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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County
Honorable R. Markley Dennis, Jr., Circuit Court Judge
Appellate Case No. 2020-000088

THE STATE,

Respondent,

vs.

ANTONIO ORLANDO SIMMONS,

Appellant.

INITIAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

MARK R. FARTHING
Senior Assistant Attorney General

Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

SCARLETT A. WILSON
Solicitor, Ninth Judicial Circuit

101 Meeting Street, Suite 400
OT Wallace Building
Charleston, SC 29401
(843) 958-1900

ATTORNEYS FOR RESPONDENT

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II. Appellant's current challenge to his aggregate sentence, which was imposed following a remand for resentencing, was not properly preserved for appellate review because defense counsel neither raised any objections to Appellant's revised sentence after it was imposed nor challenged the adequacy of the plea judge's explanation for that sentence as he is now attempting to do for the first time on appeal. However, even if Appellant's challenge to his sentence was somehow properly preserved for review, the plea judge did not abuse his discretion or otherwise violate Appellant's rights by revising the sentence originally imposed from a "total sentence" of thirty years to a twenty-eight-year term of imprisonment after Appellant's original sentence was vacated because—just as the plea judge repeatedly explained—he did not revise the sentence to punish Appellant for successfully pursuing post-conviction relief and, instead, did so purely in the manner necessary to carry out his original sentencing intentions while also complying with his new understanding of the statutory language preventing any part of the sentence from being suspended. 19

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STATEMENT OF ISSUES ON APPEAL

I.

"Whether the resentencing court abused its discretion when it failed to exercise its discretion to hear Appellant's motion to withdraw his guilty plea and proceed to trial where the initial sentence imposed by the guilty plea court was illegal and whether the PCR order remanding Appellant's case to the same lower court conferred jurisdiction to consider Appellant's motion to withdraw his guilty plea?"

II.

"Whether the resentencing court violated Appellant's due process rights where it resentenced Appellant more severely, ten more years, than Appellant's original sentence, and where the court's comments at the resentencing hearing showed its intention was to punish Appellant for succeeding at his PCR appeal where the same judge imposed both the initial sentence at the guilty plea hearing and the subsequent harsher sentence at the resentencing hearing?"

COUNTER-STATEMENT OF ISSUES ON APPEAL

I.

Is Appellant's current challenge to the manner in which the plea judge addressed the pro se motion seeking to withdraw guilty pleas that were entered nearly two years earlier improper when the motion was made in a pro se fashion by a represented defendant over the objection of his defense counsel, who conversely argued the plea judge lacked the authority to grant the motion under the circumstances involved? Moreover, even if the challenge is somehow proper, did the plea judge nonetheless correctly recognize he lacked the authority to grant Appellant's pro se motion because that motion was made nearly two years after the term of court in which the guilty pleas were entered had ended without any timely post-trial motions being filed and during a hearing being held following a remand solely for the purpose of resentencing and resentencing alone?

II.

Is Appellant's current challenge to his aggregate sentence, which was imposed following a remand for resentencing, properly preserved for appellate review when defense counsel neither raised any objections to Appellant's revised sentence after it was imposed nor challenged the adequacy of the plea judge's explanation for that sentence as he is now attempting to do for the first time on appeal? Moreover, even if Appellant's challenge to his sentence is somehow properly preserved for review, did the plea judge abuse his discretion or otherwise violate Appellant's rights by revising the sentence originally imposed from a "total sentence" of thirty years to a twenty-eight-year term of imprisonment after Appellant's original sentence was vacated when—just as the plea judge repeatedly explained—he did not revise the sentence to punish Appellant for successfully pursuing post-conviction relief and, instead, did so purely in the manner necessary to carry out his original sentencing intentions while also complying with his new understanding of the statutory language preventing any part of the sentence from being suspended?

STATEMENT OF THE CASE

In April of 2014, Appellant Antonio Orlando Simmons was arrested following an investigation into a series of similar armed robberies that had been committed at a variety of different locations throughout Charleston County over the course of the preceding few months.[1] In December of 2014, the Charleston County Grand Jury indicted Appellant for ten counts of armed robbery along with ten counts of possession of a weapon during the commission of a violent crime. On March 20, 2018, Appellant appeared in the Charleston County Court of General Sessions and entered negotiated guilty pleas to five of the indicted counts of armed robbery before the Honorable R. Markley Dennis, Jr., circuit court judge.[2] During the plea hearing, the plea judge accepted Appellant's guilty pleas and sentenced him to a thirty-year term of imprisonment that was suspended upon the service of an eighteen-year term of imprisonment for one of the counts along with concurrent eighteen-year terms of imprisonment for the remaining four counts.[3]

Subsequently, Appellant did not appeal and, instead, timely filed an application for post-conviction relief seeking for his guilty pleas to be vacated and a new trial to be granted. In response, the State filed a return requesting an evidentiary hearing. On July 23, 2019, an evidentiary hearing was conducted in the Charleston County Court of Common Pleas with the

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[1] Notably, following Appellant's arrest, the armed robberies ceased. (Plea Tr. p. 22).

[2] In exchange for the entry of the guilty pleas, the solicitor dismissed Appellant's other fifteen charges. (Plea Tr. p. 4).

[3] Throughout his brief, Appellant asserts the plea judge originally sentenced him to a thirty-year term of imprisonment that was suspended to eighteen years of imprisonment and twelve years of probation. (App. Br. p. 2; p. 11; p. 15). However, the plea judge did *not* actually impose any probationary term when imposing Appellant's sentence and, instead, explained to Appellant how the suspended portion of the sentence imposed would interplay with the mandatory community supervision that would follow the completion of the sentence's unsuspended portion. (Plea Tr. pp. 37-39; Sentencing Sheets).

Honorable Michael G. Nettles, circuit court judge, presiding. At the conclusion of the hearing, the post-conviction relief judge granted resentencing but dismissed all other claims, and that ruling was confirmed through a written order filed on October 1, 2019. Following the issuance of the final order, Appellant again elected not to appeal.

Thereafter, on January 10, 2020, a resentencing hearing was conducted in the Charleston County Court of General Sessions with the Honorable R. Markley Dennis, Jr., circuit court judge, once again presiding. At the conclusion of the hearing, the plea judge sentenced Appellant to concurrent terms of imprisonment of twenty-eight years for the five armed robbery convictions, and that ruling was confirmed through a written order filed on January 15, 2020. Appellant then timely filed a notice of appeal.[4]

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[4] Subsequent to the initiation of the appeal, plea counsel submitted a statement asserting there were no issues appropriate for appellate review in Appellant's case.
Appellate Records for State v. Antonio Orlando Simmons, South Carolina Appellate Court Public Index, https://ctrack.sccourts.org/public/caseView.do?csIID=71471. However, later on, plea counsel submitted a revised statement alleging there actually was a lone issue related to the plea judge's decision to increase Appellant's sentence that had been preserved for review. Id.

STATEMENT OF FACTS

Between December of 2013 and March of 2014, a number of highly-similar armed robberies were carried out at different Charleston County restaurants, gas stations, and stores. (Plea Tr. pp. 19-20). Due to the similarities between the crimes, the law enforcement officers who began investigating them suspected they were likely being perpetrated by the same individuals. (Plea Tr. p. 20).

As the investigation into the armed robberies progressed, Appellant was identified as a potential suspect. (Plea Tr. pp. 21-22). Through further investigation, Appellant was determined to have been at the location of the majority of the crimes based on information obtained from his phone records. (Plea Tr. p. 21). Similarly, evidence consistent with items worn by the robbers was found amongst trash left outside Appellant's home. (Plea Tr. p. 21).

