified he expected to receive a fine, a suspended sentence, and that any active sentence could be served through home incarceration. He also testified that he would not have plead guilty but for his plea counsel's erroneous legal advice.

Robert Simpson corroborated this expectation. He testified he was present in the courtroom and prepared to pay a fine in excess of \$100,000.00 the same day as his brother's guilty plea.

#### IV. Argument.

For the following reasons, the Court should reconsider the order filed on March 19, 2015, alter and amend the judgment, and grant post-conviction relief.

##### **A. The findings of fact and conclusions of law are those of an advocate and not the Court.**

As a threshold matter, the procedure followed by the Court denied Mr. Simpson an opportunity to have his post-conviction relief claims adjudicated by a judicial officer. “S.C. Code Ann. §17-27-80 (1976), requires the PCR court to ‘make specific findings of fact, and state expressly its conclusions of law, relating to each issue presented.’” *McCray v. State*, 305 S.C. 329, 330, 408 S.E.2d 241, 241 (1991). *See also Pruitt v. State*, 310 S.C. 254, 423 S.E.2d 127 (1992). This Court did not do that, but rather delegated that responsibility to the Attorney General’s Office. Because the Court’s email of January 15, 2015 and subsequent email of March 2, 2015, do not contain any findings of fact or conclusions of law, Mr. Simpson does not know the Court’s reasons for denying his post-conviction relief application. The Court’s emails, therefore, are “insufficient for appellate review.” *McCray*, 305 S.C. at 330, 408 S.E.2d at 241. Although the Attorney General addressed the merits of each issue presented during the hearing, the reasoning in the order is entirely that of an advocate and not an independent judicial officer, which violates the separation of powers. S.C. Const. Art. I, §8. Addressing section 17-27-80 in the context of a capital post-conviction relief case, our Supreme Court “strongly encourage[d] PCR judges to draft their own findings of fact and conclusions of law.” *Hall v. Catoe*, 360 S.C. 353, 365, 601 S.E.2d 335, 341 (2004).

The right to have the Court make its own findings of fact and conclusions of law takes on added significance in this case as the Court’s order of dismissal endorses counsel requesting and sentencing judges nullifying law enacted by the General Assembly. As seen, the Attorney

General's first proposed order, which was signed and filed, included a finding of fact that the sentencing judge in this case might be inclined to violate that oath. Although the amended order removes this particular finding of fact, it continues to endorse criminal defense lawyers asking circuit court judges to violate their oaths and nullify statutory sentencing schemes. Justifying plea counsel's performance in this manner seems more like the rationale of an advocate trying to "save" the conviction that a judicial officer "safeguard[ing] the rights of litigants." *State v. Langford*, 400 S.C. 421, 429, 735 S.E.2d 471, 475 (2012)

The Court, therefore, should withdraw this order and make its own findings of fact and conclusions of law.

**B. Contrary to the original order's findings of fact, there is no evidence that the plea judge would intentionally violate enactments of the South Carolina General Assembly.**

Page 5 of the written order filed on March 16, 2015 states:

Plea counsel testified he had seen this this particular judge depart from mandatory sentences in the past and that he prepared a sentencing memorandum to help persuade the plea judge to do so in this case. Plea counsel testified that you cannot receive such a sentence unless you request it.

Initially, counsel for Mr. Simpson craves reference to the PCR hearing testimony to determine whether plea counsel actually testified that Judge Verdin had ignored the law in other cases. Counsel for Mr. Simpson recalls plea counsel saying he had seen *other unnamed judges* had departed from the law and thought that that Judge Verdin was the most likely judge—of the judges appearing on the Greenwood calendar at the time—to intentionally ignore the law. Regardless of whether plea counsel made this general statement, there was no testimony in the record pointing to any specific incident where Judge Verdin intentionally ignored the law and

imposed an illegal sentence. Counsel, therefore, presented these concerns to the Court, and the Court removed this language from the amended order of dismissal.

**C. Counsel's strategy to ask the sentencing court to violate the law cannot be considered reasonable.**

In his application for post-conviction relief, Mr. Simpson contends he "was denied the right to effective assistance of counsel during his guilty plea, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina Constitution" because "[p]lea counsel failed to prepare for Applicant's guilty plea" by "inaccurately advis[ing him] about entering his guilty plea, the applicable penalties, and the authority of the sentencing judge." PCR Application ¶¶ 10 and 11.

Page 5 of the written, amended order of dismissal states:

This Court finds plea counsel explained the sentencing scheme to the Applicant, as well as his strategy to ask the plea judge to depart from that scheme (as happens in federal court) in order to receive a sentence of house arrest. The Court finds plea counsel articulated a valid reason that he asked for a departure for the mandatory minimum sentence in this case.

The order then cites to *Roseboro v. State*, 317 S.C. 292, 454 S.E.2d 312 (1995) in support of this finding. In *Roseboro*, our Supreme Court actually found trial counsel ineffective for not requesting an alibi instruction despite trial counsel testifying "[h]e made a tactical decision to focus the jury's attention on the State's failure to meet its burden of proof rather than place more emphasis on the alibi testimony by requesting an alibi charge." *Id.* 317 S.C. at 294, 454 S.E.2d at 313. Our Supreme Court held "counsel's professed strategy in this case invalid under an objective standard of reasonableness." *Id.* See also *Freiburger v. State*, Case No. 2010-177147, 2015 WL 543119, at 2 (S.C. Ct. App. Feb. 11, 2015) ("If the State contends the alleged

deficiency resulted from a strategic decision made at trial, counsel “must articulate a valid reason for employing a certain strategy.”).

Here, plea counsel’s advice to Mr. Simpson and strategy cannot be valid under an objective standard of reasonableness because the advice and strategy are contrary to law. Trafficking methamphetamine, 28-100 grams, second offense,<sup>3</sup> carries “a term of imprisonment of not less than seven years nor more than thirty years, no part of which may be suspended nor probation granted, and a fine of fifty thousand dollars.” S.C. Code Ann. §44-53-375(C)(2)(b). Because of this specific prohibition, the plea court’s general power to suspend sentences, pursuant to S.C. Code Ann. §24-21-410, does not apply. *Compare State v. Tisdale*, 321 S.C. 153, 467 S.E.2d 270 (Ct. App. 1996) (by using language “the service of the minimum sentence is mandatory,” legislature intended for someone convicted third-offense DUI to serve actual imprisonment of at least 60 days) *with State v. Thomas*, 372 S.C. 466, 642 S.E.2d 724 (2007) (held that statute prohibiting distribution of controlled substance within proximity of school contained no provision prohibiting the suspension of a sentence imposed pursuant to the statute, and thus, trial judge had the general authority to suspend the minimum sentence). Plea counsel, therefore, was ineffective for advising Mr. Simpson to seek a fine and suspended sentence, which is not available under state law for this offense.

