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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO BARNWELL COUNTY
Court of Common Pleas

The Honorable J. Mark Hayes, II, Circuit Court Judge

Appellate Case No: 2018-000266 Lower

MICHAEL C. KENNEDY,

RESPONDENT,

v.

STATE OF SOUTH CAROLINA,

PETITIONER.

SUPPLEMENTAL APPENDIX

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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Barnwell County

Thomas A. Russo, Circuit Court Judge

THE STATE,

RESPONDENT,

v.

MICHAEL C. KENNEDY,

APPELLANT

INITIAL ANDERS BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

I. Is appellant's sentence of thirty years and a consecutive sentence of twenty years incarceration unconstitutionally disproportionate?

TABLE OF AUTHORITIES

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STATEMENT OF THE CASE

Appellant was indicted by the Barnwell County Grand Jury during its May 2007 term for armed robbery and assault and battery with intent to kill. On May 7, 2007, appellant, appeared before the Honorable Judge Thomas A. Russo for a bond reduction hearing. Shortly after the bond reduction motion was denied, the assistant solicitor informed Judge Russo that appellant was before him to plead guilty.

The solicitor indicated that appellant and his co-defendant, Tooks, were both entering pleas of guilty to armed robbery and assault and battery with intent to kill. The solicitor indicated that the State was not prossing the charge of criminal conspiracy. (Tr. pp. 19-20). Judge Russo sentenced appellant to incarceration for thirty years for armed robbery (2007-GS-06-144) and to incarceration for twenty years consecutive for assault and battery (2007-GS-06-145). However, the judge provided that upon service of ninety (90) days, the balance of the twenty-year sentence was suspended with probation for three years. On May 11, 2007, counsel for appellant filed a motion to reconsider the sentence which was denied by Judge Russo on June 26, 2007. This appeal follows.

ARGUMENT

- I. Appellant's sentence of thirty years and a consecutive sentence of twenty years incarceration are unconstitutionally so disproportionate as to require reversal.

Judge Russo informed appellant that he was charged with armed robbery which carried a mandatory minimum sentence of not less than ten years with a maximum sentence of up to thirty years and also with assault and battery with intent to kill which carried a maximum penalty of up to twenty years. The judge explained that these charges were classified as "most serious" violent offenses. Appellant indicated that he understood the nature of the charges against him as well as the possible punishments and that he was entering a plea of guilty to both charges. (Tr. pp. 21-22). The trial judge explained that the statute required that he would have to serve 85% of any sentence imposed on the basis of these charges. Appellant indicated that he understood that he would have to serve 85% of whatever sentence he received before he would be eligible for release. (Tr. p. 22, lines 6-19).

The trial judge further explained the application of the two or three strikes rule. The judge indicated that this would be a first most serious conviction for appellant and that by pleading guilty to these charges, if in the future he were to commit another most serious crime or two other serious crimes, the State could seek a penalty of life without the possibility of parole. Appellant indicated that he understood the application of the two and three strikes rule. (Tr. p. 23, line 4- p. 24, line 1).

Judge Russo explained that appellant would have a right to a jury trial during which he had the right to remain silent and that he waived his rights to a jury trial and to remain silent by pleading guilty. (Tr. p. 26, lines 6-13). The judge explained that if he proceeded to

~~a jury trial, appellant would be presumed innocent and the State would be required to prove~~

~~his guilt beyond a reasonable doubt. Appellant indicated that he understood that he would~~

have the right during trial to confront and question the State's witnesses and that he was waiving that right by pleading guilty. (Tr. p. 27, line 14-p. 27, line 8). The judge explained to appellant that if he went to trial he could call witnesses to testify on his behalf and that he could testify on his own behalf if he chose to do so. Appellant indicated that he understood that the State had the burden of proof and that any jury verdict would have to be unanimous. Finally, appellant indicated that he understood that if he was convicted he could appeal his conviction to a higher court. (Tr. p. 28, lines 6-23).

Appellant testified that no one had promised him anything or threatened him in any way to persuade him to testify. (Tr. p. 29, lines 21-24; p. 30, lines 21-24). Appellant indicated that he had told his attorney about any possible witnesses and everything he knew about the charges so that he could investigate possible defenses. (Tr. p. 30, lines 12-20). Appellant indicated that his answers were his own and that he was pleading guilty of his own free will.

The assistant solicitor indicated that on January 8, 2007, the appellant, who was eighteen years old, and a co-defendant, Lugene Tooks, went to the home of Mr. Tommy Richardson which is located right off of the circle across from the Barnwell Police Department. The solicitor indicated that Tooks went up to Mr. Perkins on his back porch and got his attention and then hit him over the head with a wine bottle. The assistant solicitor indicated that at that point a scuffle ensued between eighty-three (83) year old Mr. Perkins and Tooks but that appellant came to Tooks' aid. The solicitor indicated that when appellant joined in the altercation, Mr. Perkins was thrown off his porch, or "body-slammed" off of his porch, receiving injuries to his hip. The solicitor indicated "At this

point, they ripped the money out of his back pocket. It was a wallet and they actually ripped the back pocket in the process of taking it away." (Tr. p. 34-35).

The solicitor indicated that after taking the wallet, appellant and Tooks fled the scene. He indicated that appellant and Tooks were arrested on February 1, and February 2, 2007. (Tr. p. 35, lines 4-7). The solicitor explained that a person came forward to report that appellant had said that he committed the robbery, that they took \$500 from the victim, and that Mr. Tooks committed the robbery with him. The solicitor indicated that it was as a result of this information that Tooks was interviewed. (Tr. p. 35, lines 8-12). The solicitor indicated that upon being interviewed, Tooks admitted that he and appellant had committed the crime. Tooks admitted that he and appellant had committed the crime against Mr. Richardson, that Tooks was the person who knew the victim and that he had money, and that it was Tooks's idea to commit this crime. (Tr. p. 35, lines 21-25). Appellant agreed that the facts as recited by the solicitor were correct. (Tr. p. 36, lines 17-19).

Counsel for appellant indicated that appellant was very sorry for his actions, that he had never been in trouble before, and that the case did not involve drugs. (Tr. p. 38, lines 14-25). Counsel asked the judge to sentence appellant to no more than ten years and to run the sentences concurrent. (Tr. p. 30, lines 2-16). Appellant stated, "I just want to say I'm sorry to Mr. Richardson and his family and the community of Barnwell. Sometime you get caught up in the wrong place at the wrong time. You got to pay the consequences to get your life right. And I want to say again I am very, very sorry for what I have committed." (Tr. p. 45, line 23-p. 46, line 3). Sherry Felder, appellant's mother, stated, "I wanted to say

~~to the Richardson family I have been knowing them all my life and I'm so sorry what my son did because they are some good people. My mama used to work for them for years and~~

I'm so sorry." (Tr. p. 46, lines 11-15). Appellant was eighteen years old at the time of the alleged crime and nineteen years old at the time of sentencing. (Tr. p. 7, lines 22-24; p. 25, line 1). Appellant completed the twelfth grade but he did not graduate or complete the G.E.D. program. (Tr. p. 25, lines 7-15). Appellant had no prior criminal record. Appellant had never been in trouble before this alleged incident. At the time of his arrest, in an effort to improve himself, appellant had voluntarily enrolled himself in a structured high school setting similar to a military academy. (Tr. p. 8, lines 15-23).

Judge Russo sentenced appellant to incarceration for thirty years for armed robbery (2007-GS-06-144) and to incarceration for twenty years consecutive for assault and battery (2007-GS-06-145). However, the judge provided that upon service of ninety (90) days, the balance of the twenty-year sentence was suspended with probation for three years. Judge Russo further ordered, "I am going to allow for restitution. I will order restitution to be paid to the victims in this case and allow and give 30 days for that amount to be either consented to or we'll do a hearing to determine what that - - what that amount is. That is the assault and battery with intent to kill sentence is to run consecutive to the armed robbery case." (Tr. p. 57, lines 3-9).

