



DANIEL A. SELWA, II
Attorney at Law, L.L.C.

LITIGATION OFFICE
516 29TH AVENUE NORTH
MYRTLE BEACH, S.C. 29577
OFFICE: (843) 492-5449
FAX: (843) 353-0683
MOBILE: (843) 450-7566

REAL ESTATE OFFICE
302 MAIN STREET
N. MYRTLE BEACH, S.C. 29582
OFFICE: (843) 281-2156
FAX: (843) 281-2159
SELWA@SCLAWYERS.NET

WWW.SCLAWYERS.NET

January 29, 2018

Daniel E. Shearouse
Clerk of Court – SC Supreme Court
Supreme Court
P.O. Box 11330
Columbia, SC 29211

RECEIVED

FEB 02 2018

S.C. SUPREME COURT

Re: DeVante Simmons #363222 v. State of South Carolina
2016-CP-26-0800

Dear Mr. Shearouse:

Enclosed please find the original Notice of Appeal in the above-entitled action and one copy. Please file and return the copy to me in the self addressed stamped envelope enclosed.

If you should have any questions or concerns, please do not hesitate to contact me.

Sincerely,

Daniel A. Selwa, II

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

FEB 02 2018

APPEAL FROM HORRY COUNTY
Court of Common Pleas

S.C. SUPREME COURT

Honorable William H. Seals, Jr., Circuit Court Judge

Case No.: 2016-CP-26-0800

DeVante Simmons #363222,..... Petitioner,

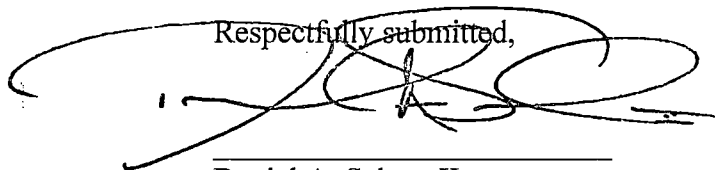
v.

State of South Carolina,..... Respondent.

NOTICE OF APPEAL

The Petitioner appeals the Honorable William H. Seals, Jr., September 21, 2017, order, denying the Applicant's Petition for post-conviction relief. Undersigned counsel received notice of entry of the order on January 29, 2018. A copy of the order on appeal is attached to this notice.

Respectfully submitted,



Daniel A. Selwa, II
516 29th Avenue North
Myrtle Beach, SC 29577
Attorney for the PCR Applicant

January 29, 2018

Other counsel of record:

Alan Wilson, Attorney General

Joshua L. Thomas, Assistant Attorney General

Post Office Box 11549

Columbia, SC 29211-1549

RECEIVED

FEB 02 2018

THE STATE OF SOUTH CAROLINA
In The Supreme Court

S.C. SUPREME COURT

APPEAL FROM HORRY COUNTY
Honorable William H. Seals, Jr., Circuit Court Judge

Case No.: 2016-CP-26-0800

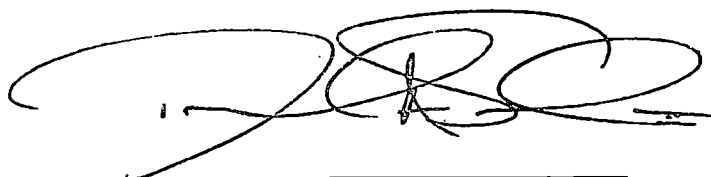
DeVante Simmons #363222,..... Petitioner,

v.

State of South Carolina,..... Respondent.

PROOF OF SERVICE

I, Daniel A. Selwa, II, certify that I have served the within Notice of Appeal on the Respondent, the State of South Carolina, by depositing a copy of the same in the United States Mail, postage prepaid, addressed to his attorney of record, Alan Wilson, Attorney General, Post Office Box 11549, Columbia, SC 29211-1549. I further certify that all parties required by Rule to be served have been served this 29th day of January 2018.



Daniel A. Selwa, II
516 29th Avenue North
Myrtle Beach, SC 29577
Attorney for the PCR Applicant




DANIEL A. SELWA, II
 ATTORNEY AT LAW, L.L.C.