Additionally, the sentencing court was without authority to impose house arrest. Our General Assembly has enacted a “Home Detention Act.” S.C. Code Ann. §24-13-1510, *et. seq.* The “Home Detention Act,” however, does not apply to “charges of violating, the illicit narcotic drugs and controlled substances laws of this State which are classified as Class A, B, or C

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<sup>3</sup> The order, at p. 4, states, “Plea counsel testified that he was able to negotiate a reduction of the second offense to a first offense.” This statement is simply not accurate. Ms. Simpson plead guilty to a second offense.

felonies.” S.C. Code Ann. §24-13-1590. Trafficking methamphetamine, 28-100 grams, second offense is a Class A felony. S.C. Code Ann. §16-1-90(A). Plea counsel, therefore, was ineffective for advising Mr. Simpson to seek house arrest, when the “Home Detention Act” expressly excludes that sentence in the situation.

For a plea to be voluntary, intelligent, and knowing, “a defendant entering a guilty plea must be aware of the nature and crucial elements of the offense, the maximum and *any mandatory minimum penalty*, and the nature of the constitutional rights being waived.” *Pittman v. State*, 337 S.C. 597, 599, 524 S.E.2d 623, 624 (1999) (emphasis added). Here, trial counsel did not advise Mr. Simpson that the minimum sentence is *mandatory*. The plea judge did not correct trial counsel’s erroneous advice.

A strategy of advocating for a judge to nullify valid statutes enacted by the General Assembly can *never* be reasonable. In addition to violating the law, this strategy violates Rule 501, Canon 3(B)(2) of the Code of Judicial Conduct, which provides, “A judge shall be faithful to the law and maintain professional competence in it. A judge shall not be swayed by partisan interests, public clamor or fear of criticism.” By amending the order of dismissal, the Court obviously agreed with counsel for Mr. Simpson that there is no credible evidence to support a belief that Judge Verdin would ignore enactments of the General Assembly. The absence of any credible evidence that any circuit court judge would intentionally ignore the legislatively enacted sentencing requirements makes the objectively unreasonable strategy appear even more unreasonable.

The Court, therefore, should reconsider the order, alter and amended the judgment, and grant post-conviction relief.

**D. Federal law relied on by plea counsel and adopted by the amended order of dismissal is not applicable in South Carolina state court proceedings.**

Plea counsel, furthermore, was ineffective for advising Mr. Simpson to seek “a federal-esque variance,” when no such variance is available under our state’s law. The Sentencing Memorandum incorrectly relies on federal authority. The memorandum, at p. 3, cites 18 U.S.C. §3553(a), which lists facts for a federal court judge to consider prior to imposing sentence. *Koon v. United States*, 518 U.S. 81 (1996), at p. 5 of the memorandum, reviewed a downward departure under the Federal Sentencing Guidelines and *not* a state court judge’s authority to ignore statutory, mandatory minimum sentences.

This Court’s order errs in two aspects. First, the authority cited in the memorandum does not authorize even the federal court to ignore mandatory minimum sentences. The memorandum, at p. 3, cites 18 U.S.C. §3553(a), which lists facts for a federal court judge to consider prior to imposing sentence. *Koon v. United States*, 518 U.S. 81 (1996), at p. 5 of the memorandum, reviewed a downward departure under the Federal Sentencing Guidelines and *not* a state court judge’s authority to ignore statutory, mandatory minimum sentences.

Second, the Court, without explanation, applies federal law to state court proceedings to justify plea judges nullifying enactments of the General Assembly. In our state, it is well settled, “A trial judge is allowed broad discretion in sentencing within statutory limits.” *Brooks v. State*, 325 S.C. 269, 271, 481 S.E.2d 712, 713 (1997).

The Court, therefore, should reconsider the order, alter and amended the judgment, and grant post-conviction relief.

**E. By limiting review to the guilty plea transcript, the order applies an incorrect standard of review.**

The order, at p. 6, states, "This Court finds there is no evidence in the guilty plea transcript to support the Applicant's assertion that he had been misadvised (or made any promises) about the sentence he would receive; therefore the transcript refuted this allegation." Including this statement in the order is curious for three reasons.

First, it is contrary to the standard of review of guilty pleas. "When determining issues relating to guilty pleas, the court will consider the entire record, including the transcript of the guilty plea, and the evidence presented at the PCR hearing." *Pittman*, 337 S.C. at 599, 524 S.E.2d at 624-25. Consideration of the PCR record supports granting relief. Mr. Simpson's uncontradicted PCR testimony was that he would not have plead guilty but for the incorrect advise from counsel. Mr. Simpson's brother was present in the courtroom prepared to pay a fine in excess of \$100,000.00. Trial counsel acknowledged his strategy was to convince the plea judge to impose an illegal sentence. The sentencing memorandum, which was reviewed by the plea judge but not placed in the record during the guilty plea, verifies this strategy.

Second, this finding is not supported by the record. Plea counsel asked Judge Verdin to suspend the sentence and impose house arrest. The plea judge never clarified that the minimum sentence is mandatory and cannot be suspended. Nor did she inform Mr. Simpson that hosue arrest is not available for this offense. The amended order of dismissal does not address these points at all.

Third, this portion of the order is inconsistent with other portions of the order. The order, at p. 5, actually finds that plea counsel adopted a strategy to seek an illegal sentence and discussed this strategy with Mr. Simpson. The order, at p. 6, also finds that Mr. Simpson "hoped

fore a sentence of house arrest.” This “wishful thinking” was created by plea counsel’s deficient advice. There is no justification for plea counsel creating such and unrealistic expectation.

The Court, therefore, should reconsider the order, alter and amended the judgment, and grant post-conviction relief.