Based on that, Appellant was tracked down in April of 2014. (Plea Tr. pp. 21-22; Arrest Warrants). Once he had been apprehended, Appellant was interviewed by officers, and, during the course of the interview, he confessed to having committed two of the armed robberies. (Plea Tr. p. 22). A search was then conducted at Appellant's home, and further evidence linking him to the crimes was recovered. (Plea Tr. p. 22).

Subsequently, Appellant was indicted for twenty total offenses, including ten counts of armed robbery, in connection to his crime spree. (Plea Tr. p. 4; Indictments). Based on the "most serious" nature of Appellant's offenses, the solicitor considered pursuing separate convictions in order to subject Appellant to a mandatory sentence of life without parole. (Plea Tr. pp. 5-6). However, following negotiations with defense counsel, the solicitor extended a plea offer that would have permitted Appellant to receive an aggregate sentence of twenty to twenty-five years. (Plea Tr. p. 5). Ultimately though, Appellant rejected that offer. (Plea Tr. p. 5).

Following that, Appellant's original defense counsel was relieved, and new defense counsel was appointed to investigate whether Appellant might be suffering from some mental health or competency issues. (Plea Tr. pp. 5-6). Based on that investigation, Appellant was determined to be competent, and Appellant's new defense counsel began renewed negotiations with the solicitor. (Plea Tr. p. 3; p. 6). Through those negotiations, the solicitor agreed to extend a revised offer that would result in Appellant receiving an aggregate sentence between seventeen and twenty-eight years in exchange for pleading guilty to just five of his twenty pending charges.[5] (Plea Tr. p. 4; p. 6). In response to that offer, Appellant accepted. (Plea Tr. p. 13).

Thereafter, on March 20, 2018, a plea hearing was conducted before the plea judge, and Appellant entered negotiated guilty pleas to five counts of armed robbery. (Plea Tr. p. 1; p. 13; pp. 15-16; p. 32). In doing so, Appellant confirmed he was, in fact, guilty of the armed robberies. (Plea Tr. p. 25; p. 32). Furthermore, Appellant confirmed he understood he was receiving a "major benefit" by being able to avoid a mandatory sentence of life without parole, and he acknowledged he could potentially be sentenced to up to twenty-eight years pursuant to the terms of the plea agreement. (Plea Tr. pp. 15-16; p. 27).

Once the guilty pleas had been entered, the plea judge accepted them as freely, voluntarily, knowingly, and intelligently made. (Plea Tr. p. 33). The plea judge then imposed a thirty-year term of imprisonment suspended to an eighteen-year term of imprisonment for one of the armed robbery convictions along with concurrent eighteen-year terms of imprisonment for all the other convictions. (Plea Tr. p. 37; p. 40). In structuring Appellant's sentence in that manner, the plea judge explained "the only way" he was willing to accept the eighteen-year "active time" sentence he imposed was his perceived ability to also include "exposure time" by suspending a

[5] Later on, the plea judge described the solicitor's offer as "extremely fair." (Plea Tr. p. 37).

portion of the sentence. (Plea Tr. p. 38). He further explained he specifically structured Appellant's sentence in such a manner because he believed it would provide needed protection to society by ensuring Appellant would have to serve a total of thirty years if he was not able to successfully complete the statutorily-mandated period of community supervision that would follow the initial "active time" portion of his sentence. (Plea Tr. pp. 37-38).

Subsequent to the guilty plea hearing, Appellant filed an application for post-conviction relief seeking for his pleas to be vacated and asserting his sentence was illegal. (PCR Order, pp. 2-3). Ultimately, after considering the matter, the post-conviction relief judge determined Appellant's sentence was, in fact, illegal because the statutory language in Section 16-11-330 of the South Carolina Code of Laws prohibited any portion of an armed robbery sentence—like Appellant's—from being suspended. (PCR Order, pp. 11-12). Based on that determination, the post-conviction relief judge vacated Appellant's sentence and remanded the matter for the limited purpose of resentencing. (PCR Order, p. 1; pp. 12-13). Meanwhile, the post-conviction relief judge rejected all other claims, including Appellant's attempt to have his guilty pleas vacated. (PCR Order, pp. 1-3; pp. 5-11; p. 13).

Following the remand for resentencing, a hearing was conducted on January 10, 2020, before the plea judge in accordance with the post-conviction relief judge's remand order. (Sent. Tr. p. 1; p. 3). During the course of the hearing, defense counsel asserted the imposition of a sentence greater than the one that had previously been imposed would lead to a presumption of vindictiveness "without a valid reason" being provided. (Sent. Tr. p. 5). In response to that assertion, the plea judge indicated he would provide such a reason. (Sent. Tr. p. 5). The plea judge further explained he fully understood a defendant could not be punished for exercising a right and indicated he would never do so to a defendant. (Sent. Tr. p. 6). After making those

remarks, the plea judge afforded defense counsel and Appellant an opportunity to be heard. (Sent. Tr. p. 7).

At that point, defense counsel made a few brief comments and noted Appellant had no disciplinary infractions while incarcerated. (Sent. Tr. p. 7). Appellant then personally addressed the plea judge and claimed his guilty pleas had "not no way" been intelligently entered. (Sent. Tr. p. 8). In response, the plea judge noted that particular claim had already been litigated and rejected during the post-conviction relief action and indicated he had tried to "give [Appellant] a break" through the sentence originally imposed. (Sent. Tr. p. 8). Based on Appellant's remarks, the plea judge then asked Appellant whether he was currently seeking to withdraw his guilty pleas and proceed to trial. (Sent. Tr. p. 9). In reply, Appellant confirmed he was seeking to do so, alleged he was actually innocent, and requested a jury trial. (Sent. Tr. p. 9; p. 11).

Following that, the plea judge explained he originally structured Appellant's sentence in the manner he did "to give him the benefit of a lower sentence" while simultaneously ensuring Appellant could be subjected to additional imprisonment for the protection of society if he violated the conditions of the community supervision that would have followed the completion of the unsuspended portion of his sentence. (Sent. Tr. p. 11). The plea judge further explained he only imposed the sentence he imposed due to that "flexibility" and—consistent with the statements he made during the guilty plea hearing—confirmed he did not believe a sentence as low as eighteen years would be appropriate for Appellant's "five separate armed robberies" if he was unable to impose anything other than a "straight sentence." (Plea Tr. pp. 37-38; Sent. Tr. pp. 11-12). As a result, the plea judge indicated he believed the maximum sentence was warranted "because of the five" convictions, again confirmed the maximum sentence was only not imposed originally due to his earlier mistaken understanding as to how the sentence could be

structured, and explained he was not punishing Appellant by imposing a higher sentence. (Sent. Tr. pp. 11-14).

In response to those remarks, defense counsel indicated Appellant now wanted to go back to "square one," but he further argued he *objected* to that occurring. (Sent Tr. p. 18). In support of that objection, defense counsel asserted he did not believe the plea judge could properly vacate Appellant's guilty pleas as he did not have the authority to do so based on the current posture of the case. (Sent. Tr. pp. 15-16; p. 18). At that point, the plea judge agreed with defense counsel he no longer had authority to set aside the previously-entered-and-accepted guilty pleas under the circumstances involved. (Sent. Tr. pp. 18-19).

Thereafter, the plea judge again explained he structured Appellant's sentence originally to ensure he could be returned to incarceration if necessary. (Sent. Tr. p. 21). However, since Appellant's sentence could not properly be structured in such a manner based on the language of the armed robbery statute, the plea judge indicated the circumstances and nature of Appellant's offenses warranted the maximum sentence. (Sent. Tr. p. 22). Accordingly, the plea judge sentenced Appellant to a twenty-eight-year term of imprisonment for the armed robberies, which was the maximum sentence permissible pursuant to the earlier plea agreement. (Plea Tr. p. 4; pp. 15-16; Sent. Tr. p. 22). Following that, no objections of any kind were raised. (Sent. Tr. p. 23).