The sentence imposed upon appellant was so severe in duration as to constitute cruel and unusual punishment. Generally, a sentence that falls within the limits fixed by statute is not "cruel and unusual." State v. Kimbrough, 212 S.C. 348, 46 S.E.2D 273 (1948). However, even if it is not cruel or unusual "in kind," a particular sentence may be so severe in duration that it violates the constitutional prohibitions against cruel and unusual punishment. Id.; construing S.C. Const. art I, § 19; see also Hart v. Coiner, 483 F. 2d 136,

(4th Cir. 1973). The Court refused to apply Kimbrough in Stockton v. Leete, 269 S.C. 439,

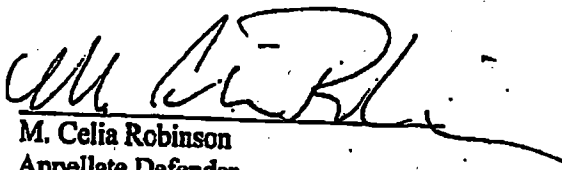
237 S.E. 2d 896 (1977), where it held that a ten-year minimum sentence for possession of burglary tools was not unconstitutional. However, Stockton affirmed Kimbrough's general premise regarding severity of duration. Id. In light of appellant's extreme youth and given that appellant had no criminal record, that he was following along with Tooks, and that he intended no harm from this first and only incident of violent behavior, the sentencing judge erred in ordering that appellant be incarcerated for what could amount to a fifty year prison sentence.

But see Kelly v. State, 274 S.C. 613, 266 S.E.2d 417 (1980) (guilty plea waived all non-jurisdictional claims); accord Brown v. Maryland, 618 F.2d 1057 (4th Cir. 1980); State v. Karen Johnston, 333 S.C. 459, 510 S.E.2d 423 (1999) (excessive sentence is not jurisdictional).

CONCLUSION

Appellant's convictions and sentences should be vacated and the matter remanded for trial.

Respectfully submitted,



M. Celia Robinson
Appellate Defender

ATTORNEY FOR APPELLANT

This 5th day of March, 2008.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Bamwell County
Thomas A. Russo, Circuit Court Judge

THE STATE,

RESPONDENT,

v.

MICHAEL C. KENNEDY,

APPELLANT

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Michael C. Kennedy states:

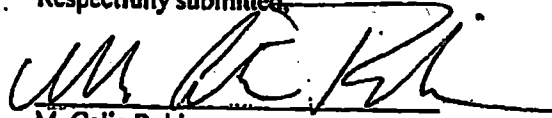
1. She is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.

2. She has reviewed the record of appellant's trial before Judge Thomas A. Russo, which was held on May 7, 2007, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.

3. She has, pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, she asks the Court to relieve her as counsel for Michael C. Kennedy.

Respectfully submitted,



M. Celja Robinson
Appellate Defender

ATTORNEY FOR APPELLANT

This 5th day of March, 2008.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Barnwell County
Thomas A. Russo, Circuit Court Judge

THE STATE,

RESPONDENT,

v.

MICHAEL C. KENNEDY,

APPELLANT

**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

Appellant proposes the following be included in the Record on Appeal:

- (1) True-billed indictment(s);
- (2) Guilty plea transcript;
- (3) Motion to reconsider sentence.

I certify that this designation contains no matter which is irrelevant to this appeal.

March 5, 2008



M. Celia Robinson
Appellate Defender

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Attorney for Appellant

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Barnwell County

Thomas A. Russo, Circuit Court Judge

THE STATE,

RESPONDENT,

v.

MICHAEL C. KENNEDY,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Initial Anders Brief of Appellant and Designation of Matter in the above referenced case has been served upon Salley W. Elliott, Esquire, at Rembert Dennis Building, Room 519; 1000 Assembly Street, Columbia, South Carolina 29201; and on Michael C. Kennedy, # 296992 at Ridgeland Correctional Institution, Post Office Box 2039, Ridgeland, South Carolina 29936 this 5th day of March, 2008.

M. Celia Robinson
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 5th day of March, 2008.

Notary Public for South Carolina
My Commission Expires: August 23, 2014.

1 State of South Carolina)

In the Court
Of Common Pleas

2 County of Barnwell)

3 Docket No. 2011-CP-06-0088

4
5
6 Michael C. Kennedy)
Applicant,)

7
8 vs.

Transcript of Record

9
10 State of South Carolina,)
Respondent.)

11
12 July 9, 2013
13 Aiken, South Carolina

14
15 B E F O R E:

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

17
18 A P P E A R A N C E S:

19 Melissa J. Armstrong, Esquire
20 Attorney for the Applicant

21 David Spencer, Assistant Attorney General
22 Attorney for the Respondent

23
24 Brenda J. Sigwald, Circuit Court Reporter
25 For the Honorable R. Knox McMahon
P.O. Box 206, Jackson, South Carolina 29831

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17	<u>E X H I B I T S</u>	
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20	(REPORTER'S NOTE: There were no exhibits	
21	entered during this hearing.)	
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1 POST-CONVICTION RELIEF HEARING

2 MR. SPENCER: Michael Kennedy, whenever you're
3 ready, Your Honor.

4 THE COURT: I'm ready.

5 MR. SPENCER: Your Honor, this is the case of
6 Michael Kennedy versus South Carolina. This is
7 2011-CP-06-088. For the record, my name the Dave Spencer
8 with the Attorney General's Office.

9 Applicant has filed a PCR application in February
10 of 2011, and he was indicted in May of 2007 for armed
11 robbery, assault and battery -- assault and battery with
12 intent to kill; and although the return doesn't reflect it,
13 he was indicted for conspiracy.

14 He was represented by Mr. Franchot Brown, who is
15 here today -- he pled guilty to the armed robbery, ABWIK
16 charge May 7 of 2007, before Judge Russo and Judge Russo
17 sentenced Mr. Kennedy to thirty years for armed robbery and
18 a consecutive twenty years for the assault and battery with
19 intent to kill charge, suspended to ninety days.
20 imprisonment and three years probation.

21 He did appeal his conviction and sentence. That
22 was dismissed pursuant to Anders v. California. He's
23 represented here today by Melissa Armstrong. I would also
24 note what is also is not reflected in the return is that
25 there was a sentencing hearing on June 26 of 2007 -- excuse

1 me, not a sentencing hearing, but a motion for
2 reconsideration and, Your Honor, you should have both
3 transcripts in your packet. There's going to be one that
4 the front page is the June 26th date and the other
5 transcript is actually the entire record on appeal pursuant
6 to Anders from pages of record page (verbatim).

7 Your Honor, as I mentioned before, he's represented
8 here today by Ms. Lisa Armstrong and I would just ask that
9 Ms. Armstrong set out her allegations for the record.

10 THE COURT: Okay.

11 MS. ARMSTRONG: Thank you, Your Honor. May it
12 please the Court. Let me just also note for the record
13 that when this case originally was filed, I was in a law
14 partnership with Terry Taggart. She was the initial
15 attorney on this case. Ms. Taggart, unfortunately is now
16 deceased, so any reference to her, obviously, she has
17 passed and is not associated with the case any longer;
18 however, if you see her name, that is where that comes
19 from. She may have filed things in the course of the early
20 litigation of this case. I've inherited it and had it
21 solely in preparing for today's hearing.