**F. By considering the weight of the evidence, the order applies the wrong standard for prejudice when evaluating counsel’s ineffectiveness in guilty pleas.**

The order, at p. 6, states, “Plea counsel’s strategy to request a departure from the mandatory minimum sentence (in favor of house arrest) cannot be viewed as having prejudiced the Applicant because the State had overwhelming evidence of Applicant’s guilt.” The order then cites *Geter v. State*, 305 S.C. 365, 367, 409 S.E.2d 344, 346 (1991) for the proposition that “concluding reasonable probability of a different result does not exist when there is overwhelming evidence of guilt.” *Geter*, however, was a trial case, not a guilty plea case.

“In the context of a guilty plea, the deficiency prong inquiry turns on whether the plea was voluntarily, knowingly, and intelligently entered.” *Taylor v. State*, 404 S.C. 350, 360, 745 S.E.2d 97, 102 (2013). As discussed above, for a plea to be voluntary, intelligent, and knowing, “a defendant entering a guilty plea must be aware of the nature and crucial elements of the offense, the maximum and *any mandatory minimum penalty*, and the nature of the constitutional rights being waived.” *Pittman*, 337 S.C. at 599, 524 S.E.2d at 624 (emphasis added). Here, trial counsel did not advise Mr. Simpson that the minimum sentence is *mandatory*. The plea judge did not correct trial counsel’s erroneous advice.

Mr. Simpson’s memorandum in support of granting post conviction relief sets forth the correct standard:

In *Hill v. Lockhart*, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985), the Supreme Court applied the two part standard adopted in *Strickland* to guilty

plea challenges bottomed on ineffective assistance of counsel. The Court reiterated that the defendant must show first that counsel's representation fell below the standard of reasonableness; and, that there was a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. 106 S.Ct. at 370. Specifically, the Court stated that the defendant must show that "there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." 106 S.Ct. at 370.

*Jordan v. State*, 297 S.C. 52, 54, 374 S.E.2d 683, 684 (1988). See also *Thompson v. State*, 340 S.C. 112, 115, 531 S.E.2d 294, 296 (2000) ("A defendant who pleads guilty on advice of counsel may only attack the voluntary and intelligent character of a plea by showing that counsel's representation fell below an objective standard of reasonableness demanded of attorneys in criminal cases and there is a reasonable probability that, but for counsel's errors, defendant would not have pled guilty and would have insisted on going to trial.").

The Court, therefore, should reconsider the order, alter and amended the judgment, and grant post-conviction relief.

**G. The Court erred by considering trial counsel's testimony that his role was as plea counsel and not trial counsel.**

The amended order of dismissal, at p. 4, states, "Plea counsel testified that this case was never going to trial and that his role was to obtain the best deal possible and make a mitigation argument." Respectfully, plea counsel and the amended order confuse the roles of attorney and client. "A lawyer shall abide by a client's decision whether to make or accept an offer of settlement of a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify." Rule 407, SCACR, Rule 1.2, RPC. These rights are fundamental and essential to due process. *State v. Lawton*, 382 S.C. 122, 128, 675 S.E.2d 454, 457 (Ct. App.

2009); 128 *Seabrook Island Prop. Owners' Ass'n v. Berger*, 365 S.C. 234, 243, 616 S.E.2d 431, 436 (Ct.App.2005).

The Court, therefore, should reconsider the order, alter and amended the judgment, and grant post-conviction relief.

#### V. Conclusion.

The Court, therefore, should reconsider the order, alter and amended the judgment, and grant post-conviction relief. Failure to grant relief would set a dangerous precedent by recognizing, as a reasonable strategy, criminal defense lawyers seeking judicial nullification of statutory sentencing schemes. Surely, our state's criminal justice system is more principled that that.

Respectfully submitted,

By 

E. Charles Grose, Jr.  
The Grose Law Firm, LLC  
404 Main Street  
Greenwood, SC 20646  
(864) 538-4466

*Counsel for Applicant*

March 30, 2015  
Greenwood, South Carolina



**Subject:** 2014-CP-23-00531 Frank D. Simpson v. The State of South Carolina  
**Date:** Thursday, January 15, 2015 at 9:19:40 AM Eastern Standard Time  
**From:** Griffith, Eugene Secretary (Jacquelyn R. Lawrence)  
**To:** kratigan@scag.gov, Charles Grose  
**CC:** Griffith, Eugene, Griffith, Eugene Law Clerk (Zachary E. Fry)

Dear Ms. Ratigan,

The Post-Conviction Relief application regarding the above styled case is respectfully denied. Please prepare an order denying the applicants request for relief and copy the opposing counsel for review.

With kind regards.

Jackie Lawrence  
Administrative Assistant to  
Judge Eugene C. Griffith, Jr.  
8<sup>th</sup> Circuit  
P.O. Box 375  
1226 College Street  
Newberry, SC 29108

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**Subject:** Proposed order

**Date:** Monday, February 9, 2015 at 11:36:06 AM Eastern Standard Time

**From:** Karen Ratigan

**To:** egriffithsc@sccourts.org

**CC:** Charles Grose, egriffithlc@sccourts.org

Jackie,

Attached please find the proposed order of dismissal in the PCR case of Frank Simpson v. State. By copy of this email, I have also sent this proposed order to opposing counsel. Please let me know if you or the judge have any questions.

Karen C. Ratigan  
Senior Assistant Deputy Attorney General  
South Carolina Attorney General's Office  
P.O. Box 11549  
Columbia, SC 29211  
(803) 734-4042

|                          |   |                              |
|--------------------------|---|------------------------------|
| STATE OF SOUTH CAROLINA  | ) | IN THE COURT OF COMMON PLEAS |
|                          | ) | C.A. No. 2014-CP-23-0531     |
| COUNTY OF GREENVILLE     | ) |                              |
|                          | ) |                              |
| Frank Daniel Simpson,    | ) |                              |
| S.C.D.C. No. 354338,     | ) |                              |
|                          | ) |                              |
| Applicant,               | ) |                              |
|                          | ) | <b>ORDER OF DISMISSAL</b>    |
| v.                       | ) |                              |
|                          | ) |                              |
| State of South Carolina, | ) |                              |
|                          | ) |                              |
| Respondent.              | ) |                              |
|                          | ) |                              |

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed January 28, 2014. The Respondent made its return on March 26, 2014. An evidentiary hearing was held on December 17, 2014 at the Greenville County Courthouse. The Applicant was present and represented by E. Charles Grose, Jr., Esquire. Karen C. Ratigan, Esquire of the South Carolina Office of the Attorney General represented the Respondent.

