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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

—————
Certiorari to Horry County

William H. Seals, Circuit Court Judge

—————
DEVANTE SIMMONS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2018-000150

—————
APPENDIX
—————

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STATE OF SOUTH CAROLINA) IN THE COURT OF GENERAL SESSIONS

COUNTY OF HORRY) 2014-GS-26-5087,03562

STATE OF SOUTH CAROLINA,)

Plaintiff,) Transcript of Record

vs.) February 26, 2015

DEVANTE SIMMONS,)

Defendant.)

B E F O R E:

Honorable Larry B. Hyman
Horry County Courthouse
Conway, South Carolina

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

Michael Travis Hyman, Esquire
Attorney for Plaintiff

James C. Galmore, III, Esquire
Attorney for Defendant

Kay H. Richardson
Circuit Court Reporter

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I N D E X

FEBRUARY 26, 2015 - Pg.

DeVante Simmons

By the Court

Sentence of the Court

Certificate of Court Reporter

E X H I B I T S

No. ID EV

(No Exhibits were marked during hearing.)

State v. Simmons - 2014-GS-26-5087, 3562
DEVANTE SIMMONS - BY THE COURT

3

1 (February 26, 2015)

2 MR. HYMAN: Judge, the first matter is the State of South
3 Carolina versus Devante Jamal Simmons.

4 DEVANTE SIMMONS, HAVING BEEN DULY
5 SWORN, TESTIFIES AS FOLLOWS:

6 MR. HYMAN: Your Honor, this is the State versus DeVante
7 Simmons. He is pleading guilty to two charges here today.
8 The first charge is assault and battery of a high and
9 aggravated nature, that's 2014-GS-26-03562. Also pleading
10 guilty of distribution of cocaine base, first offense, that's
11 indictment number 2014-GS-26-05087. The State's
12 recommendation is a ten-year sentence to run concurrent. This
13 matter was before you yesterday for an arraignment and you
14 gave Mr. Simmons until 5 o'clock to accept the offer.

15 THE COURT: All right. Mr. Simmons, you are represented
16 by Mr. Galmore, I see.

17 MR. SIMMONS: Yes, sir.

18 THE COURT: And now have you had an opportunity to
19 discuss your case with him?

20 MR. SIMMONS: Yes, sir.

21 THE COURT: Has he explained to you these charges and
22 what you could receive for the charges that you are pleading
23 to?

24 MR. SIMMONS: Yes, sir.

25 THE COURT: The distribution of cocaine base or crack

State v. Simmons - 2014-GS-26-5087, 3562
DEVANTE SIMMONS - BY THE COURT

4

1 cocaine. That carries up to fifteen years and the assault and
2 battery of a high and aggravated nature carries up to twenty.

3 Were you aware of that?

4 MR. SIMMONS: Yes, sir.

5 THE COURT: Okay. Now, I explained to you yesterday, I
6 believe that you were entitled absolutely to a jury trial. Do
7 you remember that?

8 MR. SIMMONS: Yes, sir.

9 THE COURT: Do you understand that you don't have to
10 plead guilty? We had an arraignment and we talked about your
11 desire for guilty, I mean, a jury trial. Do you understand
12 that you could have one but you can, as another option, plead
13 guilty; do you understand?

14 MR. SIMMONS: Yes, sir.

15 THE COURT: And Mr. Simmons, do you realize that if you
16 plead guilty today, you waive, you give up your right to a
17 jury trial; do you understand?

18 MR. SIMMONS: Yes, sir.

19 THE COURT: Okay. And if you give up your right to a
20 jury trial, Mr. Simmons, you give up many rights that go along
21 with it. You give up rights like your right to remain silent.
22 In a trial, no one could make you testify and, if you chose
23 not to testify, I would tell the Jury they couldn't use that
24 against you and, as I said, you could choose not to testify.
25 You obviously could testify if you wanted to. You would also

State v. Simmons - 2014-GS-26-5087, 3562
DEVANTE SIMMONS - BY THE COURT

5

1 have the right to acquire the State to prove your guilt beyond
2 a reasonable doubt. You know, in a plea, the State doesn't
3 have to prove anything by evidence to me, the State, you know,
4 tells me what the basis of the plea is. And if you are
5 pleading guilty, that's the extent of it, they don't have to
6 produce evidence and convince anyone beyond a reasonable
7 doubt. Do you understand that?

8 MR. SIMMONS: Yes, sir.

9 THE COURT: Knowing that you have these rights and I'll
10 tell you there are many others that go along with it. You
11 have these rights, you have the right to a jury trial, but if
12 you plead guilty, you waive your right to a jury trial and
13 these collateral rights that go with it. Is that what you
14 want to do?

15 MR. SIMMONS: Yes, sir.

16 THE COURT: Okay. Are you satisfied with Mr. Galmore?

17 MR. SIMMONS: Yes, sir.

18 THE COURT: Has he done everything that you think he
19 could to help you?

20 MR. SIMMONS: Yes, sir.

21 THE COURT: Do you need any more time with Mr. Galmore?

22 MR. SIMMONS: No, sir.

23 THE COURT: All right, sir. Now, Mr. Simmons, I see
24 you're twenty-two years of age; is that correct?

25 MR. SIMMONS: Yes, sir.

State v. Simmons - 2014-GS-26-5087, 3562
DEVANTE SIMMONS - BY THE COURT

6

1 THE COURT: And you're from over in Myrtle Beach?

2 MR. SIMMONS: Yes, sir.

3 THE COURT: Have you always lived in Myrtle Beach?

4 MR. SIMMONS: Yes, sir.

5 THE COURT: Okay. How far did you go in school, Mr.

6 Simmons?

7 MR. SIMMONS: I graduated.

8 THE COURT: Are you married?

9 MR. SIMMONS: Huh-uh (negative response).

10 THE COURT: Do you have any children?

11 MR. SIMMONS: Yes, sir, I've got a couple of kids.

12 THE COURT: And do you live with any of your children?

13 MR. SIMMONS: Yes, sir.

14 THE COURT: How many of them live with you?

15 MR. SIMMONS: Huh?

16 THE COURT: How many of them live with you?

17 MR. SIMMONS: All three, sir.

18 THE COURT: All three. Do you live with their mother?

19 MR. SIMMONS: Yes, sir.

20 THE COURT: Mr. Simmons, tell me, do you work?

21 MR. SIMMONS: Yes, sir.

22 THE COURT: What kind of work do you do?

23 MR. SIMMONS: I do landscaping. I was doing pressure
24 washing and I was out working at Coral Beach Resorts before I
25 got caught.