Subsequently, the plea judge issued a written sentencing order confirming Appellant's new aggregate sentence. (Sent. Order, pp. 1-2). Through that order, the plea judge again reiterated he had not imposed Appellant's sentence in a vindictive manner and, instead, had elected to impose the maximum possible sentence because he was unable to structure Appellant's sentence in a way to ensure his "continued supervision after his release from state custody." (Sent. Order, pp. 1-2).

ARGUMENT

I.

Appellant's current challenge to the manner in which the plea judge addressed the pro se motion seeking to withdraw guilty pleas that had been entered nearly two years earlier is improper because the motion was made in a pro se fashion by a represented defendant over the objection of his defense counsel, who conversely argued the plea judge lacked the authority to grant the motion under the circumstances involved. However, even if the challenge is somehow proper, the plea judge nonetheless correctly recognized he lacked the authority to grant Appellant's pro se motion because that motion was made nearly two years after the term of court in which the guilty pleas were entered had ended without any timely post-trial motions being filed and during a hearing being held following a remand solely for the purpose of resentencing and resentencing alone.

Appellant contends the plea judge abused his discretion by refusing to exercise his discretion and consider the pro se guilty plea withdrawal motion that was made during the resentencing hearing. In support of that contention, Appellant maintains he was purportedly returned to the exact same position he had been in after the guilty pleas were first accepted but prior to his original sentence being imposed when the post-conviction relief judge remanded his case for resentencing. Based on that, Appellant maintains the plea judge did, in fact, have the authority to consider and grant the pro se motion seeking to withdraw the guilty pleas and, thus, reversibly erred by reaching a contrary conclusion. Initially, Appellant's appellate challenge to the manner in which the plea judge addressed the pro se motion was procedurally barred because Appellant was represented by defense counsel, who not only did not make a motion seeking the withdrawal of the guilty pleas on Appellant's behalf but who *objected* to any such motion being granted on the basis the plea judge lacked authority to grant it. However, even if that procedural bar could somehow be ignored, the plea judge correctly determined he did not have the authority to address the pro se guilty plea withdrawal motion because: (1) the term of court in which the guilty pleas were originally entered had elapsed without any timely post-trial motions being filed; and (2) jurisdiction over the matter was only returned to the plea judge for the limited

purpose of resentencing. Therefore, just as defense counsel accurately argued, the plea judge only possessed the limited authority to resentence Appellant in accordance with the order remanding the matter for that limited purpose. Appellant's convictions and aggregate sentence should be affirmed.

Standard of Review

In criminal cases, appellate courts sit to review *preserved* errors of law only. State v. Palmer, 415 S.C. 502, 511, 783 S.E.2d 823, 827 (Ct. App. 2016); see State v. Wise, 359 S.C. 14, 21, 596 S.E.2d 475, 478 (2004) ("In criminal cases, the appellate court sits only to review errors of law which have been properly preserved, i.e., the issue has been raised to and ruled on by the trial court."). Based on that, appellate courts in criminal cases are generally "limited to determining whether the trial court abused its discretion." State v. Green, 432 S.C. 572, 582, 854 S.E.2d 626, 631 (Ct. App. 2021). "An abuse of discretion occurs when the trial court's ruling is based upon an error of law, such as application of the wrong legal principle; or, when based upon factual conclusions, the ruling is without evidentiary support; or, when the trial court is vested with discretion, but the ruling reveals no discretion was exercised; or when the ruling does not fall within the range of permissible decisions applicable in a particular case, such that it may be deemed arbitrary and capricious." State v. Allen, 370 S.C. 88, 94, 634 S.E.2d 653, 656 (2006).

Argument

A. Impropriety of Appellant's Current Challenge to the Plea Judge's Determination He Had No Authority to Withdraw Appellant's Guilty Pleas at the Time of the Resentencing Hearing in Light of Defense Counsel's Objection to the Guilty Pleas Being Withdrawn

During a criminal proceeding conducted in South Carolina, "[t]here is no right to 'hybrid representation' that is partially pro se and partially by counsel[.]" Miller v. State, 388 S.C. 347, 347, 697 S.E.2d 527, 527 (2010); see Jones v. State, 348 S.C. 13, 14, 558 S.E.2d 517, 517 (2002)

("There is no constitutional right to hybrid representation either at trial or on appeal."); see also United States v. Carranza, 645 F. App'x 297, 300 (4th Cir. 2016) ("A criminal defendant has no statutory or constitutional right to proceed pro se while simultaneously being represented by counsel."). Therefore, when a defendant in our state is represented by counsel, the defendant is ordinarily not permitted to make substantive pro se motions and, instead, must raise issues and arguments *through counsel*. See, e.g,. Foster v. State, 298 S.C. 306, 307, 379 S.E.2d 907, 907 (1989) (ordering the return of a substantive pro se document because it was filed while Foster was represented by counsel). Meanwhile, a represented defendant is ordinarily *bound* by his or her defense counsel's motions, arguments, and actions. Coleman v. Thompson, 501 U.S. 722, 753 (1991); see United States v. Daniels, 572 F.2d 535, 540 (5th Cir. 1978) ("[U]nless an attorney's actions effectively deny the defendant his sixth amendment right to the assistance of counsel, the defendant is bound by his attorney's decisions during trial."); Clark v. Clark, 271 S.C. 21, 23, 244 S.E.2d 743, 744 (1978) ("The acts and omissions of an attorney are directly attributable to the client.").

In the case sub judice, defense counsel argued—correctly—during the resentencing hearing the plea judge did not have authority to consider or grant a motion seeking withdrawal of the guilty pleas at that time due to the limited nature of the remand that had been ordered and, based on that, expressly *objected* to Appellant's previously-entered-and-accepted guilty pleas being withdrawn.[6] Significantly, because Appellant was represented by defense counsel at the time that objection was lodged on behalf of the defense, Appellant was bound by defense counsel's actions and arguments. See Arnold v. Yarborough, 281 S.C. 570, 572, 316 S.E.2d 416,

[6] Tellingly, Appellant has omitted from his appellate brief any reference to or acknowledgment of defense counsel's express assertion the plea judge lacked the authority to grant the motion to withdraw Appellant's guilty pleas under the circumstances involved. (App. Br. pp. 1-16).

417 (Ct. App. 1984) ("Acts of an attorney are directly attributable to and binding upon the client."); see also State v. Worthy, 239 S.C. 449, 465, 123 S.E.2d 835, 843 (1962) (explain an appellant—who acted "through his attorney" during the circuit court proceedings—was "not in position to assert error when he was the author of such and his own conduct induced the situation of which he now complains"), overruled by on other grounds by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991). As a result, Appellant cannot now properly adopt an appellate position contrary to the one taken by defense counsel on his behalf during the resentencing hearing. See State v. Bryant, 372 S.C. 305, 315-316, 642 S.E.2d 582, 588 (2007) (recognizing an issue conceded during trial cannot subsequently be argued on appeal); State v. Thomason, 355 S.C. 278, 288, 584 S.E.2d 143, 148 (Ct. App. 2003) ("[A] party cannot argue one theory at trial and a different theory on appeal."); cf. State v. Washington, 315 S.C. 108, 110, 432 S.E2d 448, 449 (1993) ("Appellant may not now be heard to complain of the admission of evidence elicited by his own counsel.").