The Applicant testified at the PCR hearing. Also testifying were Robert Simpson and the Applicant's plea counsel, Cameron G. Boggs, Esquire. The Court had before it the transcript of the guilty plea hearing, the Greenville County Clerk of Court records, the Applicant's South Carolina Department of Corrections records, the PCR application, the return, and Applicant's Exhibit 1.

**PROCEDURAL HISTORY**

The Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Greenville County Clerk of Court. The Applicant was indicted at the December 2011 term of the Greenville County Grand Jury for trafficking methamphetamine (2011-GS-23-9272). He was represented by Cameron G. Boggs, Esquire.

On February 13, 2013, the Applicant pled guilty to trafficking methamphetamine (28-100 grams), first offense. The Honorable Letitia H. Verdin sentenced the Applicant to nine years imprisonment. The Applicant did not appeal.

### ALLEGATIONS

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

1. Ineffective assistance of counsel:
  - a. "Plea counsel failed to prepare for Applicant's guilty plea.
  - b. "Plea counsel inaccurately advised Applicant about entering his guilty plea, the applicable penalties, and the authority of the sentencing judge."
  - c. "Plea counsel failed to present accurately available mitigation during the guilty plea and sentencing proceedings."

### 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 and arguments presented at the PCR hearing. This Court has further had the opportunity to observe each witness who testified at the hearing, and closely pass upon their credibility. This Court has weighed the testimony accordingly. Set forth below are the findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80 (2003).

#### Ineffective Assistance of Counsel

The Applicant alleges he received ineffective assistance of counsel. In a PCR action, "[t]he burden of proof is on the applicant to prove his allegations by a preponderance of the evidence." Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002).

For an applicant to be granted PCR as a result of ineffective assistance of counsel, he must show both: (1) that his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by his counsel's ineffective

performance. See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006). When there has been a guilty plea, the applicant must prove that counsel's representation was below the standard of reasonableness and that, but for counsel's unprofessional errors, there is a reasonable probability that he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 58-59, 106 S. Ct. 366, 370 (1985); Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001).

The Applicant stated he had numerous meetings with plea counsel. The Applicant stated he and plea counsel reviewed the State's evidence and his prior criminal record. The Applicant stated plea counsel told him the State had a strong case against him. The Applicant stated plea counsel asked if his family could pay any of his fines (the Applicant stated his brother could do so). The Applicant stated he knew the sentence to which he was pleading guilty carried a mandatory minimum seven-year sentence. The Applicant stated plea counsel said he would ask for a sentence of house arrest and GPS monitoring. The Applicant stated he was under the impression this was a possibility but not that he would receive such a sentence. The Applicant stated he would not have pled guilty if he had known he would not receive house arrest. The Applicant stated he was unhappy with plea counsel's performance but admitted he sent him an Easter card after the plea hearing.

Robert Simpson, the Applicant's twin brother, stated the Applicant had asked him whether he would be able to pay a fine on his behalf. Simpson stated he was at the Applicant's plea hearing.

Plea counsel testified he was the Applicant's second attorney. Plea counsel testified he met with the Applicant more than any other client that he did not take to trial. Plea counsel testified the Applicant was extremely intelligent and a drug abuser, not a dealer. Plea counsel

testified this case was never going to trial and that his role was to obtain the best deal possible and make a mitigation argument. Plea counsel testified he was able to negotiate a reduction of the second offense to a first offense. Plea counsel testified he prepared a sentencing memorandum for the plea judge (as well as another document listing mitigating factors) in which he requested a sentence of house arrest. Plea counsel testified both he and the Applicant were aware the Applicant's charge carried a mandatory minimum sentence of seven years but that he had seen sentences suspended before and that he would have to make this request if he had any hope for such a suspension. Plea counsel testified he never told the Applicant he would receive house arrest and that the Applicant would not have expected to receive a sentence of less than seven years. Plea counsel testified he did not tell the Applicant to rely upon the possibility of an illegal sentence and that the Applicant never expected anything other than a chance. Plea counsel testified the Applicant's family had the financial ability to pay any fines.

Initially, this Court notes the Applicant acknowledged to the plea judge that he was aware the sentence range for this offense was 7-30 years. (Plea transcript, p.7). The Applicant did not dispute the facts recited by the assistant solicitor. (Plea transcript, pp.18-19). The Applicant also told the plea judge that he understood the trial rights he was waiving in pleading guilty, was satisfied with counsel, and had not been coerced. (Plea transcript, pp.8-11). Specifically, the Applicant stated he was not made any promises in exchange for his guilty plea. (Plea transcript, p.9). This Court finds there is no evidence in the guilty plea transcript to support the Applicant's assertion that he had been misadvised (or made any promises) about the sentence he would receive; therefore the transcript has refuted this allegation. See Stalk v. State, 375 S.C. 289, 300, 652 S.E.2d 402, 407 (Ct. App. 2007); see also Rayford v. State, 314 S.C. 46, 48-49, 443 S.E.2d 805, 806 (1994) (where transcript of guilty plea proceeding refuted applicant's claim that he did

not understand the terms of a plea bargain, grant of PCR was inappropriate notwithstanding applicant's claim lawyer misadvised him).

This Court finds the Applicant failed to meet his burden of proving plea counsel was ineffective. Plea counsel testified he had more contact with the Applicant than with any other guilty plea client. Plea counsel testified the Applicant was extremely intelligent and aware of the sentence he was facing. Plea counsel testified he explained to the Applicant that he would request the plea judge suspend his sentence to house arrest and that the Applicant understood this was merely a request. Plea counsel testified the Applicant knew not to expect to receive a sentence of less than seven years. This Court finds plea counsel's testimony is credible. This Court finds plea counsel explained the sentencing scheme to the Applicant, as well as his strategy to ask the plea judge to depart from that scheme (as happens in federal court) in order to receive a sentence of house arrest. Plea counsel testified he had seen this particular plea judge depart from mandatory sentences in the past and that he prepared a sentencing memorandum to help persuade the plea judge to do so in this case. Plea counsel testified you cannot receive such a sentence unless you request it. This Court finds plea counsel articulated a valid reason that he asked for a departure from the mandatory minimum sentence in this case. See Roseboro v. State, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995) (finding where trial counsel articulates a valid reason for employing a certain strategy, such conduct should not be deemed ineffective assistance of counsel). This Court finds the Applicant was aware of this strategy – as well as the fact that he must assume he would still receive a sentence of at least seven years. This Court finds plea counsel was a zealous advocate for his client and presented a compelling mitigation argument to the plea judge. (Plea transcript, p.20-27). While the Applicant may have hoped for a sentence of house arrest, plea counsel did not promise that he would receive such. See Holden

v. State, 713 S.E.2d 611, 617, 393 S.C. 565, 575-76 (2011) (citation omitted) (“Wishful thinking regarding sentencing does not equal a misapprehension concerning the possible range of sentences, especially where one acknowledges on the record that one knows the range of sentences and that no promises have been made.”).