State v. Simmons - 2014-GS-26-5087, 3562
DEVANTE SIMMONS - BY THE COURT

7

1 THE COURT: Okay. All right. Mr. Simmons, have you ever
2 had any mental health problems or addiction issues or anything
3 of that nature that might cause you to have difficulty
4 understanding what we're doing here today?

5 MR. SIMMONS: No, sir.

6 THE COURT: Have you taken any drugs or alcohol in the
7 last twenty-four hours?

8 MR. SIMMONS: No, sir.

9 THE COURT: All right. I want you to listen to Mr.
10 Hyman. He's gonna tell me why you're charged with this
11 offense.

12 MR. HYMAN: Thank you, Your Honor. I'll address the
13 attempted murder charges first, that's what he was indicted
14 for. State is allowing him to plead guilty to the lesser
15 included offense of assault and battery of a high and
16 aggravated nature. That offense took place back in June of
17 2014. The Defendant knew the victim in this case. His name
18 was Moses Lee Scott and they lived near each other over in
19 Crimson Street here in Myrtle Beach. An argument took place
20 that night concerning a female, based on what the victim tells
21 the State. After the argument, the Defendant retreated to his
22 house, got a gun, came back and he fired the gun at Moses Lee
23 Scott several times. He actually struck the victim three
24 times, twice in the leg and once in the side. The victim --
25 EMS was called, 911 was called, the victim actually did

State v. Simmons - 2014-GS-26-5087, 3562
DEVANTE SIMMONS - BY THE COURT

8

1 survive the incident. The victim has been notified to be here
2 and has not chosen to be here in court today, Your Honor.

3 The victim, Mr. Scott, did get charged with a couple of
4 counts of trafficking in heroin, he's out on bond. We've sent
5 letters and called the last known telephone number informing
6 him of the arraignment yesterday and the plea today. We just
7 wanted to put all that out there for the Court to know the
8 full situation regarding this case. Obviously, a very
9 egregious set of facts, shockingly bad. However, based on the
10 Defendant's young age and his lack of criminal records, the
11 State's position is that a ten-year sentence may actually be
12 the proper sentence in this case and give him an opportunity
13 to be rehabilitated after he comes out.

14 As far as the distribution goes, Judge, there was an
15 unrelated incident that took place back in May of 2014. That
16 was an operation conducted by the Drug Enforcement Unit. They
17 utilized a confidential informant, issued controlled money,
18 put a video camera on him and did a controlled buy, Judge, for
19 about \$100 worth of crack cocaine. The State is just asking
20 that these sentences run concurrent.

21 THE COURT: All right. Mr. Simmons, is that what
22 happened? Did you sell some crack and did you shoot your
23 friend, Mr. Moses, is that what ---

24 MR. HYMAN: Moses Scott.

25 THE COURT: --- Mr. Moses Scott?

State v. Simmons - 2014-GS-26-5087, 3562
DEVANTE SIMMONS - BY THE COURT

9

1 MR. SIMMONS: Yes, sir.

2 THE COURT: Are you pleading guilty because you are
3 guilty of these offenses?

4 MR. SIMMONS: Yes, sir.

5 THE COURT: Mr. Simmons, has anybody promised you
6 anything, threatened you in any way. Has anyone done anything
7 wrong or inappropriate in order to get you to enter these
8 pleas?

9 MR. SIMMONS: No, sir.

10 THE COURT: You believe this is the best way for you to
11 go with this thing?

12 MR. SIMMONS: Yes, sir.

13 THE COURT: Have you had all the time you need to think
14 about it?

15 MR. SIMMONS: Yes, sir.

16 THE COURT: Do you need any more time with Mr. Galmore?

17 MR. SIMMONS: No, sir.

18 THE COURT: I can't give you any legal advice, Mr.
19 Simmons, but I'll be happy to answer any questions you have
20 about this process. Do you need to ask me anything?

21 MR. SIMMONS: No, sir.

22 THE COURT: All right. You understand what we're doing?

23 MR. SIMMONS: Yes, sir.

24 THE COURT: All right. I find that there is a
25 substantial factual basis for the plea and it's made freely,

State v. Simmons - 2014-GS-26-5087, 3562
DEVANTE SIMMONS - BY THE COURT

10

1 voluntarily, knowingly and intelligently after the advice of a
2 very competent attorney with whom he says he satisfied and I
3 will accept his plea.

4 Mr. Galmore?

5 MR. GARDNER: Yes, Your Honor. Just very briefly, I want
6 to tell you a little bit about Mr. Simmons. He is a very
7 intelligent, very articulate smart young man, Your Honor. He
8 graduated from Myrtle Beach High School. He's taking courses
9 over at Horry/Georgetown Tech. He's been over there for a
10 year and a half. I say that because I don't know, in today's
11 society, it is no longer a badge of honor to say that this is
12 an intelligent person. For whatever reason, society just does
13 not respect that the way they used to but I wanted him to know
14 and the Court to know that this is a smart young man who has a
15 lot of potential, Judge. Now, he grew up in a tough
16 environment. He had a single mother, she did the best that
17 she could for her family. But in the end, they were living
18 paycheck-to-paycheck, day-to-day, just trying to survive.