516 29th Avenue North
 Myrtle Beach, SC 29577

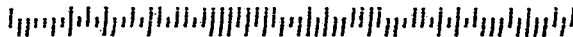
000000000000
 000000000000
 000000000000
 000000000000



UNITED STATES POSTAGE

 PITNEY BOWES
 02 1P \$000.68⁰
 0000702258 JAN 29 2018
 MAILED FROM ZIP CODE 29577

Daniel E. Shearouse
 Clerk of Court -- SC Supreme Court
 Supreme Court
 P.O. Box 11330
 Columbia, SC 29211

29211-133030





ALAN WILSON
ATTORNEY GENERAL

January 10, 2018

The Honorable Renee N. Elvis
Clerk of Court, Horry County
Post Office Box 677
Conway, SC 29528-0677

FILED
HORRY COUNTY
2018 JAN 12 PM 2 40
CLERK OF COURT
HORRY COUNTY, SC

Re: DeVante Simmons, #363222 v. State of South Carolina
2016-CP-26-0800

Dear Ms. Elvis:

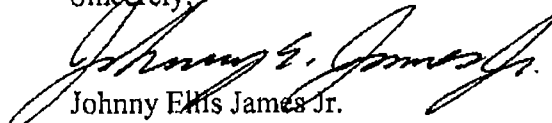
Enclosed please find the original **Order of Dismissal** signed by the Honorable William H. Scals, Jr., in the above-captioned case, for filing in your office.

Pursuant to Rule 71.1(f), of the South Carolina Rules of Civil Procedure, please "provide notice of entry of judgment and serve a copy of the order or judgment to the parties as provided in Rule 77(d), SCRPC."

In addition, please forward proof of service and a time stamped copy back to our office for our file.

Should you have any questions, please do not hesitate to call me at (803) 734-3737.

Sincerely,


Johnny Ellis James Jr.
Assistant Attorney General

JEJ/mm

Enclosure

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	FOR THE FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY)	
DeVante Simmons,)	Case No.: 2016-CP-26-00800
S.C.D.C. No. 363222,)	
)	
Applicant,)	
)	ORDER OF DISMISSAL
v.)	
)	
State of South Carolina,)	
)	
Respondent.)	
)	

FILED
 2018 JAN 12 PM 2:40
 CLERK OF COURT
 HORRY COUNTY, SC

This matter comes before the Court by way of an application for post-conviction relief filed by DeVante Jamal Simmons (“Applicant”) on February 4, 2016. Respondent made its return on or about June 23, 2017. The Court convened an evidentiary hearing into the matter on Thursday, September 21, 2017, at the Horry County Courthouse in Conway, South Carolina. Applicant was present at the hearing and represented by Daniel A. Selwa, II, Esq. Johnny Ellis James Jr., of the South Carolina Attorney General’s Office, represented Respondent.

Applicant testified on his own behalf at the evidentiary hearing. Applicant’s plea counsel, James C. Galmore, III, Esq. (“Counsel”) also testified. The Court had before it Applicant’s records from the South Carolina Department of Corrections, a copy of the original plea transcript, the records of the Horry County Clerk of Court regarding the subject convictions, and the pleadings. The Court finds as follows:

I. PROCEDURAL HISTORY

Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Horry County Clerk of Court. Applicant was indicted at the September 2014 term of the Horry County Grand Jury for attempted murder (2014-GS-26-03562), and

further indicted at the December 2014 term for distribution of cocaine base (2014-GS-26-05087). James C. Galmore, III, Esq. represented Applicant, and Michael Travis Hyman, of the Fifteenth Circuit Solicitor's Office, prosecuted the case. On February 26, 2015, Applicant pled guilty to distribution of cocaine base, as indicted, and to assault and battery of a high and aggravated nature, as a lesser-included offense of attempted murder. Consistent with the recommendation of the State, the Honorable Larry B. Hyman sentenced Applicant to imprisonment for concurrent terms of 10 years on each charge. Applicant did not appeal his plea or sentence.