22 Your Honor, we've raised two allegations, both of
23 which are based on ineffective assistance of counsel. The
24 first is on page 2 of the amended final application to You
25 Honor, as well as to the attorney general, and this

1 application will be filed in Barnwell. I apologize, I sent
2 it by .pdf format. The attorney general was kind enough to
3 accept that while I was on vacation. I'll send a stamped
4 copy, Your Honor, as soon as that's completed.

5 There are two issues being raised. Both of them
6 are ineffective assistance of counsel. Page 2, Your Honor,
7 A, the applicant believes he was denied effective
8 assistance and because -- basically lack of preparedness
9 for the plea itself. May 7th was intended to be a bond
10 reduction hearing. That's why he was brought over.
11 Somehow that ended up metamorphosing into a guilty plea for
12 which there was no negotiation on sentence or really
13 anything of the like.

14 There is one correction I want to make and that
15 is -- after I got the transcript -- which I did not believe
16 existed and fortunately, the attorney general's office was
17 able to get the transcript for June 26th. There was the
18 motion for reconsideration hearing. But in it is a
19 reference to the conspiracy charge that was dismissed. So
20 we did not plead straight up to all of the charges. There
21 was one that was dismissed; however, I guess that part of
22 our allegation change as far as to the lack of negotiations
23 for sentencing is concerned.

24 Mr. Kennedy had no prior record and was very young
25 at the time and we think that that was ineffective for

1 failing to properly negotiate something rather than have
2 him plead straight up.

3 The second claim is based on trial counsel's
4 failure to object to certain comments that were made during
5 the course of the sentencing. I'm sure after Your Honor
6 has an opportunity to read both the transcript and read the
7 brief's it will be obvious that it was a very emotional
8 case and had very bad facts. There was an elderly
9 gentleman who was severely injured and we believe that in
10 the course of the sentencing arguments that were made that
11 certain comments were made that were prejudicial to
12 Mr. Kennedy; and, in fact, the judge commented during the
13 reconsideration hearing that his sentence perhaps would
14 stop the somebody else from doing anything new and the
15 consequences -- and we just think that the arguments that
16 were made were overly -- I guess you could say inflammatory
17 and prejudicial to Mr. Kennedy as far as the sentencing is
18 concerned. We think that at a minimum, there should have
19 been an objection to and that's part of the argument that
20 should have been made.

21 And those are -- essentially, those are our
22 complaints, Your Honor, ineffective assistance with two
23 different prongs. And I believe that spells it out for you
24 right now.

25 THE COURT: Okay. You want to call your first

Franchot A. Brown - Direct Examination by Ms. Armstrong ⁷

1 witness?

2 MS. ARMSTRONG: Yes, Your Honor, the applicant
3 calls Mr. Franchot Brown.

4 FRANCHOT BROWN,
5 having been duly sworn, testified as follows:

6 THE CLERK: Please be seated in the witness box and
7 state your full name for the Court.

8 THE WITNESS: Good morning, Your Honor. Franchot
9 A. Brown.

10 DIRECT EXAMINATION

11 BY MS. ARMSTRONG:

12 Q Good morning, Mr. Brown, how are you?

13 A Oh, I'm fine, how are you?

14 Q Good. Mr. Brown, what do you do for a living?

15 A I practice law.

16 Q How long have you done that.

17 A Since 1969.

18 Q Okay. And about what percentage of your practice
19 is in -- deals with criminal defense, if any?

20 A Oh gosh, I would say about 25 to 35 percent.

21 Q Okay. All right. So about one out of four or more
22 clients are criminal defense?

23 A Yeah.

24 Q Okay. In that capacity, did you come to represent
25 Michael Kennedy?

Franchot-A. Brown - Direct Examination by Ms. Armstrong

1 A Yes.

2 Q Okay. Do you recall when you were first retained
3 on this case on behalf of Mr. Kennedy?

4 MR. RODNEY PEOPLES: Excuse me, could you cut the
5 sound up a little bit. We're having difficulty hearing
6 him.

7 MS. ARMSTRONG: I'm sorry. I'll speak louder too.
8 (WHEREUPON the witness was looking through his
9 records.)

10 THE WITNESS: I'm sorry.

11 BY MS. ARMSTRONG:

12 Q That's all right.

13 A I didn't know you were going to ask me that
14 question.

15 Q I'm sorry.

16 A Good grief. February 9, 2007.

17 Q February 9, 2007. Was that a call from the family
18 about representing Michael? Or would that have been when
19 you first met Michael?

20 A No, the family came to my house -- my office and I
21 had a long conversation about the -- about the case.

22 Q Okay.

23 A And retained me that day.

24 Q All right. And do you recall conversations about
25 possibly getting a bond reduction for Mr. Kennedy?

Franchot A. Brown - Direct Examination by Ms. Armstrong ⁹

- 1 A Correct.
- 2 Q Okay. Did you file any motions asking for a bond
3 reduction?
- 4 A Yes.
- 5 Q Okay. All right. And as a result of filing those
6 motions, was a hearing date set?
- 7 A Yes.
- 8 Q Okay. Do you recall what the date was?
- 9 A No, I don't.
- 10 Q Would that have been the date of the actual guilty
11 plea?
- 12 A I think so.
- 13 Q Okay. So does May 7th, 2007, sound correct to you?
- 14 A I'd have to say I really don't know.
- 15 Q Okay. The transcript reflected that May 7 --
- 16 A Okay.
- 17 Q -- that would be correct?
- 18 A Okay. I trust the transcript.
- 19 Q Okay. Can you tell me what happened at -- you
20 scheduled a bond reduction and then it ended up becoming a
21 guilty plea. Did you have certain conversations with the
22 solicitor's office that caused it to go from one to the
23 other?
- 24 A First thing I contacted the solicitor's office
25 prior to even going to visit with Michael. I always like

Franchot A. Brown - Direct Examination by Ms. Armstrong

1 to get the solicitor's side of the case.

2 Q Yes, sir.

3 A And I had to get the discovery and I talked with
4 the, I think it was Ben Moore from the solicitor's office.
5 I tried to meet with him in person, but I missed him when I
6 was at the jail visiting with Michael. I missed him that
7 day.

8 Q Okay.

9 A But I did have a long conversation with him
10 regarding the case. And I wrote a letter to my client and
11 explained to him my findings as a result of that
12 conversation and I explained to him that, number 1, the
13 victim was -- alleged victim was 86 years old, very well
14 known in the community, that he'd been hit across the head
15 with a bottle. The bottle had a fingerprint on it. There
16 was a footprint in the area of the crime, and it was
17 thought that that footprint belonged to him, my client,
18 Michael Kennedy.

19 Q Was there ever any forensic documentation as to who
20 these prints belonged to? Anything from SLED or any
21 independent source?

22 A I can't remember. I cannot remember that.

23 Q But the solicitor believed they belonged to --

24 A I think the fingerprint was that of Mr. Toots.

25 Q Mr. Toots?

Franchot A. Brown - Direct Examination by Ms. Armstrong

- 1 A Mr. Toots is I believe his name.
- 2 Q Okay. So the print -- the fingerprint belonged to
- 3 the codefendant who gave the statement.
- 4 A Correct. And he'd already -- he'd already
- 5 confessed to the crime.
- 6 Q That, meaning Mr. Toots?
- 7 A Mr. Toots. And he named Mr. Michael Kennedy as
- 8 being his codefendant.
- 9 Q Yes, sir.
- 10 A Well, when they came to -- when the family came to
- 11 my office, all of that was already passed.
- 12 Q Yes, sir.
- 13 A Okay.
- 14 Q Mr. Kennedy was arrested, in other words, based on
- 15 the statement of Mr. Toots?
- 16 A He was in jail when they came to see me.
- 17 Q Yes, sir.
- 18 A That's why I did a motion to get a bond reduction
- 19 because bond was set for \$55 thousand if I'm not mistaken.
- 20 I did a motion to reduce the bond to get him out.
- 21 Q Yes, sir.
- 22 A And both defendants were in court on that day. I
- 23 recall that. And both lawyers were present.
- 24 Q Yes, sir. And it became a joint guilty plea; is
- 25 that correct?