Therefore, even though Appellant personally indicated to the plea judge he was seeking for his guilty pleas to be withdrawn, that improper—and null—pro se motion was not sufficient to properly raise any issue related to the withdrawal of the guilty pleas since it was made while Appellant was represented by defense counsel who took the exact *opposite* position on Appellant's behalf. See State v. Winzer, 151 So. 3d 135, 145 (La. Ct. App. 2014) ("[A] trial court is not required to entertain motions filed by a defendant who is represented by counsel. While an indigent defendant has a right to counsel as well as the opposite right to represent himself, he has no constitutional right to be both represented and representative."); cf. Miller, 388 S.C. at 347, 697 S.E.2d at 527 ("Since there is no right to 'hybrid representation' that is partially pro se and partially by counsel, substantive documents, with the exception of motions to

relieve counsel, filed pro se by a person represented by counsel are not to be accepted unless submitted by counsel. Because petitioner was represented by counsel, the pro se motion was not proper, should not have been accepted, and should not have been ruled upon. The motion was essentially a nullity." (citations omitted)); State v. Devore, 416 S.C. 115, 123, 784 S.E.2d 690, 694 (Ct. App. 2016) ("Since Devore was represented by counsel, his pro se motion was not proper and could not be accepted."). Accordingly, Appellant's current challenge to the plea judge's ruling on the pro se guilty plea withdrawal motion—which was fully consistent with the position advanced by *defense counsel*—cannot now appropriately be considered or addressed on appeal and should be rejected as procedurally barred. See State v. Goodwin, 250 S.C. 403, 406, 158 S.E.2d 195, 197 (1967) (instructing an appellant cannot properly complain on appeal about something done by his own defense counsel); cf. Dos Santos v. State, 834 S.E.2d 733, 737 (Ga. 2019) ("Dos Santos's pro se motion to withdraw her pleas was unauthorized and without effect, because she had no right to represent herself at the same time she was represented by a lawyer. The trial court should have dismissed Dos Santos's pro se motion rather than ruling on its merits." (citations omitted)). Appellant's convictions and aggregate sentence should be affirmed.

B. Correctness of the Plea Judge's Determination He Lacked Authority to Entertain Appellant's Pro Se Guilty Plea Withdrawal Motion at the Time of the Resentencing Hearing

Pursuant to South Carolina law, a circuit court judge generally "is without authority to consider a criminal matter once the term of court during which judgment was entered expires." State v. Warren, 392 S.C. 235, 238, 708 S.E.2d 234, 235 (Ct. App. 2011); see State v. Hinson, 303 S.C. 92, 94, 399 S.E.2d 422, 422 (1990) ("It is a long-standing rule of law that a trial judge is without jurisdiction to consider a criminal matter once the term of court during which judgment was entered expires."). Significantly, that general rule is inapplicable *only* when

either: (1) a timely post-trial motion is filed; or (2) a motion for a new trial based on after-discovered evidence is filed. State v. Campbell, 376 S.C. 212, 215, 656 S.E.2d 371, 373 (2008). Thus, absent the filing of a timely post-trial motion or a specific type of new trial motion, a circuit court judge lacks the authority to act in a particular matter once the term of court has ended. Id.; see Rule 29(a), SCRCrimP ("Except for motions for new trials based on after-discovered evidence, post-trial motions shall be made within ten (10) days after the imposition of the sentence.").

Meanwhile, when a case is properly appealed or challenged through some form of post-conviction action and then later remanded back to the circuit court, the circuit court judge has no authority to act in the remanded case in a manner that exceeds the mandates of the reviewing court. S.C. Dep't of Soc. Servs. v. Basnight, 346 S.C. 241, 250, 551 S.E.2d 275, 279 (Ct. App. 2001); see Parker v. Shecut, 359 S.C. 143, 152, 597 S.E.2d 793, 798-799 (2004) (instructing the circuit court obtains jurisdiction to enforce the judgment and take any actions consistent with the appellate court's ruling when an appellate court remits a case to the circuit court). A reviewing court's mandate is jurisdictional, and a circuit court judge has a duty to follow the reviewing court's directives. Prince v. Beaufort Mem'l Hosp., 392 S.C. 599, 605, 709 S.E.2d 122, 125 (Ct. App. 2011); see Ackerman v. McMillan, 324 S.C. 440, 443, 477 S.E.2d 267, 268 (Ct. App. 1996) ("It is the duty of the trial court to follow the decision of the appellate court."). Accordingly, when a case is remanded to the circuit court on limited grounds, a circuit court judge commits reversible error by considering an issue outside of the narrow scope of the basis for the remand. Ackerman, 324 S.C. at 443, 477 S.E.2d at 268; see Prince, 392 S.C. at 605, 709 S.E.2d at 125 ("When we remand a case, the trial court has only the jurisdiction and authority mandated by this court.").

In the case at bar, the plea judge accepted Appellant's guilty pleas and originally sentenced him for his crimes on May 20, 2018. Following that, Appellant did not seek to withdraw his guilty pleas at that time, did not timely file any post-trial motions, and did not appeal his convictions. Instead, he waited over *six-hundred* days and then—while represented by counsel—made a pro se motion seeking to withdraw his guilty pleas during the course of a hearing being conducted following a *limited* remand for the sole purpose of resentencing.[7] See, e.g., State v. Petty, 245 S.C. 40, 42, 138 S.E.2d 643, 645 (1964) ("In the case of an illegal sentence, the well settled practice in this jurisdiction is to *affirm the conviction* but set aside the sentence and remand the case to the trial court for the purpose of resentencing the defendant." (emphasis added)).

Obviously, Appellant's pro se motion was not filed within ten days of the imposition of his original sentence. Cf. Warren, 392 S.C. at 240, 708 S.E.2d at 236 ("Warren's motion to reconsider her sentence . . . is subject to the ten day time period prescribed in Rule 29; thus, because the motion was filed more than three years after imposition of the sentence, Warren's motion is not timely."). Based on that, Appellant's convictions stemming from his entry of the

[7] Significantly, none of the cases Appellant has elected to rely upon on appeal as support for his challenge to the manner in which the plea judge addressed his pro se motion to withdraw his guilty pleas involved a situation in which a defendant first sought to withdraw a guilty plea at a resentencing hearing that was conducted following a limited remand, which renders them all highly distinguishable from Appellant's case. Cf. Santobello v. New York, 404 U.S. 257, 258-259 (1971) (addressing an issue arising after defense counsel moved to withdraw Santobello's guilty plea prior to sentencing and then later immediately objected when the prosecutor breached the terms of the plea agreement at sentencing); State v. Lee, 274 S.C. 372, 375, 264 S.E.2d 418, 419 (1980) (addressing an issue related to a motion to withdraw a guilty plea that was made directly after the sentence was imposed); State v. Gilliam, 274 S.C. 324, 325, 262 S.E.2d 923, 924 (1980) (addressing an issue related to a motion to withdraw a guilty plea that was made before Gilliam's sentence was finally imposed); State v. Lambert, 266 S.C. 574, 580, 225 S.E.2d 340, 342-343 (1976) (addressing an issue related to a motion to withdraw a guilty plea that was made after sentencing); State v. Mansfield, 343 S.C. 66, 86, 538 S.E.2d 257, 267 (Ct. App. 2000) (addressing an issue related to a motion to withdraw a guilty plea that was made "prior to sentencing").

armed robbery guilty pleas nearly two full years earlier had long since become final. See State v. Pfeiffer, 427 S.C. 10, 13, 828 S.E.2d 764, 766 (2019) ("In a criminal case, once the term of court ends, the trial court lacks jurisdiction to consider additional matters unless a party files a timely post-trial motion."); State v. Black, 400 S.C. 10, 28, 732 S.E.2d 880, 890 (2012) (instructing an unappealed ruling—regardless of whether it is right or wrong—becomes the law of the case); see also Anderson v. Leeke, 271 S.C. 435, 441, 248 S.E.2d 120, 123 (1978) (recognizing the importance of finality in criminal cases).