19 Your Honor, Mr. Simmons tells me that he lost his way, he
20 lost his focus when his grandfather died a couple of years
21 back and once that happened, he started using drugs and then
22 he started selling drugs to support his own habit which lead
23 to these charges here. I am hopeful, I am confident that once
24 he finishes his sentence, he'll get out and he'll be
25 rehabilitated, he will have his head on straight and he'll be

State v. Simmons - 2014-GS-26-5087, 3562
DEVANTE SIMMONS - BY THE COURT

11

1 able to continue with his education.

2 Now, Your Honor, we're gonna ask the Court to consider
3 perhaps deviating from the recommendation just a little bit.
4 I know the State is recommending ten years on each of these.
5 We'd ask the Court to consider perhaps a downward deviation,
6 perhaps a seven-year is appropriate. And if you can't do that
7 for the entire case, then we'd ask you to consider that for
8 the assault and battery charge. Mr. Simmons does not have a
9 significant prior record. The only thing on his record is one
10 driving under suspension charge from 2012. Like I said, he
11 was doing the right thing until his father -- until his
12 grandfather died and then he fell into a bad way.

13 Your Honor, the bottom line here is that he is very
14 remorseful for what he did. He knows he was using drugs, he
15 was in the street, he was doing things that he wasn't supposed
16 to do and he's very apologetic for his actions. We would just
17 ask you to take into account that he was simply trying to
18 provide for his family and went about it the wrong way. We'd
19 ask that you take into account that, like the Solicitor said,
20 the victim in this case, Mr. Moses Scott is facing charges of
21 his own. Ultimately, I suspect that he's going end up serving
22 time in perhaps the same facility as Mr. Simmons. But we just
23 ask you for what leniency you could allow for him. He has
24 been at the detention center now for 260 days.

25 SENTENCE OF THE COURT:

State v. Simmons - 2014-GS-26-5087, 3562
SENTENCE OF THE COURT

12

1 THE COURT: All right. All right, Mr. Simmons, I really
2 think that the recommendation is a reasonable sentence
3 considering the severity of this crime. And I think it takes
4 into account that fact that you have a minimal record. The
5 sentence of the Court is on each count is that he be confined
6 for ten years. He's to be given credit for 260 days time-
7 served and these are concurrent sentences.

8 MR. GALMORE: Thank you.

9 (ADJOURNED - 2:11 P.M.)

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ORIGINAL

State v. Simmons - 2014-GS-26-5087, 3562
SENTENCE OF THE COURT

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C E R T I F I C A T E

I, the undersigned, Kay H. Richardson, Official Court Reporter for the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the hearing held in the case of State of South Carolina versus DeVante Simmons, held in the Court of General Sessions for Horry County, Horry County Courthouse, Conway, South Carolina, on February 26, 2015.

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



Kay H. Richardson

Official Court Reporter

April 7, 2016.

PAB

FORM 5

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF HORRY)

Walter Simmons 365222
Full name and prison number (if any) of Applicant.

2016 CP26 800

v.)

APPLICATION FOR

State of South Carolina)

POST-CONVICTION RELIEF

INSTRUCTIONS - READ CAREFULLY

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

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

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention J. Rueben Long Detention Center
2. Name and location of Court which imposed sentence Horry County
3. Name(s) of co-defendant(s) (if any) N/A
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) 2014GS2603562 (Assault / Assault + Battery of High + Armed)
 - (b) 2014GS2605087 (Disturbance of Peace Base Location)
 - (c) _____
5. The date upon which sentence was imposed and the terms of the sentence:
 - (a) February 26, 2015 - 10 yrs concurrent
 - (b) _____

FILED
ZIMMERMAN COUNTY
CLERK OF COURT
NOV 11 2015
PH 2:28
CORRECTIONS WARD

(c) _____

6. Check whether a finding of guilty was made:

(a) after a plea of guilty _____

(b) after a plea of not guilty N/A _____

(c) after a plea of nolo contendere N/A _____

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

No

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

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

i. N/A _____

ii. N/A _____

iii. N/A _____

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

i. N/A _____

ii. N/A _____

iii. N/A _____

(c) the date of each such result:

i. N/A _____

ii. N/A _____

iii. N/A _____

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

i. N/A _____

ii. N/A _____

iii. N/A _____

9. If you answered "no" to (7), state your reasons for not so appealing:

(a) All Appeals are at The discretion of Trial Counsel

(b) _____

(c) _____

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

- (a) Ineffective Assistant Counsel
- (b) Count error
- (c) Ineffective Assistance Counsel

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

- (a) Continued plea agreement
- (b) I was denied my preliminary hearing after requested
- (c) failure to request motion on self defense and/or actual innocence
Under SC Code (15-11-410)

12. Prior to this application have you filed with respect to this conviction:

- (a) any petition in a State Court under South Carolina Law? N/A
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? N/A
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? N/A
- (d) any other petitions, motions or applications in this or any other Court? N/A

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

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

iv. N/A

(d) the date of each such disposition:

i. N/A

ii. N/A

iii. N/A

iv. N/A

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

i. N/A

ii. N/A

iii. N/A

iv. N/A

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

N/A

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

(a) which grounds have been presented:

i. N/A

ii. N/A

iii. N/A

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

i. N/A

ii. N/A

iii. N/A

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

(a) N/A

(b) N/A

(c) N/A

17. Were you represented by an attorney at any time during the course of: Yes

- (a) your arraignment and plea? yes
- (b) your trial, if any? N/A
- (c) your sentencing? yes
- (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? N/A
- (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? N/A

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

- (a) the name and address of each attorney who represented you:
 - i. James Gilmore 205 Laurel Street P.O. Box 1166 Conway, SC 29520
 - ii. _____
 - iii. _____
- (b) the proceedings at which each such attorney represented you:
 - i. Pre arraignment and sentencing
 - ii. _____
 - iii. _____

19. State clearly the relief you seek in filing this application:

Reversal and/or New Proceeding

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

No

2016 CP26 800

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

I, DeVante Simmons hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

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

DeVante Simmons
Applicant

SWORN or affirmed to and subscribed before me this
29th day of January, 2016.