Franchot A. Brown - Direct Examination by Ms. Armstrong

1 A A joint guilty plea, but there was a -- that one
2 came about late in the afternoon or maybe early afternoon,
3 I should say. We got there early that morning and we did a
4 lot of conversating and a lot of negotiating -- attempt to
5 negotiate with the solicitor. Which that process, I'd
6 already begun.

7 Q Yes, sir.

8 A I started that over the telephone and perhaps maybe
9 in person prior to that date. So a lot had taken place.
10 It wasn't like we went there on a bond reduction and boom,
11 did a plea. A lot of work had gone into it. In fact, I
12 wrote Michael a very lengthy letter --

13 Q Do you have that with you?

14 A I do -- I can give you a copy of it, but I have the
15 original. If you don't mind I'll give you a copy if you
16 don't mind.

17 Q And when was the letter dated?

18 A February 21st, 2007.

19 Q February 21st?

20 A Yes, ma'am.

21 Q Okay. So -- okay. You were hired on the 9th and
22 then on February 21st wrote a letter to Mr. Kennedy?

23 A Right.

24 Q And you just want to summarize what you told
25 Mr. Kennedy on that date?

Franchot A. Brown - Direct Examination by Ms. Armstrong

1 A Well, do you mind if I just read it?

2 Q Oh, certainly.

3 A Okay.

4 Q As long as there's no objection from the attorney
5 general?

6 MR. SPENCER: No objection to him reading it --
7 publishing the letter.

8 BY MS. ARMSTRONG:

9 Q All right.

10 A Dear Michael, on this week I had an opportunity to
11 have a conversation with the Assistant Solicitor, Ben
12 Moore, assigned to your case. Mr. Moore confirmed most of
13 what your mother, sister and brother told me here at the
14 office when they initially visited with me and retained me
15 to represent you. He has indicated to me that the victim
16 in your case was in fact 86 years old, was well known in
17 the community and popular to most people. He does have
18 family members who are entrenched in the Barnwell community
19 and he has a lot of support. Several persons chipped in on
20 the reward money to find the persons who assaulted him.

21 The codefendant in your case, Eugene Toots has
22 apparently made a confession in writing and has admitted to
23 committing the crime and indicated further that you were
24 the codefendant involved in the matter with him. There is
25 also a thumbprint found on a bottle which was the bottle

Franchot A. Brown - Direct Examination by Ms. Armstrong

1 used to strike the alleged victim and the thumbprint is
2 being analyzed by the Aiken County Sheriff's Department.
3 Shoe prints were also found at the scene and a cast
4 was made of the print and was sent to SLED to be analyzed:
5 It is believed that the shoe print from the -- it is
6 believed that your shoe print -- that it is your shoe print
7 from the incident date.

8 I have made a request for discovery as you are
9 aware and as soon as I receive the first batch of
10 discovery, I shall set an appointment to come see you to
11 review the discovery and for you to get to know -- and for
12 you and I to get to know each other.

13 The analysis from SLED will take longer and I will
14 not hold up my visiting with you until I receive that
15 discovery; however, Attorney Ben Moore feels that within a
16 week and a half he should be able to get me about
17 everything and I will come to see you shortly after I
18 receive that.

19 This letter is really to bring you up to date and
20 by way of a copy to your mother, I am advising her of the
21 contents of this letter.

22 Sincerely yours, Franchot A. Brown.

23 Q Okay. Great. Did you ever -- do you recall ever
24 getting the SLED information about the boot print?

25 A I got the discovery.

Franchot A. Brown - Direct Examination by Ms. Armstrong

- 1 (WHEREUPON there was a pause in the proceedings.)
- 2 Q By any chance, is there a cover letter indicating
- 3 when you would have received the discovery?
- 4 A No -- from the solicitor's office, you mean?
- 5 Q Yes, sir. Yes, sir.
- 6 A I don't recall that.
- 7 Q All right.
- 8 A I know I went to visit with him and went over this
- 9 discovery page by page with him.
- 10 Q All right.
- 11 A And I do have the fingerprint. I gave all this
- 12 stuff to you, I thought.
- 13 Q I'm just trying to get a timeline from you.
- 14 A Okay.
- 15 Q So it would have been before the May 7th --
- 16 A Oh, yeah.
- 17 Q -- hearing?
- 18 A Oh, yeah.
- 19 Q Okay. All right. So you got discovery?
- 20 A We went over all this -- yeah, prior to.
- 21 Q Okay. All right. And as part of your negotiations
- 22 with the solicitor's office, be it on the phone or by
- 23 letter or e-mail or in person, do you ever recall
- 24 discussing the possible sentences?
- 25 A Yes.

Franchot A. Brown - Direct Examination by Ms. Armstrong

1 Q Okay.

2 A That's normal and typical and I did it in this
3 particular case. The solicitor wouldn't budge off of the
4 assault and battery with intent to kill nor would he budge
5 off of the armed robbery.

6 Q Yes, sir. Okay.

7 A The only thing he would agree to, and I got him to
8 do that, would be to drop the conspiracy charge.

9 Q All right.

10 A I also tried to put a cap on the sentence so that
11 we wouldn't have to worry about going over a certain number
12 of years. They refused that. In other words, let's put it
13 this way, I did everything that a defense lawyer is
14 supposed to do in attempting to negotiate a plea and it was
15 just falling on deaf ears.

16 Q Okay. So the solicitor would not budge?

17 A No.

18 Q Okay. All right. And you don't recall if the boot
19 print was ever matched or not?

20 A Oh, I forgot about that.

21 (WHEREUPON there was a pause in the proceedings.)

22 BY MS. ARMSTRONG:

23 Q Mr. Brown, let me ask it this way. Maybe this will
24 sort of shorten this a little bit.

25 The existence of the boot print, would you say that

17

Franchot A. Brown - Direct Examination by Ms. Armstrong

1 was significant or not significant as far as your advice to
2 Mr. Kennedy to do a guilty plea?

3 A I don't think it was significant as you might think
4 it was.

5 Q Okay. What would you say the most significant
6 factor was in your judgment?

7 A Well, the investigation that took place in the case
8 revealed the -- I think it was -- Toots' aunt had sent them
9 out to get a bottle of wine and the wine was traced back to
10 the store I think it was purchased from. There was a call
11 in -- call in to the -- I guess the sheriff's department,
12 whoever it was, law enforcement to reveal the whole thing
13 that the defendant, the main defendant standing good with
14 the story and named him as a defendant, codefendant --

15 Q Did you know much about Mr. Toots?

16 A No. Other than my interview about with my client.

17 Q Okay.

18 A I interviewed my client and he told me they were
19 good friends; they'd been going -- they had been good
20 friends for years. He was a year younger than my client.
21 He was 16 and my client was 18. But they had been friends
22 for the longest. And of course, I mean, my client admitted
23 to everything, but I don't think that was important to me
24 because the State, you know, I didn't reveal that to --
25 well, obviously, my client was involved and it was

Franchot A. Brown - Direct Examination by Ms. Armstrong

- 1 provable. Okay? That --
- 2 Q By the statement or something else?
- 3 A No, by the evidence in the case.
- 4 Q Which would be the statement of Mr. Toots and we
- 5 know the print on the bottle belonged to Mr. Toots and we
- 6 think the print, the shoe print -- the boot print belonged
- 7 to Mr. Kennedy?
- 8 A That's what the State felt.
- 9 Q Okay. But you can't recall specifically whether or
- 10 not that was confirmed?
- 11 A I really can't.
- 12 Q Okay. All right. But putting aside the boot
- 13 print --
- 14 A Okay.
- 15 Q -- you think the case would have been one where you
- 16 would have advised Mr. Kennedy to plead?
- 17 A Oh, yeah, I do.
- 18 Q And that would have been based on the --
- 19 A It was based on my research of the law, my
- 20 research -- my -- also, we had an a relatively new judge.
- 21 Judge Russo was rather new to the bench.
- 22 Q Yes, sir.
- 23 A I did research on Judge Russo --
- 24 Q And he was a former prosecutor?
- 25 A Also a public defender as well.