This Court finds the Applicant’s testimony that he would have gone to trial if he had realized he would not receive house arrest is not credible. The Applicant was aware of the sentence range (including the mandatory minimum sentence of seven years) for his offense. The Applicant also admitted that, while house arrest was presented as a possibility, it was never promised that he would receive this sentence. The Applicant failed to present any credible evidence or testimony that he would have chosen to proceed to a jury trial. See Hill v. Lockhart, 474 U.S. at 58-59, 106 S. Ct. at 370.

This Court also finds the Applicant cannot prove he was prejudiced as a result of plea counsel’s representation. Plea counsel’s strategy to request a departure from the mandatory minimum sentence (in favor of house arrest) cannot be viewed as having prejudiced the Applicant because the State had overwhelming evidence<sup>1</sup> of the Applicant’s guilt. See Geter v. State, 305 S.C. 365, 367, 409 S.E.2d 344, 346 (1991) (concluding reasonable probability of a different result does not exist when there is overwhelming evidence of guilt).

Accordingly, this Court finds the Applicant has failed to prove the first prong of the Strickland test – that plea counsel failed to render reasonably effective assistance under prevailing professional norms. The Applicant failed to present specific and compelling evidence that plea counsel committed either errors or omissions in his representation of the Applicant. This Court also finds the Applicant has failed to prove the second prong of Strickland – that he

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<sup>1</sup> Plea transcript, pp.18-19.

was prejudiced by plea counsel's performance. This Court concludes the Applicant has not met his burden of proving counsel failed to render reasonably effective assistance. See Frasier v. State, 351 S.C. at 389, 570 S.E.2d at 174.

#### 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 testimony, argument, or evidence at the hearing regarding such allegations. Accordingly, this Court finds the Applicant has abandoned any such allegations.

#### CONCLUSION

Based on all the foregoing, this Court finds and concludes the Applicant has not established any constitutional violations or deprivations before or during his guilty plea and sentencing proceedings. Counsel was not deficient in any manner and the Applicant was not prejudiced by counsel's representation. Therefore, this PCR application must be denied and dismissed with prejudice.

This Court advises the Applicant that he must file a notice of intent to appeal within thirty (30) days from the receipt of this Order if he wants to secure appropriate appellate review. His attention is also directed to Rules 203, 206, and 243 of the South Carolina Appellate Court Rules for the appropriate procedures to follow after notice of intent to appeal has been timely filed.

**IT IS THEREFORE ORDERED:**

1. That the application for post-conviction relief be denied and dismissed with prejudice; and
2. That the Applicant be remanded to the custody of the Respondent.

**AND IT IS SO ORDERED** this \_\_\_\_ day of \_\_\_\_\_, 2015.

\_\_\_\_\_  
Eugene C. Griffith, Jr.  
Presiding Judge  
Thirteenth Judicial Circuit

\_\_\_\_\_, South Carolina.

**Subject:** RE: Frank Daniel Simpson v. State of South Carolina 2014-CP-23-00531  
**Date:** Thursday, March 5, 2015 at 3:18:55 PM Eastern Standard Time  
**From:** Karen Ratigan  
**To:** Griffith, Eugene Secretary (Jacquelyn R. Lawrence), Charles Grose  
**CC:** Griffith, Eugene Law Clerk (Zachary E. Fry), Griffith, Eugene

Jackie,

I'm sorry I'm just now responding. Somehow your email ended up in my spam folder. Attached is the revised order.

Karen

---

**From:** Griffith, Eugene Secretary (Jacquelyn R. Lawrence) [mailto:egriffithsc@sccourts.org]  
**Sent:** Monday, March 02, 2015 12:33 PM  
**To:** Karen Ratigan; 'charles@groselawfirm.com'  
**Cc:** Griffith, Eugene Law Clerk (Zachary E. Fry); Griffith, Eugene  
**Subject:** RE: Frank Daniel Simpson v. State of South Carolina 2014-CP-23-00531

Ms. Ratigan,

Judge Griffith is requesting an Amended order for the above styled case. Please remove the following language, located on page 5, from the proposed order:

Plea counsel testified he had seen this particular judge depart from mandatory sentences in the past and that he prepared a sentencing memorandum to help persuade the plea judge to do so in this case. Plea counsel testified that you cannot receive such a sentence unless you request it.

If you should have any questions please contact me.

With kind regards.

Jackie Lawrence  
Administrative Assistant to  
Judge Eugene C. Griffith, Jr.  
8<sup>th</sup> Circuit  
P.O. Box 375  
1226 College Street  
Newberry, SC 29108

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**From:** Charles Grose [mailto:charles@groselawfirm.com]  
**Sent:** Thursday, February 12, 2015 10:29 AM  
**To:** Karen Ratigan; Griffith, Eugene Secretary (Jacquelyn R. Lawrence)  
**Cc:** Griffith, Eugene Law Clerk (Zachary E. Fry)  
**Subject:** Re: Proposed order

Dear Judge Griffith,

I have had a chance to review the proposed order, which appears to address the issues raised at the PCR hearing. Because we plan to appeal, I will have to make a Rule 59(e) motion.

I also want to make sure this order really reflects Your Honor's view of the facts. Specifically, I call your attention to this portion of page five:

This Court finds plea counsel explained the sentencing scheme to the Applicant, as well as his strategy to ask the plea judge to depart from that scheme (as happens in federal court) in order to receive a sentence of house arrest. Plea counsel testified he had seen this particular judge depart from mandatory sentences in the past and that he prepared a sentencing memorandum to help persuade the plea judge to do so in this case. Plea counsel testified that you cannot receive such a sentence unless you request it. The Court finds plea counsel articulated a valid reason that he asked for a departure for the mandatory minimum sentence in this case.