Beyond that, the hearing during which Appellant made his untimely and improper pro se motion was being held following a limited remand *solely* for the purpose of conducting resentencing while the mandate ordering such a hearing be held had simultaneously rejected Appellant's attempt to have his convictions themselves disturbed. Cf. State v. Slocumb, 412 S.C. 88, 92-93, 770 S.E.2d 436, 439 (Ct. App. 2015) ("Although review of Slocumb's burglary sentence was directed to the circuit court from the federal district court rather than one of our state appellate courts, we find the circuit court was likewise bound by the district court's directive. In this case, the directive included only reconsideration of the sentence for the burglary conviction. . . . We find no error by Judge Benjamin in refusing to entertain Slocumb's request to reconsider sentencing on all of his convictions."). Because the remand was solely for the limited purpose of resentencing and resentencing alone, the plea judge only acquired jurisdiction to carry out resentencing as directed and did *not* possess the authority to address other unrelated matters, including Appellant's belated pro se motion seeking to withdraw his guilty pleas well over a year after they had been entered. See Prince, 392 S.C. at 605, 709 S.E.2d at 125 (explaining a trial court following remand "has only the jurisdiction and authority mandated" by the remanding court); Basnight, 346 S.C. at 250, 551 S.E.2d at 279 ("[A] trial

court has no authority to exceed the mandate of the appellate court on remand."); cf. State v. Yarborough, 363 S.C. 260, 268, 609 S.E.2d 592, 596 (Ct. App. 2005) ("In no way does our remand imply that the trial court should consider any issue other than premature deliberations. Therefore, the trial court properly denied the motion for a new trial based on fundamental fairness reasons.").

Therefore, Appellant's pro se motion seeking to withdraw his guilty plea was not timely, and, resultantly, the plea judge did not have jurisdiction to grant that motion during the limited resentencing hearing. See Rule 29(a), SCRCrimP (affording ten days from the imposition of a sentence for the filing of post-trial motions in the circuit court); State v. Best, 257 S.C. 361, 368, 186 S.E.2d 272, 275 (1972) ("Under our judicial system the presiding judge in the Circuit Court loses jurisdiction with the adjournment of the term."). Moreover, had the plea judge granted Appellant's improper pro se motion, any ruling doing so would have been both improper and null. See Blanton v. Stathos, 351 S.C. 534, 542, 570 S.E.2d 565, 569 (Ct. App. 2002) ("A judgment by a court without jurisdiction of both the parties and the subject matter is a nullity and must be so treated by the courts whenever and for whatever purpose it is presented and relied on."). Accordingly, the plea judge did not err by declining to exercise discretion he did not actually possess and by rejecting Appellant's improper pro se motion when—just as defense counsel astutely argued—he did not have the proper authority to grant it. Cf. Slocumb, 412 S.C. 88, 92-93, 770 S.E.2d 436, 439 (affirming the resentencing judge's refusal to entertain a motion seeking resentencing on all Slocumb's charges when the matter had been remanded for resentencing solely as to a single charge due to the limited nature of the remanding court's mandate). Appellant's convictions and aggregate sentence should be affirmed.

II.

Appellant's current challenge to his aggregate sentence, which was imposed following a remand for resentencing, was not properly preserved for appellate review because defense counsel neither raised any objections to Appellant's revised sentence after it was imposed nor challenged the adequacy of the plea judge's explanation for that sentence as he is now attempting to do for the first time on appeal. However, even if Appellant's challenge to his sentence was somehow properly preserved for review, the plea judge did not abuse his discretion or otherwise violate Appellant's rights by revising the sentence originally imposed from a "total sentence" of thirty years to a twenty-eight-year term of imprisonment after Appellant's original sentence was vacated because—just as the plea judge repeatedly explained—he did not revise the sentence to punish Appellant for successfully pursuing post-conviction relief and, instead, did so purely in the manner necessary to carry out his original sentencing intentions while also complying with his new understanding of the statutory language preventing any part of the sentence from being suspended.

Appellant contends the plea judge violated his due process rights by sentencing him "more severely" during the resentencing hearing to punish him for successfully challenging his original sentence through a post-conviction relief action. In support of that contention, Appellant maintains his original sentence was "the equivalent of an eighteen-year active prison sentence" and, thus, the fact his sentence was revised to a twenty-eight-year term of imprisonment coupled with the comments made by the plea judge during the resentencing hearing established his revised sentence was vindictively imposed. Initially, Appellant's current challenge to his revised sentence was not properly preserved for appellate review because: (1) Appellant did not raise any objections to his revised sentence after it was imposed; and (2) Appellant did not raise any arguments or objections to the adequacy of the plea judge's explanation for the revised sentence when such an explanation was provided. Under those circumstances, the plea judge was denied any opportunity to address the arguments and issues Appellant is now raising for the first time on appeal, and, as a result, those arguments and issues were not properly preserved for appellate review. However, even if Appellant's current challenge to his sentence could somehow properly be considered and addressed for the first time on appeal, the plea judge did not abuse his broad

sentencing discretion or otherwise violate Appellant's rights by revising Appellant's original "total sentence" of thirty years to a twenty-eight-year term of imprisonment after the original sentence was vacated because he did not do so to vindictively punish Appellant for successfully challenging his original sentence through the post-conviction relief action. Instead, as the plea judge repeatedly explained, he restructured Appellant's sentence in the manner necessary to serve his original sentencing intentions while simultaneously complying with his new understanding of the statutory language preventing any part of the sentence from being suspended, and the revised sentence imposed fully complied with both the terms of the plea agreement and sentencing limits for Appellant's offenses. Therefore, the plea judge did not abuse his discretion or violate Appellant's rights by imposing the revised sentence, and there is no proper basis upon which to disturb Appellant's revised sentence on appeal. Appellant's convictions and aggregate sentence should be affirmed.

Standard of Review

In criminal cases, appellate courts sit to review errors of law only. State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). When reviewing a sentencing issue on appeal, an appellate court will only interfere with a circuit court judge's sentencing decision in rare and unusual circumstances in light of the broad discretion afforded to the circuit court judge on such matters. State v. Ferguson, 221 S.C. 300, 307, 70 S.E.2d 355, 358 (1952); see State v. Sidell, 262 S.C. 397, 398, 205 S.E.2d 2, 3 (1974) ("A broad discretion is allowed the trial judge in imposing sentence within the legal limits."); see also State v. Franklin, 267 S.C. 240, 246, 226 S.E.2d 896, 898 (1976) ("A trial judge generally has wide discretion in determining what sentence to impose."). Furthermore, appellate courts in South Carolina have "no jurisdiction on appeal to correct a sentence alleged to be excessive when it is within the limits prescribed by law

in the discretion of the [sentencing] judge, and is not the result of partiality, prejudice, oppression or corrupt motive." State v. Scates, 212 S.C. 150, 154, 46 S.E.2d 693, 694 (1948); cf. State v. Davis, 88 S.C. 229, __, 70 S.E. 811, 814 (1911) ("It is excepted that imprisonment for five years in this case is excessive. We have repeatedly held that we have no jurisdiction to correct a sentence on this ground, provided it is within the limits prescribed by law for the discretion of the trial court, and is not the result of partiality, prejudice, oppression, or corrupt motive.").

Argument

A. Lack of Proper Issue Preservation

In South Carolina, issue preservation requirements are a fundamental component of appellate procedure. Gaddy v. Douglass, 359 S.C. 329, 350, 597 S.E.2d 12, 23 (Ct. App. 2004). The key purpose of those requirements is "to give the trial court a fair opportunity to rule on the issues, and thus provide [the appellate court] with a platform for meaningful appellate review." Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp., 368 S.C. 342, 373, 628 S.E.2d 902, 919 (Ct. App. 2006). Through their enforcement and application, the trial court is guaranteed a chance "to rule properly after it considered all relevant facts, law, and arguments[,]" and the appellate court is provided with everything needed to properly review whatever ruling is made within the limits of the applicable standard of review. I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000); see Queen's Grant, 368 S.C. at 373, 628 S.E.2d at 919 ("The rationale for the [error preservation] rule is that until the trial court considers the matter and makes a ruling, an appellate court is unable to find error.").