Debbie L. McCoskey
Notary Public

My Commission Expires: 7-10-2024

FILED
HOREY COUNTY
2016 FEB -4 PM 2:29
MELANIE HUGHES-WARD
CLERK OF COURT

2016 CP26 800

STATE OF SOUTH CAROLINA)
County of Horry County)

VERIFICATION

I, Dwaine Simmons, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

Dwaine Simmons

SWORN to and subscribed before me this 29th
day of January, 2016.

Debbi J. McCarty (L.S.)
Notary Public

My Commission Expires: July - 10, 2024

FILED
Horry County
2016 FEB -4 PM 2:29
MELANIE JIGGINS-WARD
CLERK OF COURT

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

In response to the application for post-conviction relief filed by DeVante Simmons (Applicant) on February 4, 2016, Respondent would show this Court:

I.

Applicant is confined in the South Carolina Department of Corrections pursuant to the 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-26-3562), and further indicted at the December 2014 term for distribution of cocaine base (2014-GS-26-5087). James C. Galmore, III, Esquire, represented Applicant, and Michael Travis Hyman, of the Fourth Circuit Solicitor's Office, prosecuted the case. On February 26, 2015, Applicant pled guilty to -5087 as indicted and to the lesser included offense of assault and battery of a high and aggravated nature. 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.

II.

In his application for post-conviction relief, Applicant alleges he is being held in custody 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."

Attached to and incorporated herein are the records of the Horry County Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, the plea transcript, and the current application for relief. Respondent reserves the right to amend this Return upon receipt of relevant information.

III.

Applicant's allegations of ineffective assistance of counsel are without merit. In a PCR action, Applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that [it] cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. at 442, 334 S.E.2d at 814.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland v. Washington, 466 U.S. 668. First, Applicant must prove that counsel's performance was deficient. Id.; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at

625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. (citing Strickland, 466 U.S. at 690). Applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. Second, counsel's deficient performance must have prejudiced Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. With respect to guilty plea counsel, 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, 106 (1985).

Applicant can satisfy neither requirement of the Strickland test. However, the allegation of ineffective assistance of counsel probably raises questions of fact that the record does not conclusively refute. Accordingly, Respondent respectfully requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

IV.

Applicant's allegation that his guilty plea was involuntary is equally without merit. In post-conviction relief cases, an applicant asserting a constitutional violation must frame the issue as one of ineffective assistance of counsel. Al-Shabazz, 338 S.C. at 363-64, 527 S.E.2d at 747 (citing Drayton v. Evatt, 312 S.C. 4, 430 S.E.2d 517 (1993)). An applicant who pleads guilty on the advice of counsel may collaterally attack the plea only by showing that (1) counsel was ineffective and (2) there is a reasonable probability that but for counsel's errors, the defendant

would not have pled guilty and would have insisted on going to trial. Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001). An applicant alleging that his guilty plea was induced by ineffective assistance of counsel must prove that counsel's advice was not "within the competence demanded of attorneys in criminal cases." Hill v. Lockhart, 474 U.S. 52, 56, 106 S. Ct. 366, 369 (1985); Bennett v. State, 371 S.C. 198, 204, 638 S.E.2d 673, 675 (2006). "A guilty plea is a solemn, judicial admission of the truth of the charges" against the applicant. Dalton v. State, 376 S.C. 130, 137, 654 S.E.2d 870, 874 (Ct. App. 2007) (citing Blackledge v. Allison, 431 U.S. 63 (1977)).

To find a guilty plea is voluntarily and knowingly entered into, the record must establish the applicant had a full understanding of the consequences of his plea and the charges against him. See Boykin v. Alabama, 395 U.S. 238, 243-44, 89 S. Ct. 1709, 1712 (1969). In Boykin, the United States Supreme Court held that before a court can accept a guilty plea, a criminal defendant must be advised of the constitutional rights he is waiving. Id. at 243, 89 S. Ct. at 1712. Specifically, the accused must be aware of the privilege against self-incrimination, the right to a jury trial, and the right to confront one's accusers. Id. Moreover, a criminal 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). A criminal defendant's knowing and voluntary waiver of statutory or constitutional rights in a guilty plea "must be established by a complete record and may be accomplished by colloquy between court and defendant, between court and defendant's counsel, or both." Roddy v. State, 339 S.C. 29, 34, 528 S.E.2d 418, 421 (2000). 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. Anderson v. State, 342 S.C. 54, 57, 535 S.E.2d 649, 657 (2000).

Respondent submits the record fully supports the knowing and voluntary nature of Applicant's plea. However, allegations regarding the voluntariness of the plea may raise a question of fact that is not conclusively refuted by the record. Accordingly, Respondent requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. at 265, 305 S.E.2d at 248.

V.

Applicant alleges the Court erred with respect to his desire for a preliminary hearing. This allegation should be summarily dismissed. An application for post-conviction relief does not serve as a substitute for direct appeal, and an issue that could have been raised at applicant's trial or on appeal is not cognizable in an application for PCR. S.C. Code Ann. § 17-27-20(b); Simmons v. State, 264 S.C. 417, 215 S.E.2d 883 (1974). Trial court error is not a cognizable claim for PCR. Roscoe v. State, 345 S.C. 16, 546 S.E.2d 417 (2001); Wolfe v. State, 326 S.C. 158, 485 S.E.2d 367 (1997); Ashley v. State, 260 S.C. 436, 196 S.E.2d 501 (1973). Applicant's allegation with respect to a preliminary hearing, or lack thereof, could have been raised to the court and thereafter considered on appeal. Therefore, Applicant's allegation of court error should be dismissed as not cognizable under the Uniform Post-Conviction Procedure Act.

VI.

Respondent therefore requests that this Court convene an evidentiary hearing on the allegations of ineffective assistance of counsel and that the guilty plea was involuntarily entered. As to all other allegations, Respondent moves for summary dismissal pursuant to § 17-27-70 of the South Carolina Code of Laws on the basis that there is no genuine issue of material fact

which would necessitate an evidentiary hearing and that those allegations should be dismissed as a matter of law.

VII.