Present Application

In his post-conviction relief application, Applicant alleges he is being held unlawfully for the following reasons:

1. Ineffective Assistance of Counsel;
 - a. "Coerced plea agreement."
 - b. "Failure to request motion on self-defense and/or actual innocence."
2. Court error;
 - a. "I was denied my preliminary hearing after requested under SC Code."

At the evidentiary hearing, Applicant withdrew the allegation of trial court error and proceeded only upon his allegation that his plea was coerced by the misadvice of counsel.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, this Court has reviewed the records submitted to it by the parties and the legal arguments made by the attorneys. Pursuant to S.C. Code Ann. § 17-27-80, this Court makes the following findings based upon all of the probative evidence presented.

A. Ineffective Assistance of Counsel

In a post-conviction relief action, an applicant has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRPC; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant alleges ineffective assistance of counsel as a ground for relief, he or she must prove “counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result.” Butler at 442, 334 S.E.2d 441 (quoting Strickland v. Washington, 466 U.S. 668, 686 (1984)). The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Id.

“[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” Butler at 442, 334 S.E.2d 441 (quoting Strickland at 690). The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989). “Judicial scrutiny of counsel’s performance must be highly deferential, as it is all too tempting for a defendant to second-guess counsel’s assistance after conviction or an adverse sentence, and it is all too easy for a court, examining counsel’s defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable.” Strickland, 466 U.S. at 689; Edwards v. State, 392 S.C. 449, 456-57, 710 S.E.2d 60, 64 (2011). “[W]hen counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel.” Smith v. State, 386 S.C. 562, 567, 689 S.E.2d 629, 632 (2010) (citing Caprood v. State, 338 S.C. 103, 110, 525 S.E.2d 514, 517 (2000)).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel’s performance was deficient. Under this

prong, attorney performance is measured by its "reasonableness under professional norms." Cherry at 117, 386 S.E.2d at 625 (citing Strickland at 688). Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry at 117-18, 386 S.E.2d at 625 (citing Strickland at 694). With respect to guilty plea counsel, Applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pleaded guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 59 (1985).

The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. Strickland at 696. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies; if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 466 U.S. at 696-97.

IAC Allegation #1 – Affirmative Misadvice as to Parole Eligibility

Applicant alleges Counsel affirmatively misadvised him regarding his parole eligibility if he accepted the State's offer and pled guilty. Parole eligibility is typically a collateral consequence of sentencing. Smith v. State, 329 S.C. 280, 283, 494 S.E.2d 626, 628 (1997) (citing Griffin v. Martin, 278 S.C. 620, 300 S.E.2d 482 (1983)). However, an allegation that counsel improperly advised a client regarding parole eligibility is cognizable in a PCR action. Id., see also Coats v. State, 352 S.C. 500, 503, 575 S.E.2d 557, 558 (2003). "[I]f trial counsel actively misinforms the defendant about parole eligibility, the defendant must prove he relied on

the misinformation to receive PCR.” Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174-75 (2002).

At the evidentiary hearing, Applicant testified Counsel communicated a plea offer in which he would receive a 10-year, parole eligible sentence. In support of his claim, applicant produced a letter dated January 5, 2015, signed by Counsel which read, in part: “He said they would reduce the attempted murder charge to assault and battery and drop all the other charges if you plead to one (1) drug charge. Basically, they are making you a ten (10) year *parole eligible* plea, and they are giving you third (30) days to think about it.” See Applicant’s Ex. 1. After pleading to ABHAN, Applicant learned in jail that he was not eligible for parole. Notably, Applicant indicated he really only wished for a reconsideration of his sentence.

Counsel confirmed sending the erroneous letter. Counsel testified he had no specific notes to show he ever corrected the letter and could not recall ever correcting the letter. Importantly, however, Counsel testified that he tells every client to expect to serve every day of the sentences they receive.

The Court finds Applicant has met his burden in showing deficiency on the part of Counsel. The uncontroverted testimony and letter show that Applicant was told he would be pleading in exchange for a parole-eligible sentence. The Court finds, however, that Applicant has not met his burden in showing prejudice by proving he relied upon that misinformation. The Court places great weight on Counsel’s testimony that he advised Applicant to expect to serve every day of the sentence he would receive. Relying upon the advice of counsel, Applicant had every expectation that he would serve the full term of the 10 year sentence.