For an issue to be preserved for appellate review pursuant to our issue preservation requirements, the issue must have been: (1) raised to and ruled upon by the trial court; (2) raised by the appellant; (3) raised in a timely manner; and (4) raised to the trial court with sufficient

specificity. State v. Rogers, 361 S.C. 178, 183, 603 S.E.2d 910, 912-913 (Ct. App. 2004). Thus, based on those requirements, an issue cannot ordinarily be raised or considered on appeal unless it was first presented to and ruled upon by the trial judge. State v. Freiburger, 366 S.C. 125, 135, 620 S.E.2d 737, 742 (2005); see State v. Patterson, 324 S.C. 5, 19, 482 S.E.2d 760, 767 (1997) ("Appellant is limited to the grounds raised at trial.").

Furthermore, in the specific context of sentencing issues, a criminal defendant is required to contemporaneously object to an alleged sentencing error during trial in order to preserve an issue with a sentence for appellate review. State v. Salisbury, 330 S.C. 250, 276, 498 S.E.2d 655, 669 (Ct. App. 1998); see State v. Johnston, 333 S.C. 459, 462, 510 S.E.2d 423, 425 (1999) ("[A] challenge to sentencing must be raised at trial, or the issue will not be preserved for appellate review."). Importantly, an appellant's failure to timely object to or seek modification of a sentence in the trial court precludes him from pursuing the issue on appeal. State v. Winestock, 271 S.C. 473, 475, 248 S.E.2d 307, 308 (1978); see State v. Garner, 304 S.C. 220, 222, 403 S.E.2d 631, 632 (1991) ("No objection to sentencing was raised at trial and this issue is not properly before the court."); State v. Shumate, 276 S.C. 46, 47, 275 S.E.2d 288, 288 (1981) ("A defendant's failure to timely object to or seek modification of his sentence in the trial court precludes him from presenting his objection for the first time on appeal. Appellant's contention was not advanced at the probation revocation hearing where the results were most favorable to him. By failing to object to or seek modification of the revocation sentence in the trial court he is now foreclosed from doing so on appeal." (citations omitted)).

In the present case, Appellant readily acknowledges on appeal the plea judge provided an explanation during the resentencing hearing to justify the manner in which he revised Appellant's sentencing following the grant of post-conviction relief. Nevertheless, Appellant

now alleges his due process rights were violated because that justification was "a pretense" and—contrary to what the plea judge stated—his sentence was really increased to punish him for being successful in the post-conviction relief action. Importantly though, defense counsel did *not* raise such a contention during the resentencing hearing. Instead, defense counsel simply advised the plea judge an increase in Appellant's sentence following the remand for resentencing would raise a *presumption* of vindictiveness if the newly-imposed sentence was increased "without a valid a reason." The plea judge then proceeded to provide just such a reason and explained exactly why Appellant's sentence was being altered following the remand. And, once that reason was provided and Appellant's revised sentence was imposed, defense counsel did *not* object to that new sentence, did *not* argue the plea judge's stated justification was inadequate or insincere, and did *not* argue the plea judge improperly punished Appellant for exercising his rights.

Because defense counsel did not raise to the plea judge any of the arguments Appellant is now attempting to raise on appeal, the plea judge was wholly denied an opportunity to consider, address, or rule upon those arguments. See Queen's Grant, 368 S.C. at 372-373, 628 S.E.2d at 919 ("Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide us with a platform for meaningful appellate review." (citations omitted)). Critically, without first giving the plea judge an opportunity to address his claims regarding the propriety of the sentence actually imposed or the adequacy of the justification provided for the revised sentence, Appellant is now precluded from raising those claims for the first time on appeal pursuant to our state's well-settled issue preservation requirements. See I'On, 338 S.C. at 422, 526 S.E.2d at 724 ("The losing party must first try to convince the lower court it is has ruled wrongly and then, if that effort fails, convince the appellate court that the

lower court erred."); cf. State v. McCray, 222 S.C. 391, 394, 73 S.E.2d 1, 2 (1952) (finding McCray's appellate contention the sentence imposed was "cruel and excessive" was unavailable to him on appeal because that particular contention was not raised to the circuit court judge). As a result, Appellant's current challenge to his sentence was not properly preserved for appellate review and cannot appropriately be raised or addressed for the first time on appeal. See Johnston, 333 S.C. at 462, 510 S.E.2d at 425 (explaining a sentencing challenge *must* be raised at trial in order to be preserved for appellate review); see also Atl. Coast Builders & Contractors, LLC v. Lewis, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012) ("[E]rror preservation has been a critical part of appellate practice in this State for a long time, serving to ensure . . . that we do not reach issues which were not ruled upon by the trial court. . . . [T]hese rules *must also be applied consistently* and not selectively. If our review of the record establishes that an issue is not preserved, then we should not reach it." (emphasis added)); cf. State v. Walker, 252 S.C. 325, 327-328, 166 S.E.2d 209, 210 (1969) (declining to address Walker's appellate contention the sentence he received could not have properly been imposed "on the elementary ground that the question was not raised below"). Appellant's convictions and aggregate sentence should be affirmed.

B. Propriety of Appellant's Revised Sentence

In our state, sentencing judges are vested with broad discretion to impose a sentence falling within the statutory limits upon an offender convicted of a crime. Sidell, 262 S.C. at 398, 205 S.E.2d at 3. In exercising that broad sentencing authority, the sentencing judge must be accorded "very wide" discretion to determine the appropriate sentence and can properly consider "any and all information that reasonably might bear upon the proper sentence for the particular defendant, given the crime committed." State v. Hicks, 377 S.C. 322, 325, 659 S.E.2d 499, 500

(Ct. App. 2008). Importantly, so long as the sentence imposed falls within the permissible sentencing limits for an offender's crime, the sentencing judge's decision regarding the appropriate sentence will not be found to be improper unless it violated the constitutional prohibition against cruel and unusual punishment or resulted from partiality, prejudice, oppression, or corrupt motive. See Garrett v. State, 320 S.C. 353, 356, 465 S.E.2d 349, 350 (1995) ("A sentence is not excessive if it is within statutory limitations and there are no facts supporting an allegation of prejudice against respondent."); Wood v. State, 257 S.C. 179, 182, 184 S.E.2d 702, 703 (1971) ("It is well settled in this State that this Court has no jurisdiction to disturb, because of alleged excessiveness, a sentence which is within the limits prescribed by statute unless: (a) the statute itself violates the constitutional injunction . . . against cruel and unusual punishment, or (b) the sentence is the result of partiality, prejudice or pressure or corrupt motive.").

Obviously though, a sentencing judge unquestionably cannot penalize a defendant for exercising a constitutional or statutory right, such as the right to appeal or pursue some other form of post-conviction relief, when imposing a sentence. Alabama v. Smith, 490 U.S. 794, 798 (1989); see United States v. Goodwin, 457 U.S. 368, 372 (1982) ("To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort." (citation and internal quotations omitted)); State v. Higgenbottom, 344 S.C. 11, 14, 542 S.E.2d 718, 720 (2001) ("It is a due process violation to punish a person for exercising a protected statutory or constitutional right."). Critically, vindictiveness against a defendant who merely availed himself or herself of an available right can and "must play no part" in the imposition of a sentence. North Carolina v. Pearce, 395 U.S. 711, 725 (1969).