Applicant must specify any claims he intends to raise at the PCR evidentiary hearing. Any claims not specifically laid out in this PCR application or in amendments *will be opposed by the State at an evidentiary hearing* pursuant to §§ 17-27-10 to -160 of the South Carolina Code of Laws and Rule 71.1 of the South Carolina Rules of Civil Procedure. See also Rules 15(a)-(b), SCRCF. All claims should be made well in advance of the evidentiary hearing. Because Applicant has been appointed an attorney, the attorney, and not Applicant, is the only individual authorized to file amendments to this application. See Rule 11, SCRCF. Pro se filings will not be considered at the PCR hearing. Respondent reserves the right to request that any amendments withheld until the last minute be stricken because of undue prejudice to Respondent. See Rule 15(a), SCRCF.

VIII.

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

[Conclusion and signature on following page]

IX.

WHEREFORE, Respondent respectfully requests that Applicant's claim of court error be summarily dismissed, and that an evidentiary be held on Applicant's claims of ineffective assistance of plea counsel.

Respectfully submitted,

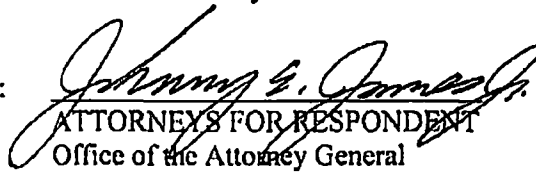
ALAN WILSON
Attorney General

ROBERT BOLCHOZ
Chief Deputy Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General

JOHNNY E. JAMES JR.
Assistant Attorney General

By:


ATTORNEYS FOR RESPONDENT
Office of the Attorney General
P.O. Box 11549
Columbia, S.C. 29211

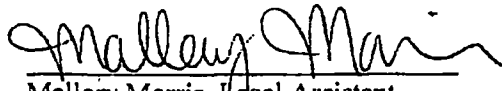
June 23, 2017

STATE OF SOUTH CAROLINA)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF HORRY)	
)	
	)	2016-CP-26-0800
DEVANTE A. SIMMONS, #363222,)	
)	
Applicant,)	
)	
vs	)	AFFIDAVIT OF SERVICE BY MAIL
)	
STATE OF SOUTH CAROLINA,)	
)	
Respondent.)	

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

Mr. Daniel A. Selwa, II, Esquire
516 29th Avenue North
Myrtle Beach, SC 29577

DATED this 23rd day of June, 2017.



 Mallory Morris, Legal Assistant
 For Respondent

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF Horry) 2016-CP-26-00800
DEVANTE SIMMONS,)
))
Applicant,) **Transcript of Record**
) (Post-Conviction Relief)
vs.)
) September 21, 2017
STATE OF SOUTH CAROLINA,)
))
Respondent.)

B E F O R E :

Honorable William H. Seals, Jr.
Horry County Courthouse
Conway, South Carolina

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

Daniel E. Selwa, Esquire
Attorney for Applicant

Johnny E. James, Jr., Esquire
Attorney for Respondent

Kay H. Richardson
Circuit Court Reporter

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I N D E X

<u>SEPTEMBER 21, 2017</u>	<u>Pg.</u>
Motion	3
DeVante Jamal Simmons	
Direct by Selwa	4
Cross by James	9
James C. Galmore, III	
Direct by Selwa	10
Cross by James	14
By the Court	15
Certificate of Court Reporter	16

E X H I B I T S

<u>No.</u>		<u>ID</u>	<u>EV</u>
A1	Letter Galmore to Simmons 1/5/15		8

Simmons v. State - 2016-CP-26-00800
MOTION

3

1 (SEPTEMBER 21, 2017 - 11:53 A.M.)

2 MOTION:

3 MR. JAMES: If it may please the Court?

4 THE COURT: Yes, sir.

5 MR. JAMES: I bring your attention to the matter of
6 DeVante Jamal Simmons vs. State of South Carolina. That is
7 docket number 2016-CP-26-00800. Mr. Simmons is present here
8 today in the courtroom and is represented by Mr. Daniel Selwa.
9 Mr. Simmons pled guilty on February 26th, 2015 to distribution
10 of cocaine base and a lesser included offense of assault and
11 battery of a high and aggravated nature, Your Honor. That was
12 the lesser included of attempted murder. Consistent with the
13 recommendation of the state, the Honorable Larry B. Hyman
14 sentenced Applicant to imprisonment for concurrent terms of 10
15 years on each charge. Mr. Simmons did not appeal his plea or
16 sentence.

17 THE COURT: All right.

18 MR. JAMES: I'm sorry. One last point of order, the
19 state has an outstanding partial motion to dismiss. One of
20 Mr. Simmons' allegations is error on the part of the Trial
21 Court, however my understanding that he will not be proceeding
22 on that allegation.

23 MR. SELWA: Yes, Your Honor. We will withdraw that --
24 I've spoken to my client about the preliminary rights to a
25 hearing.

1 THE COURT: Thank you. You can call your first witness.

2 MR. SELWA: Your Honor, I would call DeVante Simmons to
3 the stand.

4 DEVANTE SIMMONS, HAVING BEEN DULY
5 SWORN, TESTIFIED AS FOLLOWS:

6 CLERK: State your name for the Court, please.

7 MR. SIMMONS: My name is DeVante Jamal Simmons.

8 MR. SELWA: May it please the Court?

9 THE COURT: Yes, sir.

10 MR. SELWA: Thank you, Your Honor.

11 DIRECT EXAMINATION OF DEVANTE JAMAL SIMMONS BY MR. SELWA:

12 Q: Mr. Simmons, you are here for a PCR on your trial
13 counsel, Mr. Galmore; is that correct?

14 A: That's correct, sir.

15 Q: Okay. And your action that you are complaining of was a
16 guilty plea; is that correct?

17 A: Yes, sir.

18 Q: Okay. What were you originally charged with?

19 A: I was charged with attempted murder and several counts of
20 distribution of crack cocaine, first offense.

21 Q: What did you ultimately plead guilty to?

22 A: I plead guilty to assault and battery high aggravated
23 nature and one count of distribution of crack cocaine, first
24 offense.