Franchot A. Brown - Direct Examination by Ms. Armstrong

- 1 Q Okay.
- 2 A He had both sides going for him and a positive
3 reputation for being fair.
- 4 Q Okay.
- 5 A And I did all my research on him and I was very
6 pleased with the research.
- 7 Q Okay.
- 8 A I thought that he would -- obviously, I thought the
9 sentence was way out of line with the facts of the case.
- 10 Q Yes, sir.
- 11 A Obviously, I wouldn't have -- on my own expense, I
12 did the motion to reconsidering.
- 13 Q Yes, sir.
- 14 A I wasn't getting paid to do that. I did it because
15 I felt that strongly about it.
- 16 Q Okay.
- 17 A I thought the sentence -- it doesn't matter about
18 the sentence -- I thought the sentence should be about ten,
19 no more than fifteen -- ten to twelve years no more than
20 fifteen years. I said that to him and I say it now.
- 21 Q Yes, sir.
- 22 A I think it was --
- 23 Q And let's talk a little bit about the motion for
24 reconsideration.
- 25 A Okay.

Franchot A. Brown - Direct Examination by Ms. Armstrong

1 Q Were the witnesses who testified at the motion for
2 reconsideration, were they available on the day of May 7th
3 at the bond reduction and it became a plea?

4 A Everybody was aware of the hearing because they had
5 hired me to have a hearing. So they were all present, but
6 they did not -- some of them were not there, okay? If you
7 see from the transcript of the -- that you have from my
8 motion to reconsider --

9 Q Yes, sir.

10 A -- I stated in the transcript that they were not
11 available on that day, but they were aware of the hearing.
12 All of them were aware.

13 Q Right. They just didn't know it was going to be a
14 plea, they thought it was going to be a bond reduction; is
15 that correct?

16 A No, I think they knew that they were expected to be
17 in court that day.

18 Q For a bond reduction versus a plea. I guess that's
19 my question. Did they think there was going to be a plea or a
20 bond?

21 A I don't know. I can't tell you what they thought,
22 except that I --

23 Q What you told them, I guess.

24 A I told them that they needed to be in court that
25 day.

Franchot A. Brown -- Direct Examination by Ms. Armstrong

1 Q For a bond reduction or a plea?

2 A Well, I can't really say with honesty, you know. I
3 know that they paid me to go to court that day.

4 Q Yes, sir.

5 A And they were to be there with me in court that
6 day. And I know that they were there and I know that they
7 were consulted.

8 Q Okay. Did you -- did you have a chance to speak to
9 them before May the 7th about testifying in mitigation --
10 for mitigation purposes?

11 A That's standard and normal, but if I told you
12 specifically yes, that wouldn't be very honest. That's
13 been several years ago and I can't recall that.

14 Q All right.

15 A But that -- you know, I sort of do this in every
16 case and I've been doing it for so many years until -- it's
17 sort of standard procedure, but -- and I call on every
18 witness that's available. When I interviewed them in my
19 office on that particular day, I took all down all of their
20 information, the brother's name, the sister's names, all of
21 the addresses.

22 Q Yes, sir.

23 A There were two sisters names and the brothers and
24 all of that and the purpose is to allow to have some
25 opportunity to express themselves regarding the --

Franchot A. Brown - Direct Examination by Ms. Armstrong

1 Q Well, that was my question for asking -- that was
2 the purpose for asking did they know it was a bond
3 reduction or did they think it was possibly a guilty plea;
4 because my understanding was that the purpose of the
5 hearing as it was designated for May 7th was that you were
6 going for a bond reduction.

7 A Okay.

8 Q And if I'm wrong, I just wanted to make sure that
9 you corrected me on that?

10 A I don't want to lie on the stand. I can't -- you
11 don't make notes on everything. All I know is they were
12 expected to be there that date and most of them were there.

13 And --

14 Q Okay. Well, let me ask you this, once the plea got
15 started, did you ever think that the -- some of the
16 arguments made about the sort of -- and I'm sure you've
17 seen the application, send a message to the community --
18 did you ever consider objecting to that sort of argument
19 based on the case law in South Carolina that says those
20 aren't the source of arguments that need to be considered
21 in determining a sentence? Did you ever consider objecting
22 to any --

23 A The statements by the State or by, rather, Judge
24 Peoples?

25 Q Yes, sir.

Franchot A. Brown - Cross-Examination by Mr. Spencer

1 A Yeah, yeah. Yeah.

2 Q You did consider it? Or did consider objecting?

3 I'm sorry.

4 A Well, I was greatly concerned about some comments
5 made and I did not object.

6 Q Okay. If you had to do it again, do you think you
7 might object --

8 MR. SPENCER: Your Honor, I object. This is not a
9 hindsight --

10 MS. ARMSTRONG: Okay. Withdrawn, withdrawn. Okay.
11 I think those are all the questions I have. Thank
12 you.

13 THE WITNESS: I'm shocked.

14 CROSS-EXAMINATION

15 BY MR. SPENCER:

16 Q Mr. Brown, thank you for being here.

17 A No, problem. I'm sorry for Mr. Kennedy and I'm
18 happy to be here because I did not like the sentence, so
19 I'm glad to get the opportunity to hopefully get this
20 straight.

21 Q And I understand that you're disappointment with
22 the final sentence. Is it fair to say that you were hoping
23 to get -- find a judge that would be favorable to the facts
24 of your case?

25 A I thought I had the judge that would be favorable

Franchot A. Brown - Cross-Examination by Mr. Spencer

1 to the facts of my case. I did all the research and
2 everybody -- I mean, I did a lot of looking into Judge
3 Russo and he might have been a new judge on the bench, but
4 from the standpoint of both being a prosecuting attorney as
5 well as a public defender lawyer, and from his record of
6 being on the bench at that time, I really thought that we
7 were in the hands of someone who would have been a little
8 lighter on that sentence.

9 In fact, I had another case with him at the same
10 time in another County. And in that case he was very nice.

11 Q In that case it was much more favorable to y'all.

12 A Yeah, very favorable.

13 Q What I wanted to ask you about is the question as
14 to whether you should have objected to certain comments by
15 Judge Peoples during the hearing. Is it -- was your
16 approach to this plea hearing for it to be a contentious
17 hearing or you were seeking to basically show the judge
18 that your client was somebody who deserved some leniency or
19 deserves some mitigation?

20 A Exactly.

21 Q And certainly by objecting to Judge Peoples
22 comments that opened the potential for making the hearing a
23 little more --

24 A You know, I don't know whether that would have
25 helped this situation to be honest with you. You know

Franchot A. Brown-- Cross-Examination by Mr. Spencer

1 hindsight's always 20/20. I --

2 Q Let me ask you this, given your analysis of Judge
3 Russo and the fact that he's a fair judge and the fact that
4 he had a lot of experience in the courtroom on both sides
5 of the -- and had been in front of judges himself, do you
6 think he had the ability to sort out what should be
7 relevant and what should not be relevant to the sentence?