This portion is essentially a finding of fact that Judge Verdin violated in the past (and might do so again in the future) Rule 501, Cannon 3(B)(2) of the Code of Judicial Conduct, which provides, "A judge shall be faithful to the law and maintain professional competence in it. A judge shall not be swayed by partisan interests, public clamor or fear of criticism."

I am concerned this finding of fact might have consequences for Judge Verdin. I want to be on record as objecting to this finding because I don't think there is any credible evidence to support a belief that she would ignore enactments of the General Assembly.

Thank you for your attention to this matter.

Best,  
Charles

E. Charles Grose, Jr.  
The Grose Law Firm, LLC  
404 Main Street  
Greenwood, SC 29646  
Phone: 864-538-4466  
Fax: 864-538-4405  
Web: GroseLawFirm.com  
Email: [charles@groselawfirm.com](mailto:charles@groselawfirm.com)

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**From:** Karen Ratigan <[kratigan@scag.gov](mailto:kratigan@scag.gov)>  
**Date:** Monday, February 9, 2015 at 11:36 AM  
**To:** "[egriffithsc@sccourts.org](mailto:egriffithsc@sccourts.org)" <[egriffithsc@sccourts.org](mailto:egriffithsc@sccourts.org)>  
**Cc:** Charles Grose <[charles@groselawfirm.com](mailto:charles@groselawfirm.com)>, "'Griffith, Eugene Law Clerk (Gregory Close)'" <[egriffithlc@sccourts.org](mailto:egriffithlc@sccourts.org)>  
**Subject:** Proposed order

Jackie,

Attached please find the proposed order of dismissal in the PCR case of Frank Simpson v. State. By copy of this email, I have also sent this proposed order to opposing counsel. Please let me know if you or the judge have any questions.

Karen C. Ratigan

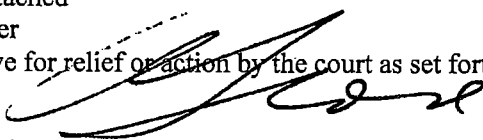
Senior Assistant Deputy Attorney General  
South Carolina Attorney General's Office  
P.O. Box 11549  
Columbia, SC 29211  
(803) 734-4042

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STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF Greenville )  
 )  
Frank Daniel Simpson, SCDC# 354338 )  
 Plaintiff, )  
 vs. )  
State of South Carolina )  
 Defendant. )

IN THE COURT OF COMMON PLEAS  
 13<sup>th</sup> JUDICIAL CIRCUIT  
 CASE NO.: 2014 -CP-23-0531

**MOTION AND ORDER INFORMATION  
 FORM AND COVERSHEET**

|  |   |   |   |  |  |  |  |  |  |   |  |                               |  |                                       |  |
|--|---|---|---|--|--|--|--|--|--|---|--|-------------------------------|--|---------------------------------------|--|
| Plaintiff's Attorney:<br><u>Charles Grose, Bar No. 66063</u><br>Address:<br><u>404 Main Street, Greenwood, SC 20646</u><br>Phone: <u>864-538-4466</u> Fax <u>864-538-4405</u><br>E-mail: <u>charles@groselawfirm.com</u> Other: _____  | Defendant's Attorney:<br><u>Karen Ratigan, Bar No. _____</u><br>Address:<br><u>P.O. Box 11549 Columbia, SC 29211</u><br>Phone: <u>(803) 734-4042</u> Fax _____<br>E-mail: <u>kratigan@scag.gov</u> Other: _____ |   |   |  |  |  |  |  |  |   |  |                               |  |                                       |  |
| <input type="checkbox"/> MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)<br><input checked="" type="checkbox"/> FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)<br><input type="checkbox"/> PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)  |   |   |   |  |  |  |  |  |  |   |  |                               |  |                                       |  |
| <b>SECTION I: Hearing Information</b>  |   |   |   |  |  |  |  |  |  |   |  |                               |  |                                       |  |
| Nature of Motion: <u>Rule 59(e), SCRCP</u><br>Estimated Time Needed: _____ Court Reporter Needed: <input type="checkbox"/> YES / <input type="checkbox"/> NO   |   |   |   |  |  |  |  |  |  |   |  |                               |  |                                       |  |
| <b>SECTION II: Motion/Order Type</b>   |   |   |   |  |  |  |  |  |  |   |  |                               |  |                                       |  |
| <input checked="" type="checkbox"/> Written motion attached<br><input type="checkbox"/> Form Motion/Order<br>I hereby move for relief or action by the court as set forth in the attached proposed order.  |   |   |   |  |  |  |  |  |  |   |  |                               |  |                                       |  |
| <br>Signature of Attorney for <input checked="" type="checkbox"/> Plaintiff / <input type="checkbox"/> Defendant  | March 30, 2015<br>Date submitted  |   |   |  |  |  |  |  |  |   |  |                               |  |                                       |  |
| <b>SECTION III: Motion Fee</b>   |   |   |   |  |  |  |  |  |  |   |  |                               |  |                                       |  |
| <input type="checkbox"/> PAID – AMOUNT: \$ _____<br><input type="checkbox"/> EXEMPT: (check reason) <table style="width:100%; border: none;"> <tr> <td><input type="checkbox"/> Rule to Show Cause in Child or Spousal Support</td> <td><input type="checkbox"/> State Agency v. Indigent Party</td> </tr> <tr> <td><input type="checkbox"/> Domestic Abuse or Abuse and Neglect</td> <td><input checked="" type="checkbox"/> Post-Conviction Relief</td> </tr> <tr> <td><input type="checkbox"/> Indigent Status</td> <td><input type="checkbox"/> Motion for Stay in Bankruptcy</td> </tr> <tr> <td><input type="checkbox"/> Sexually Violent Predator Act</td> <td><input type="checkbox"/> Motion for Execution (Rule 69, SCRCP)</td> </tr> <tr> <td><input type="checkbox"/> Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions</td> <td></td> </tr> <tr> <td colspan="2">Name of Court Reporter: _____</td> </tr> <tr> <td colspan="2"><input type="checkbox"/> Other: _____</td> </tr> </table> |   | <input type="checkbox"/> Rule to Show Cause in Child or Spousal Support | <input type="checkbox"/> State Agency v. Indigent Party | <input type="checkbox"/> Domestic Abuse or Abuse and Neglect | <input checked="" type="checkbox"/> Post-Conviction Relief | <input type="checkbox"/> Indigent Status | <input type="checkbox"/> Motion for Stay in Bankruptcy | <input type="checkbox"/> Sexually Violent Predator Act | <input type="checkbox"/> Motion for Execution (Rule 69, SCRCP) | <input type="checkbox"/> 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: _____ |  | <input type="checkbox"/> Other: _____ |  |
| <input type="checkbox"/> Rule to Show Cause in Child or Spousal Support  | <input type="checkbox"/> State Agency v. Indigent Party   |   |   |  |  |  |  |  |  |   |  |                               |  |                                       |  |
| <input type="checkbox"/> Domestic Abuse or Abuse and Neglect   | <input checked="" type="checkbox"/> Post-Conviction Relief  |   |   |  |  |  |  |  |  |   |  |                               |  |                                       |  |
| <input type="checkbox"/> Indigent Status   | <input type="checkbox"/> Motion for Stay in Bankruptcy  |   |   |  |  |  |  |  |  |   |  |                               |  |                                       |  |
| <input type="checkbox"/> Sexually Violent Predator Act   | <input type="checkbox"/> Motion for Execution (Rule 69, SCRCP)  |   |   |  |  |  |  |  |  |   |  |                               |  |                                       |  |
| <input type="checkbox"/> 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: _____  |   |   |   |  |  |  |  |  |  |   |  |                               |  |                                       |  |
| <input type="checkbox"/> Other: _____  |   |   |   |  |  |  |  |  |  |   |  |                               |  |                                       |  |
| <b>JUDGE'S SECTION</b><br><input type="checkbox"/> Motion Fee to be paid upon filing of the attached order.<br><input type="checkbox"/> Other: _____   | JUDGE CODE _____<br>Date: _____   |   |   |  |  |  |  |  |  |   |  |                               |  |                                       |  |
| <b>CLERK'S VERIFICATION</b>  |   |   |   |  |  |  |  |  |  |   |  |                               |  |                                       |  |
| Collected by: _____ Date Filed: _____<br><input type="checkbox"/> MOTION FEE COLLECTED: \$ _____<br><input type="checkbox"/> CONTESTED – AMOUNT DUE: \$ _____  |   |   |   |  |  |  |  |  |  |   |  |                               |  |                                       |  |

STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF GREENVILLE )  
 )  
 Frank Daniel Simpson, )  
 S.C.D.C. No. 354338, )  
 )  
 Applicant, )  
 )  
 v. )  
 )  
 State of South Carolina, )  
 )  
 Respondent. )  
 \_\_\_\_\_ )

IN THE COURT OF COMMON PLEAS  
 C.A. No. 2014-CP-23-0531

**ORDER OF DISMISSAL**

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed January 28, 2014. The Respondent made its return on March 26, 2014. An evidentiary hearing was held on December 17, 2014 at the Greenville County Courthouse. The Applicant was present and represented by E. Charles Grose, Jr., Esquire. Karen C. Ratigan, Esquire of the South Carolina Office of the Attorney General represented the Respondent.

The Applicant testified at the PCR hearing. Also testifying were Robert Simpson and the Applicant's plea counsel, Cameron G. Boggs, Esquire. The Court had before it the transcript of the guilty plea hearing, the Greenville County Clerk of Court records, the Applicant's South Carolina Department of Corrections records, the PCR application, the return, and Applicant's Exhibit 1.

**PROCEDURAL HISTORY**

The Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Greenville County Clerk of Court. The Applicant was indicted at the December 2011 term of the Greenville County Grand Jury for trafficking methamphetamine (2011-GS-23-9272). He was represented by Cameron G. Boggs, Esquire.

On February 13, 2013, the Applicant pled guilty to trafficking methamphetamine (28-100 grams), first offense. The Honorable Letitia H. Verdin sentenced the Applicant to nine years imprisonment. The Applicant did not appeal.

### ALLEGATIONS

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

1. Ineffective assistance of counsel:
  - a. "Plea counsel failed to prepare for Applicant's guilty plea.
  - b. "Plea counsel inaccurately advised Applicant about entering his guilty plea, the applicable penalties, and the authority of the sentencing judge."
  - c. "Plea counsel failed to present accurately available mitigation during the guilty plea and sentencing proceedings."

### 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 and arguments presented at the PCR hearing. This Court has further had the opportunity to observe each witness who testified at the hearing, and closely pass upon their credibility. This Court has weighed the testimony accordingly. Set forth below are the findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80 (2003).

#### Ineffective Assistance of Counsel

The Applicant alleges he received ineffective assistance of counsel. In a PCR action, "[t]he burden of proof is on the applicant to prove his allegations by a preponderance of the evidence." Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002).

For an applicant to be granted PCR as a result of ineffective assistance of counsel, he must show both: (1) that his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by his counsel's ineffective

performance. See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006). When there has been a guilty plea, the applicant must prove that counsel's representation was below the standard of reasonableness and that, but for counsel's unprofessional errors, there is a reasonable probability that he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 58-59, 106 S. Ct. 366, 370 (1985); Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001).

The Applicant stated he had numerous meetings with plea counsel. The Applicant stated he and plea counsel reviewed the State's evidence and his prior criminal record. The Applicant stated plea counsel told him the State had a strong case against him. The Applicant stated plea counsel asked if his family could pay any of his fines (the Applicant stated his brother could do so). The Applicant stated he knew the sentence to which he was pleading guilty carried a mandatory minimum seven-year sentence. The Applicant stated plea counsel said he would ask for a sentence of house arrest and GPS monitoring. The Applicant stated he was under the impression this was a possibility but not that he would receive such a sentence. The Applicant stated he would not have pled guilty if he had known he would not receive house arrest. The Applicant stated he was unhappy with plea counsel's performance but admitted he sent him an Easter card after the plea hearing.

Robert Simpson, the Applicant's twin brother, stated the Applicant had asked him whether he would be able to pay a fine on his behalf. Simpson stated he was at the Applicant's plea hearing.