25 Q: And did you have enough time to meet and discuss your

Simmons v. State - 2016-CP-26-00800
DEVANTE JAMAL SIMMONS - DIRECT BY SELWA

5

1 case with Mr. Galmore?

2 A: I had met with him and discuss but what we discussed
3 wasn't -- well, far as when I got my time, it wasn't what we
4 discussed.

5 Q: Okay. And what do you mean by that?

6 A: He sent me a paper, the beginning of January and it
7 states certain things and a couple of weeks later after that
8 he came to the courthouse and he discussed with me what this
9 paper was, what it consist of and he told me, well, basically
10 they giving you -- they want you to plead to assault and
11 battery and one drug charge, they gonna go down from 15 years
12 to a 10-year parole eligible plea. He said 25 -- 20 -- you'll
13 do 20 percent, 25 percent of your time before you will be
14 eligible for parole, you'll get work credits, and you'll be
15 eligible for parole. He said basically they give you a 10-
16 year parole eligible plea when you go and sign your plea.

17 Q: Okay. And did he verbally tell you that or did he
18 express that ---

19 A: He verbally tell -- told me that, sir.

20 Q: Did he send you any correspondence regarding that?

21 A: Excuse me?

22 Q: Did he send you any letters regarding that?

23 A: Yes, sir. I got this document paper right here.

24 Q: Okay. The document that you -- can you identify this
25 document?

1 A: Yes, sir.

2 Q: Is that a copy of the document you have in your
3 possession there?

4 A: Yes, sir.

5 Q: And who is that document from?

6 A: My counsel that represent me, Mr. James Galmore.

7 Q: And when was that letter sent to you?

8 A: It's dated January 15th, 2015 -- January 5, 2015.

9 Q: And it's addressed to you?

10 A: Yes, sir.

11 Q: Does it have the correct address?

12 A: Yes, sir.

13 Q: And did you receive it at that address?

14 A: Yes, sir.

15 Q: And in that letter, what are you being told -- what has
16 been expressed to you by your current ---

17 A: Basically he told me he had a conversation with my
18 solicitor and they agreed on terms that if I pled to assault
19 and battery and one drug charge, they would dismiss all the
20 other charges and I would be looking at a 10-year --
21 basically, they giving me a 10-year parole eligible plea.

22 Q: Okay. And when did you end up pleading guilty?

23 A: The next month, February 26th, 2015.

24 Q: And when you did plead guilty, did Mr. Galmore or the
25 Court go over the range of your sentence and any parole

Simmons v. State - 2016-CP-26-00800
DEVANTE JAMAL SIMMONS - DIRECT BY SELWA

7

1 eligibility or any other classifications regarding what you
2 were actually pleading guilty to?

3 A: No, sir. They just told me about he -- the Judge just
4 say he like the recommendation.

5 Q: Okay. The Judge did go over the amount of time that you
6 could possibly face, correct?

7 A: Yes, sir.

8 Q: Okay. But did the Judge in that plea conversation, did
9 he go over the fact that you would be eligible for parole?

10 A: No, sir.

11 Q: Did Mr. Galmore go over that with you?

12 A: He did, sir.

13 Q: And are you referring to his letter that he went ---

14 A: This letter and he came had a visit with me and told me
15 this personally.

16 Q: Okay. And when did you find out that you -- that the
17 parole eligibility was different than what you ---

18 A: When I got to R&E Kirkland and I seen the CDR code and
19 they told me, yeah, your sentence is a minimum of 85 percent.

20 Q: And with this letter, do you -- you recognize Mr.
21 Galmore's signature?

22 A: Yes, sir.

23 Q: Is there any doubt that this is from him?

24 A: I have no doubt it is not -- that it is from him.

25 MR. SELWA: Your Honor, I'd like to admit -- move to

1 admit that.

2 THE COURT: Any objections?

3 MR. JAMES: None from the State, Your Honor.

4 THE COURT: All right.

5 APPLICANT'S EXHIBIT NUMBER 1

6 ADMITTED INTO EVIDENCE

7 BY MR. SELWA:

8 Q: Had you been aware of the parole eligibility consequences
9 of your plea when you pled guilty?

10 A: If I knew that I wasn't gonna be parole eligible, I
11 wouldn't have plead guilty.

12 Q: And you understand that you got the minimum on most of
13 your sentence ranges?

14 A: Yes, sir.

15 Q: And you also understand that that those run concurrent
16 and not consecutive?

17 A: Yes, sir.

18 Q: And you understand that they could have been -- you
19 could've been sentenced with consecutive sentences, correct?

20 A: Yes, sir.

21 Q: Okay. And you understand also that you are asking the
22 Court to put you in a place where you were at prior to
23 entering that plea which would expose you to all the charges
24 that you were originally charged with, correct?

25 A: Yes, sir.

Simmons v. State - 2016-CP-26-00800
DEVANTE JAMAL SIMMONS - CROSS BY JAMES

9

1 Q: And you could possibly get more time?

2 A: Yes, sir.

3 Q: And you are still asking the Court to grant the PCR
4 today?

5 A: Yes, sir.

6 Q: And are you asking for a new trial?

7 A: No. I'm asking for remedy on the -- I'm really asking
8 for the reconsideration on my time as far as the plea
9 agreement that we have.

10 Q: Okay. So, you are asking or seeking from the Court to
11 allow you to accept this plea offer?

12 A: Yes, sir.

13 Q: Okay. And you're aware though that this language from
14 Mr. Galmore does not bind the state to give you that offer,
15 correct?

16 A: So, I've been told.

17 Q: No further questions, Your Honor.

18 Please answer any questions the AG's office might have.

19 THE COURT: Thank you.

20 Mr. James?

21 CROSS EXAMINATION OF DEVANTE JAMAL SIMMONS BY MR. JAMES:

22 Q: Mr. Simmons, are you aware that the state has no
23 obligation to give you any plea offer?

24 A: Yes, sir.

25 Q: And you understand that if you are granted PCR here today,

1 that the state may insist on taking this to trial?