As a result, a rebuttable presumption ordinarily arises when a sentencing judge who previously sentenced a defendant increases that defendant's sentence following a successful appeal or other post-conviction action. Higgenbottom, 344 S.C. at 14, 542 S.E.2d at 720; see Wasman v. United States, 468 U.S. 559, 569 (1984) (recognizing receipt following retrial of a greater sentence than originally received is sufficient to trigger a presumption of vindictiveness). However, such a presumption—which is based on the fact a judge who presides over both a trial and retrial in the same case "can be expected to operate in the context of roughly the same sentencing considerations"—can be rebutted by objective evidence justifying the sentencing increase. Smith, 490 U.S. at 802; see Higgenbottom, 344 S.C. at 15, 542 S.E.2d at 720 (recognizing "objective evidence of a proper motivation" for an increased sentence can rebut a presumption of vindictiveness). Thus, when the circumstances justifying the presumption do not exist or a valid reason for an increase in a sentence affirmatively appears, the simple fact a disparate sentence was imposed does not render the sentence unconstitutional, and a defendant must demonstrate actual vindictiveness in order to establish his or her sentence is improper. See State v. Hilton, 291 S.C. 276, 278, 353 S.E.2d 282, 284 (1987) ("The Pearce rule is not concerned with the actual length of sentences, but is concerned only with preventing vindictive sentencing."); see also Texas v. McCullough, 475 U.S. 134, 138 (1986) ("Beyond doubt, vindictiveness of a sentencing judge is the evil the Court sought to prevent rather than simply enlarged sentences after a new trial. The Pearce requirements thus do not apply in every case where a convicted defendant receives a higher sentence on retrial. . . . Where the prophylactic rule of Pearce does not apply, the defendant may still obtain relief if he can show actual vindictiveness upon resentencing."); Colten v. Kentucky, 407 U.S. 104, 116 (1972) ("Pearce did

not turn simply on the fact of conviction, appeal, reversal, reconviction, and a greater sentence.”).

Notably, in State v. Brown, 164 So. 3d 395, 401 (La. Ct. App. 2015), the Louisiana Court of Appeals addressed an appellate challenge to a sentence that was revised following resentencing by the same trial judge who imposed the original sentence. Specifically, in that case, Brown was convicted of attempted forcible rape, and the trial judge initially sentenced him to a twenty-year term of imprisonment that was suspended to a ten-year term of imprisonment and five years of supervised probation. Id. at 400-401. At the time that sentence was imposed, the trial judge specifically indicated he believed the manner in which he structured Brown’s sentence was necessary to ensure Brown took his medication and complied with the law following his release. Id. However, shortly after imposing that sentence, the trial judge was alerted by the Louisiana Department of Corrections the sentence was an illegal one due to a statutory provision that prohibited suspension of sentences for crimes of violence. Id. at 401. In response, the trial judge quickly conducted a resentencing hearing and revised Brown’s sentence to a fifteen-year term of imprisonment with no portion suspended. Id. Following that, Brown appealed, arguing the change to his original sentence was illegal. Id. at 400. However, upon considering the matter, the Louisiana Court of Appeals disagreed and affirmed. Id. at 402. In doing so, the Louisiana Court of Appeals noted:

> During resentencing, the trial court stated that it had originally intended for [Brown] to be released after serving part of his twenty-year sentence, but because the law would not allow that, [Brown] was instead sentenced to a lower term of years, but without the benefit of parole, probation, or suspension of sentence.

Id. Based on that, the Louisiana Court of Appeals concluded the revision to Brown’s sentence was entirely proper “even if the sentence [was] more onerous” unless a showing of

vindictiveness was made, and it further determined no such showing had been made under the circumstances involved. Id.

Like the trial judge in Brown, the plea judge in Appellant's case originally imposed an illegal sentence upon Appellant that included both an unsuspended portion and a suspended portion that could not actually properly be suspended. See S.C. Code Ann. § 16-11-330(A) (mandating "no part of" an armed robbery sentence "may be suspended"). Similarly, like the trial judge in Brown, the plea judge in Appellant's case—upon learning the originally-imposed sentence was illegal—revised that sentence by imposing a new term of imprisonment that was longer than the original sentence's unsuspended portion but shorter than that same sentence's overall length when the suspended portion was taken into account. Critically, by doing so, the plea judge—just like the trial judge in Brown—did not violate Appellant's rights because the circumstances involved demonstrate Appellant's revised sentence was not imposed in an unconstitutionally vindictive manner.

Looking to those circumstances, the plea judge—at the time Appellant's sentence was originally imposed—believed he had the authority to partially suspend the sentence and, based on that mistaken belief, imposed a "total sentence" upon Appellant that included an unsuspended eighteen-year term of imprisonment along with an accompanying suspended term that would have ensured Appellant could have been incarcerated for up to *thirty* years in total if he was unable to conform his conduct to the requirements of the law after completing the initial portion of his sentence. See State v. Picklesimer, 388 S.C. 264, 268-269, 695 S.E.2d 845, 848 (2010) (instructing "the total sentence handed down by the court" includes both the suspended and unsuspended portions of the sentence and, as result, explaining the suspended and unsuspended portions of a defendant's sentence together establish the maximum aggregate amount of time the

defendant can be incarcerated and subjected to participation in the mandatory community supervision program). And, in structuring Appellant's "total sentence" in such a manner, the plea judge—all the way back in 2018—expressly affirmed he was *only* willing to impose such a leniently-structured sentence for Appellant's egregious crimes due to the societal protection the suspended term of imprisonment provided through its ability to ensure Appellant could be returned to custody if warranted. See id. at 270, 695 S.E.2d at 848 ("If the defendant's CSP is revoked for a period due to violations, the CSP term begins anew upon the defendant's release."); see also S.C. Code Ann. § 17-25-45(C)(1) (classifying armed robbery as a "most serious" offense); State v. Johnson, 350 S.C. 543, 547, 567 S.E.2d 486, 488 (Ct. App. 2002) ("[F]ew would argue that first-degree burglary, *armed robbery*, and kidnapping are anything other than grave offenses of the 'most serious' nature." (emphasis added)). Thus, based on the "total sentence" originally imposed coupled with the contemporaneous explanation provided for it, the plea judge made abundantly clear at the time Appellant was originally sentenced he most certainly did not believe Appellant's crimes were deserving of a sentence of just eighteen years alone and, instead, warranted something more substantial than that.

Meanwhile, at the time of resentencing, the plea judge was—at least as far as his own perceptions were concerned—in a different situation from the one he mistakenly believed he was in at the time the original sentence was imposed because, by that point, he now knew he could not properly suspend any portion of Appellant's sentence due to the statutory mandate preventing him from doing so, which meant he was not operating "in the context of roughly the same sentencing considerations" at that time in light of his amended understanding of his authority. See Smith, 490 U.S. at 802 (recognizing the presumption of vindictiveness that arises from a trial judge increasing the sentence originally imposed after a retrial stems from the fact

"the sentencing judge who presides at both trials can be expected to operate in the context of roughly the same sentencing considerations after the second trial as he does after the first"). And, the fact the plea judge had earlier made a simple mistake could not legitimately insulate Appellant from being appropriately sentenced for his exceedingly-serious crimes. Cf. Bozza v. United States, 330 U.S. 160, 166-167 (1947) ("The Constitution does not require that sentencing should be a game in which a wrong move by the judge means immunity for the prisoner."). As a result, the plea judge—just like the trial judge in Brown—was both required and permitted to reevaluate the manner in which he structured Appellant's sentence in order to comply with the constraints of the statute barring any part of that sentence from being suspended, and his ensuing act of imposing a term of imprisonment higher than the unsuspended portion originally imposed—but lower than Appellant's original "total sentence"—did not and could not validly warrant a presumption of vindictiveness since the imposition of just such a sentence was necessary for him to be able to achieve the goals of his originally-expressed sentencing intentions. See Christopher v. United States, 415 A.2d 803, 805 (D.C. 1980) ("[T]he courts have made clear that when the original sentence was illegal, a longer term of imprisonment may be imposed upon resentencing."); Brown, 164 So. 3d at 402 ("[W]here an illegal sentence is corrected, a defendant's rights are not violated, even if the sentence is more onerous, unless there is a showing of vindictiveness."); see also United States v. Pimienta-Redondo, 874 F.2d 9, 13 (1st Cir. 1989) ("[O]n resentencing, if it is reasonably clear that the judge reshaped the impost merely as a means of bringing original sentencing intentions to fruition after some new development had intervened, a need for employing the Pearce presumption never arises.").