Furthermore, Applicant’s testimony indicating he wished only for reconsideration conflicts with his other testimony that he would not have pled if he had known he would not get

parole. Based upon that testimony, as well as upon this Court's observations of Applicant's testimony and courtroom demeanor, the Court finds nothing credible in Applicant's claim that he would not have pled but for Counsel's misadvice. Applicant would have pled guilty anyway. Applicant has failed to show prejudice resulting from Counsel's deficiency and, accordingly, his request for relief by way of this allegation is **DENIED**.

III. CONCLUSION

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

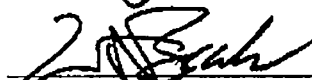
This Court notifies the Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCR provides that if the Applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

[Signature on following page]


IT IS THEREFORE ORDERED:

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

AND IT IS SO ORDERED this 5 day of Jan., 2018.



WILLIAM H. SEALS, JR.
Presiding Judge
Fifteenth Judicial Circuit

, South Carolina

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF HORRY)

DeVante Simmons, #363222)

CASE NO.
2016-CP-26-0800

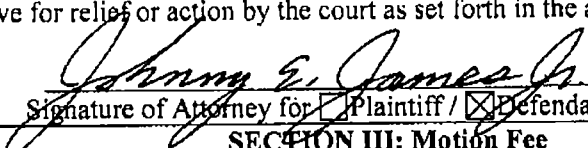
Plaintiff)

v.)

MOTION AND ORDER INFORMATION
FORM AND COVER SHEET

State Of South Carolina)

Defendant.)

Plaintiff's Attorney: Daniel A. Selwa, II, Bar No. 71976 Address: 516 29 th Ave N. Myrtle Beach, SC 29577 phone: fax: e-mail: other:	Defendant's Attorney: Johnny E. James Jr, Bar No. 101260 Address: Post Office Box 11549 Columbia SC 29211-1549 phone: (803) 734-3737 fax: (803) 734-4113 e-mail: other:
<input type="checkbox"/> MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III) <input type="checkbox"/> FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III) <input checked="" type="checkbox"/> PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)	
SECTION I: Hearing Information	
Nature of Motion: Estimated Time Needed: Court Reporter Needed: <input type="checkbox"/> YES / <input type="checkbox"/> NO	
SECTION II: Motion/Order Type	
<input type="checkbox"/> Written motion attached <input checked="" type="checkbox"/> Form Motion/Order I hereby move for relief or action by the court as set forth in the attached proposed order.	
 Signature of Attorney for <input type="checkbox"/> Plaintiff / <input checked="" type="checkbox"/> Defendant	January 2, 2018 Date submitted
SECTION III: Motion Fee	
<input type="checkbox"/> PAID - AMOUNT: <input checked="" type="checkbox"/> EXEMPT: <input type="checkbox"/> Rule to Show Cause in Child or Spousal Support (check reason) <input type="checkbox"/> Domestic Abuse or Abuse and Neglect <input type="checkbox"/> Indigent Status <input type="checkbox"/> State Agency v. Indigent Party <input type="checkbox"/> Sexually Violent Predator Act <input checked="" type="checkbox"/> Post-Conviction Relief <input type="checkbox"/> Motion for Stay in Bankruptcy <input type="checkbox"/> Motion for Publication <input type="checkbox"/> Motion for Execution (Rule 69, SCRPC) <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:	
JUDGE'S SECTION	
<input type="checkbox"/> Motion Fee to be paid upon filing of the attached order. <input type="checkbox"/> Other:	_____ JUDGE CODE: _____ Date: _____
CLERK'S VERIFICATION	
Date Filed: _____	
Collected by: _____ <input type="checkbox"/> MOTION FEE COLLECTED: _____ <input type="checkbox"/> CONTESTED - AMOUNT DUE: _____	

FILED
 2018 JAN 11
 11:40
 PH 2
 COUNTY, SC