2 A: Yes, sir.

3 Q: Okay. And you still wish to proceed?

4 A: Yes, sir.

5 MR. JAMES: No further questions.

6 THE COURT: All right. You may step down. Thank you.

7 Any other witnesses?

8 MR. SELWA: Your Honor, I can call James Galmore to the
9 stand.

10 THE COURT: All right.

11 JAMES C. GALMORE, III, HAVING BEEN

12 DULY SWORN, TESTIFIED AS FOLLOWS:

13 DIRECT EXAMINATION OF JAMES C. GALMORE BY MR. SELWA:

14 Q: Mr. Galmore, you represented Mr. Simmons in his guilty
15 plea, correct?

16 A: Yes, sir.

17 Q: All right. And did you go over the elements of the
18 crimes that he was charged with and did you have adequate
19 discussions with him regarding what he was actually charged
20 with?

21 A: Yes, sir.

22 Q: All right. Are you familiar with the correspondence, I
23 believe it's Exhibit 1 for the applicant?

24 A: Yes, sir. I'm familiar with this letter.

25 Q: Okay. Would you mind reading what -- was that coming

Simmons v. State - 2016-CP-26-00800
JAMES C. GALMORE, III - DIRECT BY SELWA

11

1 from you?

2 A: Yes, sir. This is from me.

3 Q: Okay.

4 A: To Mr. Simmons.

5 Q: All right. And do you mind reading that for the Court?

6 A: All right. The date on the letter is January 5, 2015.

7 It says, Dear Mr. Simmons, The solicitor called me earlier
8 today to let me know your case was going to trial in the next
9 60 days. He made a new plea offer in your case from 15 years
10 down to a 10-year plea. He said they would reduce the
11 attempted murder charge to assault and battery and drop all
12 the other charges if you plead to one drug charge. Basically,
13 they are making you a 10-year parole eligible plea and they
14 are giving you 30 days to think about it. Take some time and
15 think about whatever you want -- think about whether you want
16 to take the plea or not. Remember your case is going on the
17 fast track so trial is coming up soon. Should you have any
18 questions, please do not hesitate to contact me. Sincerely,
19 James Galmore.

20 Q: Do you recall if he got in touch with you after you
21 issued him that letter?

22 A: I don't recall.

23 Q: Do you remember if he accepted or expressed that he
24 accepted that offer?

25 A: Yes, sir. The letter is basically not very clear as to

1 whether the plea offer would've been to assault and battery of
2 a high and aggravated nature or assault and battery first
3 degree. The letter does talk about a 10-year parole eligible
4 plea, which would mean the assault and battery first degree as
5 opposed to the high and aggravated nature. But, Mr. Simmons
6 pled to the more serious charge.

7 Q: Which was the assault and battery high and aggravated
8 nature, correct?

9 A: Yes, sir.

10 Q: Okay. And that is not the same parole eligibility as
11 what you'd expressed there, correct?

12 A: That's correct. The assault and battery high and
13 aggravated nature is a truth-in-sentencing, no-parolable
14 offense, you have to serve 85 percent of the sentence before a
15 person is eligible for parole.

16 Q: Okay. Did Mr. -- did Mr. Simmons, did he sign any plea
17 offer from the State? Was that formally made in writing?

18 A: No, the plea offer wasn't made in writing, but he did
19 sign the sentence sheet.

20 Q: But not the standard plea offer that the prosecutor's
21 office sends over, correct?

22 A: No, they did not send over a written plea offer.

23 Q: Okay. And so the day of his plea, actually, was the only
24 time that he signed something indicating that he was willing
25 to make that plea, correct?

Simmons v. State - 2016-CP-26-00800
JAMES C. GALMORE, III - DIRECT BY SELWA

13

1 A: Yes, sir.

2 Q: Okay. And did you -- did you have time to go over the
3 sentencing sheet with him?

4 A: Yes. We would typically have time to go over a sentence
5 sheet; yes, sir.

6 Q: Okay. And did any discussion come up during that time
7 regarding the difference between what you'd put in that letter
8 and what he was actually pleading to?

9 A: Well, I try to advise the clients of exactly what they're
10 facing. I don't have any particular written notes on this
11 part of it, but if he's facing a no-parole offense, I try to
12 inform them that they're facing a no-parole offense or at the
13 very least, I'll tell them you should assume that you have to
14 do every day of whatever sentence the Judge gives you. I
15 can't say if I had that conversation with Mr. Simmons or not.

16 Q: Okay. And do you have a copy of the transcript?

17 A: Yes, sir.

18 Q: All right. Are you familiar with it?

19 A: Yes, sir.

20 Q: Do you recall in the transcript or can you find anywhere
21 in that transcript where the Court or yourself may have gone
22 over his parole eligibility or the classification of that
23 charge indicating that it was an 85 percent charge?

24 MR. JAMES: Your Honor, in the interest of efficiency,
25 the state has thoroughly reviewed this transcript; it ain't in

1 there.

2 THE COURT: All right.

3 MR. JAMES: We'll stipulate to that.

4 MR. SELWA: Thank you.

5 BY MR. SELWA:

6 Q: Given that stipulation of that fact, is there any
7 indication that Mr. Simmons knew or was informed anything
8 different from what you had put in the letter to him?

9 A: Just reading the transcript, you wouldn't know that he
10 was pleading to a 85-percent offense.

11 Q: Okay. No further questions. Please answer any questions
12 the AG's office may have.

13 THE COURT: All right.

14 CROSS EXAMINATION OF JAMES C. GALMORE, III BY MR. JAMES:

15 Q: I'll be exceedingly brief. Mr. Galmore, you did testify
16 just now that you typically tell your clients to expect to
17 serve every day of their sentence?