8 A Oh, yes. I mean -- oh, yes.

9 Q All right.

10 A I mean. I -- he's qualified.

11 Q And so would you have felt it necessary for him to
12 point out what might be improper consideration by way of an
13 objection?

14 A He mentioned in the transcript in my motion to
15 reconsider, he mentioned that himself. Actually see, he
16 brought up Judge Peoples in that transcript. And he said
17 that it had no bearing on his sentence. That's what he
18 said. He -- and I didn't bring that up. He brought it up.
19 So that let me know that he was fully aware that there was
20 some concerns about the comments made by Rodney Peoples and
21 his presentation. As I did too.

22 Q And now, there was a plea on May 7th; then you did
23 a motion to reconsider and that was heard in June; and at
24 that hearing, you presented some -- you presented both
25 Mr. Kennedy's brother and an individual by the name of

Franchot A. Brown - Cross-Examination by Mr. Spencer

1 Kelvin Isaac who indicated he was an elected official from
2 Blackville; do you recall that?

3 A Oh, yes, yes, sir.

4 Q And so you did present some additional witnesses at
5 the motion for reconsideration?

6 A Correct.

7 Q And Judge Russo actually spoke to the comment --
8 spoke to the issue as to whether or not it affected his
9 decision as to how many witnesses had been there?

10 A He did. He did.

11 Q And just --

12 MR. SPENCER: Your Honor that would be on page 36
13 of the transcript. It discusses the number of witnesses.

14 BY MR. SPENCER:

15 Q And actually, both Mr. Kennedy's mother and father
16 were present at the guilty plea; is that right?

17 A They were there.

18 Q And they were both given an opportunity to speak?

19 A Oh, yes.

20 Q And the mother did actually speak, didn't she?

21 A I don't remember and I don't have that transcript.
22 I never got it. I just can't go back four years, five
23 years.

24 Q Certainly.

25 A I never got that transcript.

Franchot A. Brown - Cross-Examination by Mr. Spencer

1 Q Certainly, and I didn't realize you didn't receive
2 that.

3 A And I didn't either, until I was preparing for
4 today and I realized I never got that?

5 Q Certainly. If the record reflects that the mother
6 spoke at the guilty plea hearing, would you dispute that?

7 A No, no, no.

8 MR. SPENCER: And, Your Honor, that's on page 46 of
9 the guilty plea transcript.

10 THE COURT: Okay.

11 MR. SPENCER: Beg the Court's indulgence.

12 (WHEREUPON there was a pause in the proceedings.)

13 BY MR. SPENCER:

14 Q And I think you made mention of it, but Mr. Kennedy
15 admitted he was involved in this robbery; is that correct?

16 A Correct.

17 Q And certainly that doesn't mean he could have made
18 the State -- he couldn't make the State prove their case;
19 but -- but you were aware that he was guilty?

20 A The State was aware I think -- I think from my
21 comments and my going over discovery with Mr. Kennedy --
22 when I go over discovery, I probably spent the bulk of a
23 day with him. I go -- I read in case he can't read well.

24 I read it to him. I go page by page by page and you see
25 this took practically all day. I wanted to make sure I

Franchot A. Brown - Cross-Examination by Mr. Spencer

1 didn't miss anything and make sure he understood
2 everything; make sure that he had an opportunity to express
3 himself on anything -- I would tell him don't wait until I
4 get way past a point to stop me. The minute I read
5 something that's not correct, you stop me right then and
6 discuss it with me and I made notes.

7 So we went over all of this and at the conclusion
8 of that hearing, I mean that meeting -- yeah -- he -- he
9 admitted that he was the codefendant. In fact, his
10 involvement and that sort of thing.

11 Q And so he -- he would be well aware of the
12 strengths or the weaknesses of the State's case were?

13 A Correct, oh, yes. Oh yes, absolutely.

14 Q And whose decision was it to plead guilty?

15 A His.

16 Q And if he had wanted a trial, were you prepared for
17 trial?

18 A Yes.

19 Q And it is fair to say that you were preparing for a
20 trial?

21 A I would not have done a trial that day. I don't
22 think the Court was even prepared for a trial that day, but
23 we would have certainly come back for a trial.

24 MR. SPENCER: Beg the Court's indulgence.

25 THE COURT: Okay.

Franchot A. Brown - Cross-Examination by Mr. Spencer

1 (WHEREUPON there was a pause in the proceedings.)

2 BY MR. SPENCER:

3 Q And in terms of presenting mitigation for the
4 guilty plea, what was your strategy on that?

5 A Well, I always discuss the fact that this -- as the
6 counsel mentioned, he's a first offender. He was --
7 although he was a year older than his codefendant, the
8 codefendant was really the main person involved and I don't
9 think there's any doubt about that. There's no doubt on
10 the facts or the basis for that. And of course, well, it's
11 really -- it's all in the transcript if I could just say it
12 like that.

13 Q Certainly.

14 A I think I made many points as I read my notes. I
15 read the transcript from my comments to the judge --

16 Q And you emphasized his youth?

17 A Oh, absolutely, first offender -- when he was
18 arrested he was allegedly in a military school in Aiken
19 somewhere. I don't know, but family background, pointing
20 out the family in the audience -- the courtroom.

21 Q And --

22 A And certain witnesses speak on his behalf about
23 what a good person he was and he deserved a second chance.

24 Q And you mentioned during the guilty plea he was not
25 on drugs at the time of the crime?

Franchot A. Brown - Redirect Examination by Ms. Armstrong

1 A That's correct.

2 MR. SPENCER: Beg the Court's indulgence.

3 (WHEREUPON there was a pause in the proceedings.)

4 MR. SPENCER: Your Honor, I have no further
5 questions.

6 THE COURT: Okay.

7 MS. ARMSTRONG: Briefly, Your Honor.

8 REDIRECT EXAMINATION

9 BY MS. ARMSTRONG:

10 Q One thing I forgot to ask you, Mr. Brown, do you
11 recall during the course of the guilty plea that you had
12 mentioned that Michael was in a military camp facility?

13 A I thought that's what I recalled.

14 Q Yes, sir. I'm -- the record would reflect it.

15 And do you also recall from the record that -- the
16 comments that -- basically saying that that couldn't be
17 true, there was no --

18 A Judge Peoples said that.

19 Q Okay.

20 A He said he knew of no military school in Aiken.

21 Q Okay. Were you aware that Camp Long Academy, in
22 fact, does exist and it's in Aiken and that's actually
23 where Mr. Kennedy was, in fact, enrolled?

24 A I didn't know where he was, but I knew I could
25 trust his word he was in -- because that's the way I --

Franchot A. Brown - Redirect Examination by Ms. Armstrong

1 that's where he was when he was arrested.

2 Q Yes, sir: Did it -- did you ever think about
3 objecting and supplementing the record with information
4 that there were some made up statements, in fact, true --
5 here's the name of it and this is where it's at?

6 A Well, personally, I don't think --

7 MR. SPENCER: Your Honor, I think that's a whole
8 new issue.

9 MS. ARMSTRONG: It's about mitigation. There was a
10 question about what theory of mitigation was and so I'm
11 following up on that.

12 MR. SPENCER: And that fact could have been in the
13 application which requires setting out the facts within the
14 applicant's knowledge.

15 MS. ARMSTRONG: A lack of preparedness includes
16 knowing --

17 THE COURT: I'll allow it, go ahead.

18 MR. SPENCER: Thank you, Your Honor.

19 THE WITNESS: I don't think Judge Peoples' word in
20 the courtroom should be given anymore respect than my word.
21 I said he was in the military academy and Judge Peoples did
22 not dispute that. So if Judge Russo heard me as he did,
23 then I should have been given the same amount of respect as
24 Rodney Peoples was.