However, even if a presumption of vindictiveness could somehow be applicable in Appellant's case, any such presumption was rebutted by the valid explanation the plea judge

provided—repeatedly—for the manner in which he revised Appellant's sentence. Cf. State v. Follin, 352 S.C. 235, 257, 573 S.E.2d 812, 823-824 (Ct. App. 2002) (considering the fact "the trial judge repeatedly noted that he was not considering Follin's exercise of her right to a jury trial in rendering her sentence" when finding the trial judge did not improperly punish Follin during sentencing for exercising his rights). Specifically, because Appellant's sentence could no longer be partially suspended, the plea judge unequivocally explained he believed a longer term of imprisonment was necessary for the protection of society due to the nature of Appellant's crimes, which involved a months-long spree of repeated armed robberies. Cf. Wasman, 468 U.S. at 569 ("In sharp contrast to Pearce and Blackledge, . . . the trial judge here carefully explained his reasons for imposing the greater sentence."); Pimienta-Redondo, 874 F.2d at 15 ("[T]he record in no way contradicts the thesis that there was an original sentencing plan."); Christopher, 415 A.2d at 805 ("Because the trial judge could not use a probation term in conjunction with a partially suspended sentence, he had to once again determine what term of incarceration would suffice to meet his sentencing goals. That determination was within his sentencing discretion. We may not disturb it." (citations omitted)). And, significantly, that explanation was fully consistent with the statements the plea judge made nearly two years earlier at the guilty plea hearing itself, which constituted strong proof of the absence of any hidden vindictive motive since those earlier remarks were made long before the plea judge ever knew he would be called upon to again sentence Appellant. See United States v. Ventura, 864 F.3d 301, 310 (4th Cir. 2017) (explaining a rebuttable presumption of vindictiveness arising "*[i]f* the trial court does not explain its reasons for a sentence increase" (emphasis added)); cf. Wasman, 468 U.S. at 570 ("[T]he trial judge's justification is plain even from the record of petitioner's first sentencing proceeding; the judge informed the parties that, although he did not consider pending charges

when sentencing a defendant, he always took into account prior criminal convictions.").
Moreover, the plea judge did not say or do anything else that would support a conclusion Appellant's revised sentence was imposed as the result of any actual vindictiveness. See Hilton, 291 S.C. at 279, 353 S.E.2d at 284 (affirming a sentencing revision where there was nothing in record suggesting the sentence "was based on anything other than proper sentencing considerations"); cf. Scates, 212 S.C. at 154, 46 S.E.2d at 694 (*affirming* the trial judge's decision to impose the maximum penalty of twenty-five years for armed robbery and rejecting Scates's argument the sentence was affected by prejudice even though the trial judge informed Scates during the sentencing proceedings his version of events was "nothing more than a 'cock and bull' story," stated the jury could not have believed that version of events unless they were "dumb simpletons," and called Scates a "husky young man"). Under such circumstances, the plea judge validly explained the increase in Appellant's sentence following resentencing such that any presumption of vindictiveness that could have arisen was rebutted while no actual vindictiveness could be shown. See United States v. Schmeltzer, 20 F.3d 610, 613 (5th Cir. 1994) ("[O]bjective information justifying the increase rebuts any presumption of vindictiveness.").

Since Appellant's aggregate sentence fell within the appropriate sentencing limits for his offenses based on the terms of the plea agreement and no vindictiveness could properly be presumed or established under the circumstances involved, the plea judge did not abuse his discretion or otherwise violate Appellant's rights by revising Appellant's original sentence from an illegal "total sentence" of thirty years to a valid twenty-eight-year term of imprisonment. See Chaffin v. Stynchcombe, 412 U.S. 17, 29 (1973) (recognizing there is "no doubt about the constitutional validity of higher sentences in the absence of vindictiveness"); Pearce, 395 U.S. at

723 (affirming there is no "absolute bar" to a higher sentence being imposed after an original sentence is vacated for some reason); Blackledge v. Perry, 417 U.S. 21, 27 (1974) ("[T]he Due Process Clause is not offended by all possibilities of increased punishment upon retrial after appeal, but only by those that pose a realistic likelihood of 'vindictiveness.' "); People v. Fuller, 520 N.Y.S.2d 449, 450 (N.Y. App. Div. 1987) ("Once the original sentence was vacated on the ground that it was illegal, the court on resentencing was not bound by either the minimum or maximum limits of the original sentence, which had become a nullity . . . . . Thus, the court was free to impose a new legal maximum term which was greater than that originally imposed." (citations omitted)); cf. Brown, (rejecting Brown's challenge to his revised sentence, which was increased following resentencing, when the trial judge explained he "had originally intended for [Brown] to be released after serving part of his twenty-year sentence, but because the law would not allow that, [Brown] was instead sentenced to a lower term of years, but without the benefit of parole, probation, or suspension of sentence"). Accordingly, there is no proper basis to disturb Appellant's revised sentence on appeal. See State v. Johnson, 159 S.C. 165, 170, 156 S.E. 353, 354 (1930) ("This Court has no jurisdiction on appeal to correct a sentence alleged to be excessive, when it is within the limits prescribed by law. The length of the prison sentence rests in the sound discretion of the trial Court unless partiality, prejudice, oppression, or corrupt motive is shown."); see also State v. Smith, 276 S.C. 494, 498, 280 S.E.2d 200, 202 (1981) ("[T]he authority to change a sentence rests solely and exclusively in the hands of the sentencing judge within the exercise of his discretion."). Appellant's convictions and aggregate sentence should be affirmed.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

ALAN WILSON
Attorney General

MARK R. FARTHING
Senior Assistant Attorney General

SCARLETT A. WILSON
Solicitor, Ninth Judicial Circuit

BY:__________________________
Mark R. Farthing
S.C. Bar 76901

ATTORNEYS FOR RESPONDENT

July 26, 2021

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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County
Honorable R. Markley Dennis, Jr., Circuit Court Judge
Appellate Case No. 2020-000088

THE STATE,

Respondent,

vs.

ANTONIO ORLANDO SIMMONS,

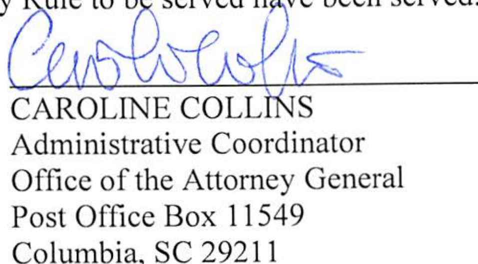
Appellant.

PROOF OF SERVICE

I, Caroline Collins, certify I have served the within Initial Brief of Respondent and Designation of Matter on Appellant by sending an electronic copy via email to the address listed in AIS for the following individual:

Victor R. Seeger, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211

I further certify all parties required by Rule to be served have been served.
This 26th day of July, 2021.



CAROLINE COLLINS
Administrative Coordinator
Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211

Caroline Collins

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Good Afternoon Mr. Seeger,

Attached please find a copy of the Initial Brief of Respondent and Designation of Matter in The State v. Antonio Orlando Simmons (2020-000088). These documents will be submitted to the South Carolina Court of Appeals today via the AIS One Drive System.

If you will, please reply to confirm receipt.

Thank you!

CAROLINE COLLINS, Administrative Coordinator
South Carolina Attorney General's Office
Criminal Appeals | Office 803-734-3723 | ccollins@scag.gov
P.O. Box 11549 | Columbia, SC 29211
scag.gov

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