18 A: Yes, sir.

19 Q: And did you tell that to the applicant in this case?

20 A: I tell every client to expect to serve every day of their
21 sentence. If you get parole early or max out at 51 percent,
22 that's between you and the State Department of Corrections.

23 Q: Okay. And again, do you recall ever further discussing
24 parole eligibility after you provided this letter to Mr.
25 Simmons?

Simmons v. State - 2016-CP-26-00800
BY THE COURT

15

1 A: No, sir; I don't.

2 Q: Okay.

3 No further questions, Your Honor.

4 BY THE COURT:

5 THE COURT: All right. You may step down. Thank you.

6 I will take it under advisement. I'll think about it and
7 rule this week.

8 MR. SELWA: Thank you, Your Honor.

9 THE COURT: Thank you.

10 MR. JAMES: Thank you, Your Honor.

11 (ADJOURNED - 12:11 P.M.)

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I, the undersigned, Kay H. Richardson, Official Court Reporter for the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the hearing held in the case of DeVante Jamal Simmons vs. State of South Carolina, held in the Court of Common Pleas for Horry County, Horry County Courthouse, Conway, South Carolina, on September 21, 2017.

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



Kay H. Richardson

Official Court Reporter

April 25, 2018.

Fifteenth Circuit Public Defender

Horry & Georgetown Counties

Horry
Edward "Ed" Chrisco
Chief Public Defender
 203 Laurel Street
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 Fax: 843 - 545 - 3673

January 5, 2015

De Vante J. Simmons
 ■■■■ Crimson St.
 Myrtle Beach, SC 29577

State vs De Vante Simmons

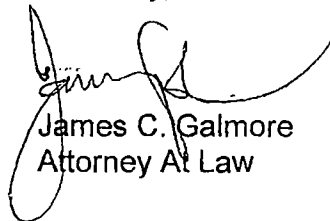
Dear Mr. Simmons:

The solicitor called me earlier today to let me know your case was going to trial in the next sixty (60) days. He made a new plea offer in your case from 15 years down to a ten (10) year plea. 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 thirty (30) days to think about it.

Take some time and think about whether you want to take the plea or not. Remember, your case is going on the fast track, so a trial is coming up soon.

Should you have any questions, please do not hesitate to contact me.

Sincerely,


 James C. Galmore
 Attorney At Law



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
 Horry County
 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

WITNESSES

S Clothier Myrtle Beach Police Department

ARREST WARRANT NUMBER

2014A2620601318
CDR: 3410 16-03-0029
DOA: 6/11/2014

ACTION OF GRAND JURY

Foreperson of Grand Jury
Date: SEP 11 2014

VERDICT

Foreperson of Petit Jury
Date:

DOCKET NO. 2014-GS-28-03562

The State of South Carolina

County of Horry

M. Travis Hyman

14H02671

COURT OF GENERAL SESSIONS

September, 2014 TERM

THE STATE

vs.

De Vante Jamal Simmons
R/M

ATTORNEY: James Cullen Galmore

**Indictment for
ATTEMPTED MURDER**

Jimmy A. Richardson, II, Solicitor

FILED
HORRY COUNTY

2014 SEP 15 PH 1:49

CLERK OF COURT

DATE RECEIVED FROM
GRAND JURY

ME. AM. ...
CLERK OF COURT
COURT DATE
FILED GUILTY/TRIAL

2015 FEB 26 PM 4:53

JURY ROOM

ORIGINAL

STATE OF SOUTH CAROLINA)
)
COUNTY OF HORRY)


INDICTMENT
ATTEMPTED MURDER

At a Court of General Sessions, convened on September 11, 2014, the Grand Jurors of Horry County present upon their oath:

ATTEMPTED MURDER
CDR: 3410 16-03-0029

That De Vante Jamal Simmons did in Horry County on or about June 10, 2014 with intent to kill Moses Scott, attempt to kill the victim with malice aforethought, either expressed or implied in violation of Section 16-3-29, S. C. Code of Laws, 1976, as amended.

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



JIMMY A. RICHARDSON, II
FIFTEENTH CIRCUIT SOLICITOR

WITNESSES

Christopher White 15th Circuit Drug Enforcement Unit

ARREST WARRANT NUMBER

2014A2610400299
CDR: 3014 44-53-0375 (B) (1)
DOA: 6/27/2014

ACTION OF GRAND JURY

TRUE BILL

Foreperson of Grand Jury
Date: *DEC 18 2014* *[Signature]*

VERDICT

Foreperson of Petit Jury
Date:

DOCKET NO. 2014-GS-26- 05087

The State of South Carolina
County of Horry

M. Travis Hyman 14H02877

COURT OF GENERAL SESSIONS

December, 2014 TERM

THE STATE

vs.

Devonte Simmons
B/M

ATTORNEY: James Cullen Galmore

Indictment for

DISTRIBUTION OF COCAINE BASE

Jimmy A. Richardson, II, Solicitor

HORRY COUNTY

2015 JAN -7 AM 9:14

CLERK OF COURT

DATE RECEIVED FROM

GRAND JURY

PLED GUILTY/TRIAL

CLERK OF COURT

2015 FEB 26 PM 4:53

HORRY COUNTY

ORIGINAL

STATE OF SOUTH CAROLINA)
)
COUNTY OF HORRY)

INDICTMENT
DISTRIBUTION OF COCAINE BASE


At a Court of General Sessions, convened on December 18, 2014, the Grand Jurors of Horry County present upon their oath:

DISTRIBUTION OF COCAINE BASE

CDR: 3014 44-53-0375(B)(1)

That Devonte Simmons did in Horry County, on or about May 13, 2014 distribute, dispense or deliver, or did aid, abet, attempt or conspire to distribute, dispense or deliver a quantity of Cocaine Base, a controlled substance under provisions of Section 44-53-110, et. seq., Code of Laws of South Carolina, 1976, as amended, such distribution not having been authorized by law, and being in violation of Section 44-53-375(B), S. C. Code of Laws, 1976, as amended.

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



JIMMY A. RICHARDSON, II
FIFTEENTH CIRCUIT SOLICITOR