25 Q Thank you very much.

Franchot A. Brown - Recross-Examination by Mr. Spencer

1 THE COURT: Okay. Anything else from the State?
2
3 **RECCROSS EXAMINATION**
4 **BY MR. SPENCER:**
5 Q Do you recall during the sentencing proceeding
6 Judge Russo said -- I believe he said something -- I'm
7 going to paraphrase it, that he certainly respects Judge
8 Peoples for a long time --
9 A Correct.
10 Q -- and respects you too?
11 A Correct.
12 MR. SPENCER: I have no further questions.
13 THE COURT: Okay. You can step down. Thank you,
14 sir.
15 THE WITNESS: May I be excused, Your Honor.
16 THE COURT: Any objection to him being excused?
17 MR. SPENCER: Your Honor, I hate to -- I know
18 Mr. Brown has come a long way but given the fact that the
19 applicant hasn't testified yet, I would just ask that
20 Mr. Brown --
21 THE COURT: Uh-uh, just hang out just a little bit
22 longer, please.
23 MR. SPENCER: I apologize, Mr. Brown.
24 THE WITNESS: No problem. Just one minute, let me
25 pack up.
(WHEREUPON there was a pause in the proceedings.)

Michael C. Kennedy - Direct Examination by Ms. Armstrong

1 MS. ARMSTRONG: Your Honor, the applicant calls
2 Mr. Kennedy, Michael Kennedy.
3 MICHAEL C. KENNEDY,
4 having been duly sworn, testified as follows:
5 THE CLERK: Please have a seat in the witness box
6 and state your full name for the record.
7 THE WITNESS: My name is Michael C. Kennedy.
8 DIRECT EXAMINATION
9 BY MS. ARMSTRONG:
10 Q Good morning, Mr. Kennedy. How are you?
11 A I'm fine, how you doing?
12 Q I'm fine.
13 Mr. Kennedy, where do you currently reside?
14 A At Lieber Correctional Institution.
15 Q Okay. How long have you lived in Lieber?
16 A Two years.
17 Q Are you there as part of your sentence?
18 A Correct.
19 Q Okay. And your sentence is thirty years with
20 twenty consecutive suspended to ninety days and three years
21 probation?
22 A Correct.
23 Q Okay. And that would be the sentence that we've
24 been talking about in the -- the facts we've been talking
25 about here today in the courtroom. Have you been present

Michael C. Kennedy - Direct Examination by Ms. Armstrong

- 1 the entire time?
- 2 A Correct.
- 3 Q Okay. You've heard everything that's been
4 testified to?
- 5 A Correct.
- 6 Q Okay. Including the grounds of your application;
7 is that correct?
- 8 A Correct.
- 9 Q Okay. As we discussed, and I believe I've already
10 mentioned it to the judge as well as the attorney general,
11 I just need it put on the record that when you challenge
12 your guilty plea and sentence that you got, if in fact,
13 you're successful, the result in South Carolina would be
14 either all or nothing. In other words, you either go back
15 to square one where you would face all of the original
16 charges, including the conspiracy that was not prosed,
17 which means not prosecuted.
- 18 You would face all those charges again and would
19 have to make a decision again to either go to trial or
20 plead guilty and if you ended up in that position, you
21 could face more time that you have right now?
- 22 A Correct.
- 23 Q And you understand that a judge could -- I'm not
24 saying that would, but it's certainly an option -- that
25 they could sentence you to thirty plus twenty plus five and

Michael C. Kennedy - Direct Examination by Ms. Armstrong

- 1 make it consecutive?
- 2 A Correct.
- 3 Q Okay. Knowing all of that and that that is a
- 4 possibility -- I'm not saying it would happen, but that it
- 5 is a possibility, you still want to go forward?
- 6 A Correct.
- 7 Q Okay. Thank you. Do you remember meeting with
- 8 your counsel prior to trial, Mr. Brown?
- 9 A Correct.
- 10 Q Okay. And you were discussing discovery and the
- 11 information that the State had provided?
- 12 A Correct.
- 13 Q Okay. Do you recall going to court on May 7th?
- 14 A Correct.
- 15 Q Okay. And what was your understanding of that
- 16 particular hearing?
- 17 A My understanding provided by Mr. Brown -- my
- 18 understanding, I was going for a bond reduction.
- 19 Q Okay. And your original bond was set at \$55,000?
- 20 A Correct.
- 21 Q And that would have been a really high bond for you
- 22 to make at that time and your family to make at that time?
- 23 A Correct.
- 24 Q Okay. So you thought for a bond reduction?
- 25 A Correct.

Michael C. Kennedy - Direct Examination by Ms. Armstrong

1 Q Okay. Do you recall ever discussing going to court
2 prior to May 7th that you would be going there for a plea?

3 A Never discussed that.

4 Q Okay. And let me ask you this: When you went to
5 court and you decided to plead guilty, would you have
6 pleaded guilty on that date had you known that, you know,
7 certain people would not have been there?

8 A No, I never would have pled guilty if it wasn't for
9 my counsel's advice.

10 Q Okay. Well, essentially, to the best of your
11 recollection, what was his advice to you on that particular
12 day?

13 A He told me to go ahead and plead guilty. That's
14 what my counsel told me. He's representing me, so I wanted
15 to do what my counsel told me. I thought -- he thought
16 that was the best for me, so that's what I went ahead and
17 did.

18 Q Okay. And after the sentence came down and it
19 turned out to be what it is, which is thirty years and
20 twenty suspended to ninety days and three years probation,
21 did you speak to your attorney and ask him to file
22 something to ask the judge to reconsider your sentence? Do
23 you recall that?

24 A Correct.

25 Q Let me ask you this: Do you recall going to that

Michael C. Kennedy - Direct Examination by Ms. Armstrong

1 hearing?

2 A Correct.

3 Q And at that time people testified on your behalf?

4 A Correct.

5 Q Yes, sir. Okay. And both the May 7th and the June

6 hearing, were you relying on your lawyer to object to any

7 comments or procedures that were not favorable to you?

8 A Correct.

9 Q Okay. And if you had known your counsel wasn't

10 going to do everything that he should have done or could

11 have done, would you plead guilty?

12 A I would never have pled guilty.

13 Q Okay. So you would have insisted on going to

14 trial?

15 A Correct.

16 Q Okay. Is there -- do you -- let me just back up

17 one second here.

18 When you were discussing your discovery with your

19 counsel, do you remember the -- ever seeing any information

20 about a boot print?

21 A No.

22 Q You recall being told there was one?

23 A Correct.

24 Q Okay. All right. So you were aware that the State

25 had some evidence that Mr. Brown believed could put you

Michael C. Kennedy - Direct Examination by Ms. Armstrong

1 there?

2 A Correct.

3 Q Even without you having given a statement. You

4 understand that there was some evidence?

5 A Correct.

6 Q Okay. Including Mr. Toots, who was your friend?

7 A Correct.

8 Q Okay. Let's see --

9 MS. ARMSTRONG: Beg. the Court's indulgence.

10 (WHEREUPON there was a pause in the proceedings.)

11 BY MS. ARMSTRONG:

12 Q Just finally, are you asking this court to reverse

13 your guilty plea conviction and award you -- basically a

14 new trial? In other words, asking the Court to overturn

15 what happened on May 7th and then in June of 2007 and

16 essentially put you back in the place that you were before

17 you pled guilty to the three charges?

18 A Yes, I am.

19 Q And you understand the hazards of doing that?

20 A Correct.

21 Q And you still want to go forward?

22 A Correct.

23 Q Please answer any questions the attorney general

24 may have.