Plea counsel testified he was the Applicant's second attorney. Plea counsel testified he met with the Applicant more than any other client that he did not take to trial. Plea counsel testified the Applicant was extremely intelligent and a drug abuser, not a dealer. Plea counsel

testified this case was never going to trial and that his role was to obtain the best deal possible and make a mitigation argument. Plea counsel testified he was able to negotiate a reduction of the second offense to a first offense. Plea counsel testified he prepared a sentencing memorandum for the plea judge (as well as another document listing mitigating factors) in which he requested a sentence of house arrest. Plea counsel testified both he and the Applicant were aware the Applicant's charge carried a mandatory minimum sentence of seven years but that he had seen sentences suspended before and that he would have to make this request if he had any hope for such a suspension. Plea counsel testified he never told the Applicant he would receive house arrest and that the Applicant would not have expected to receive a sentence of less than seven years. Plea counsel testified he did not tell the Applicant to rely upon the possibility of an illegal sentence and that the Applicant never expected anything other than a chance. Plea counsel testified the Applicant's family had the financial ability to pay any fines.

Initially, this Court notes the Applicant acknowledged to the plea judge that he was aware the sentence range for this offense was 7-30 years. (Plea transcript, p.7). The Applicant did not dispute the facts recited by the assistant solicitor. (Plea transcript, pp.18-19). The Applicant also told the plea judge that he understood the trial rights he was waiving in pleading guilty, was satisfied with counsel, and had not been coerced. (Plea transcript, pp.8-11). Specifically, the Applicant stated he was not made any promises in exchange for his guilty plea. (Plea transcript, p.9). This Court finds there is no evidence in the guilty plea transcript to support the Applicant's assertion that he had been misadvised (or made any promises) about the sentence he would receive; therefore the transcript has refuted this allegation. See Stalk v. State, 375 S.C. 289, 300, 652 S.E.2d 402, 407 (Ct. App. 2007); see also Rayford v. State, 314 S.C. 46, 48-49, 443 S.E.2d 805, 806 (1994) (where transcript of guilty plea proceeding refuted applicant's claim that he did

not understand the terms of a plea bargain, grant of PCR was inappropriate notwithstanding applicant's claim lawyer misadvised him).

This Court finds the Applicant failed to meet his burden of proving plea counsel was ineffective. Plea counsel testified he had more contact with the Applicant than with any other guilty plea client. Plea counsel testified the Applicant was extremely intelligent and aware of the sentence he was facing. Plea counsel testified he explained to the Applicant that he would request the plea judge suspend his sentence to house arrest and that the Applicant understood this was merely a request. Plea counsel testified the Applicant knew not to expect to receive a sentence of less than seven years. This Court finds plea counsel's testimony is credible. This Court finds plea counsel explained the sentencing scheme to the Applicant, as well as his strategy to ask the plea judge to depart from that scheme (as happens in federal court) in order to receive a sentence of house arrest. This Court finds plea counsel articulated a valid reason that he asked for a departure from the mandatory minimum sentence in this case. See Roseboro v. State, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995) (finding where trial counsel articulates a valid reason for employing a certain strategy, such conduct should not be deemed ineffective assistance of counsel). This Court finds the Applicant was aware of this strategy – as well as the fact that he must assume he would still receive a sentence of at least seven years. This Court finds plea counsel was a zealous advocate for his client and presented a compelling mitigation argument to the plea judge. (Plea transcript, p.20-27). While the Applicant may have hoped for a sentence of house arrest, plea counsel did not promise that he would receive such. See Holden v. State, 713 S.E.2d 611, 617, 393 S.C. 565, 575-76 (2011) (citation omitted) (“Wishful thinking regarding sentencing does not equal a misapprehension concerning the possible range of sentences, especially where one acknowledges on the record that one knows the range of

sentences and that no promises have been made.”).

This Court finds the Applicant’s testimony that he would have gone to trial if he had realized he would not receive house arrest is not credible. The Applicant was aware of the sentence range (including the mandatory minimum sentence of seven years) for his offense. The Applicant also admitted that, while house arrest was presented as a possibility, it was never promised that he would receive this sentence. The Applicant failed to present any credible evidence or testimony that he would have chosen to proceed to a jury trial. See Hill v. Lockhart, 474 U.S. at 58-59, 106 S. Ct. at 370.

This Court also finds the Applicant cannot prove he was prejudiced as a result of plea counsel’s representation. Plea counsel’s strategy to request a departure from the mandatory minimum sentence (in favor of house arrest) cannot be viewed as having prejudiced the Applicant because the State had overwhelming evidence<sup>1</sup> of the Applicant’s guilt. See Geter v. State, 305 S.C. 365, 367, 409 S.E.2d 344, 346 (1991) (concluding reasonable probability of a different result does not exist when there is overwhelming evidence of guilt).

Accordingly, this Court finds the Applicant has failed to prove the first prong of the Strickland test – that plea counsel failed to render reasonably effective assistance under prevailing professional norms. The Applicant failed to present specific and compelling evidence that plea counsel committed either errors or omissions in his representation of the Applicant. This Court also finds the Applicant has failed to prove the second prong of Strickland – that he was prejudiced by plea counsel’s performance. This Court concludes the Applicant has not met his burden of proving counsel failed to render reasonably effective assistance. See Frasier v. State, 351 S.C. at 389, 570 S.E.2d at 174.

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<sup>1</sup> Plea transcript, pp.18-19.

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 testimony, argument, or evidence at the hearing regarding such allegations. Accordingly, this Court finds the Applicant has abandoned any such allegations.

CONCLUSION

Based on all the foregoing, this Court finds and concludes the Applicant has not established any constitutional violations or deprivations before or during his guilty plea and sentencing proceedings. Counsel was not deficient in any manner and the Applicant was not prejudiced by counsel's representation. Therefore, this PCR application must be denied and dismissed with prejudice.

This Court advises the Applicant that he must file a notice of intent to appeal within thirty (30) days from the receipt of this Order if he wants to secure appropriate appellate review. His attention is also directed to Rules 203, 206, and 243 of the South Carolina Appellate Court Rules for the appropriate procedures to follow after notice of intent to appeal has been timely filed.

**IT IS THEREFORE ORDERED:**

1. That the application for post-conviction relief be denied and dismissed with prejudice; and
2. That the Applicant be remanded to the custody of the Respondent.

**AND IT IS SO ORDERED** this \_\_\_\_\_ day of \_\_\_\_\_, 2015.

\_\_\_\_\_  
Eugene C. Griffith, Jr.  
Presiding Judge  
Thirteenth Judicial Circuit

\_\_\_\_\_, South Carolina.