25 ///

Michael C. Kennedy - Cross-Examination by Mr. Spencer

CROSS-EXAMINATION

1
2 BY MR. SPENCER:

3 Q Mr. Kennedy, as I understand it the purpose of the
4 May 7th hearing was for a bond reduction; is that correct?

5 A Correct.

6 Q And then at some point there is discussion about
7 pleading guilty that day?

8 A Correct.

9 Q And so you listened to your attorney's advice?

10 A Correct.

11 Q All right. And then you decided to plead guilty?

12 A For more counsel's advice. My counsel advised me
13 to plead guilty, so I was going on what my counsel
14 counseled me what to do. So I did what my counsel told me
15 to do and plead guilty. He said that was the best thing
16 for me to do, so that's why I did it.

17 Q All right. Do you recall Judge Russo asking
18 whether or not you wanted to plead guilty?

19 A Correct.

20 Q And you told him you did?

21 A Correct.

22 Q And basically, is it fair to say you pled guilty in
23 hopes of avoiding a harsher punishment?

24 A No, I pled guilty because my counsel's advice.

25 Q Did you tell your -- did you tell counsel you

Michael C. Kennedy - Cross-Examination by Mr. Spencer

1 wanted a trial?

2 A He never discussed a trial.

3 Q He never discussed a trial with you?

4 A No, sir.

5 Q Is that your testimony?

6 A Yes, sir.

7 Q All right. Do you recall Judge Russo advising you

8 that you had a right to trial?

9 A Correct.

10 Q And you told Judge Russo you understood it, right?

11 A Yes, sir.

12 Q And Judge Russo told you how much time you were

13 facing?

14 A Correct.

15 Q And he told you you were facing between ten to

16 thirty years in armed robbery?

17 A Correct.

18 Q And twenty years on assault and battery with intent

19 to kill?

20 A Correct.

21 Q So you understood you were facing up to fifty

22 years?

23 A Correct.

24 Q And you told Judge Russo you wanted to plead

25 guilty?

Michael C. Kennedy - Cross-Examination by Mr. Spencer

1 A Yeah, per my counsel's advice to plead guilty,
2 correct.

3 Q But whose decision was it?

4 A For my counsel's advice, my counsel advised me to
5 plead guilty.

6 Q At what point did you tell Judge Russo that the
7 only reason you were pleading guilty was because your
8 attorney told you to?

9 A I never told him that.

10 Q You told Judge Russo it was your decision to plead
11 guilty?

12 A That was my counsel's advice to tell the judge to
13 plead guilty, so I proceeded.

14 Q Are you saying Mr. Brown told you how the answer
15 the questions?

16 A Correct.

17 Q Now, who's going to be doing the prison sentence at
18 the end of this plea was that you or Mr. Brown?

19 A Me, Mr. Kennedy.

20 Q You're the one who's going to get the time?

21 A Correct.

22 Q At what point did you tell Judge Russo you don't
23 want to plead guilty?

24 A I never told him that.

25 Q What point did you tell Judge Russo you were not

Michael C. Kennedy - Cross-Examination by Mr. Spencer

- 1 satisfied with Mr. Brown's help?
- 2 A I never told him that.
- 3 Q You told him the very opposite, right? You told
- 4 Judge Russo you were satisfied with your attorney?
- 5 A That was my counsel's advice to agree on everything
- 6 that he was saying.
- 7 Q So was that a lie to Judge Russo?
- 8 A What you mean was it a lie.
- 9 Q Were you happy -- when you were pleading guilty
- 10 this day, May 7th, when you were pleading guilty you were
- 11 about to go to prison because you were pleading guilty, did
- 12 you tell Judge Russo, I'm not happy with Mr. Brown?
- 13 A No, sir, I never did.
- 14 Q Were you happy with Mr. Brown when you were
- 15 pleading guilty?
- 16 A I mean per my counsel's advise, I thought he was
- 17 doing his job as an attorney to get me a fair sentence.
- 18 Q So -- so what you're saying, at the time when you
- 19 were answering Judge Russo's questions that's -- that was
- 20 the truth. You were satisfied with Mr. Brown's services?
- 21 A Correct.
- 22 Q Okay. Thank you. And you apologized to the Court;
- 23 is that correct?
- 24 A Correct.
- 25 Q And I believe the sense of your apology was, you

Michael C. Kennedy - Cross-Examination by Mr. Spencer

1 said you were in the wrong place at the wrong time?

2 A Correct.

3 Q You said that again during the reconsideration

4 hearing?

5 A Correct.

6 Q And as a matter of fact, you had told Mr. Brown

7 prior -- you had told Mr. Brown that you, in fact, did

8 commit the robbery?

9 A I never told him that.

10 Q You never told him that?

11 A I never told him that.

12 Q So when Mr. Brown says during the guilty plea

13 hearing in front of Judge Russo as an officer of the Court,

14 when he says that you admitted the crime to him that would

15 be false?

16 A False.

17 Q What about the apology then? What were you

18 apologizing for?

19 A I never told him I was at the place of the crime.

20 I never told him that.

21 Q What does wrong place, wrong time mean?

22 A I never told him that I -- I never told him that.

23 Q You never told Judge Russo --

24 A Yes, correct, I told Judge Russo, but I never told

25 my attorney that.

Michael C. Kennedy - Cross-Examination by Mr. Spencer

- 1 Q Okay. So you didn't tell that to Mr. Brown, but
2 you told that to Judge Russo?
- 3 A Correct.
- 4 Q Were you -- were you there for that robbery?
- 5 A Correct. I was.
- 6 Q You were there for that robbery?
- 7 A Correct.
- 8 Q That you and Mr. Toots committed?
- 9 A Correct.
- 10 Q You committed the robbery?
- 11 A Correct.
- 12 Q And, of course, Mr. -- excuse me, Judge Russo told
13 you, you had a right to trial and you could make the State
14 prove their case, right?
- 15 A Correct.
- 16 Q And you told him you want to plead guilty?
- 17 A Correct.
- 18 Q Why didn't you tell him, Well, if that's the case,
19 I want to make the State prove it?
- 20 A Because of my counsel's advice I pled. When my
21 counsel told me to plead guilty, that's what I did.
- 22 Q Right, because counsel was hoping to get you a
23 light sentence too?
- 24 A Correct.
- 25 Q I mean, Mr. Brown and you had the same goal, right?

Michael C. Kennedy - Cross-Examination by Mr. Spencer

- 1 To get as low a sentence as possible?
- 2 A I mean from my counsel's advice to plead guilty, he
3 said that was in my best interest, so that's what I did.
- 4 MR. SPENCER: Beg the Court's indulgence.
- 5 THE COURT: Okay.
- 6 (WHEREUPON there was a pause in the proceedings.)
- 7 BY MR. SPENCER:
- 8 Q Do you remember the solicitor going over the facts
9 of the case?
- 10 A Somewhat.
- 11 Q Have you had a chance to read the plea transcript
12 since you filed your application?
- 13 A Correct.
- 14 Q And do you recall that you agreed with the facts as
15 related by the solicitor?
- 16 A Say again?
- 17 Q Do you recall during that guilty plea that you
18 agreed with the facts as stated by the solicitor?
- 19 A What facts?
- 20 Q The facts of the case. You remember the solicitor
21 gave the facts of the case to Judge Russo?
- 22 A Correct.
- 23 Q And do you remember that you told Judge Russo you
24 agreed with those facts?
- 25 A I don't recall.

Michael C. Kennedy - Cross-Examination by Mr. Spencer

- 1 Q I would just turn to page 36 of the guilty plea
2 transcript. And Mr. Kennedy are you able to read?
- 3 A Correct, yes, sir.
- 4 Q Okay. Very good. If you can, read on page 26,
5 line 17 through 19 to yourself and just tell me when your
6 done?
- 7 (WHEREUPON there was a pause in the proceedings.)
- 8 THE WITNESS: Done.
- 9 BY MR. SPENCER:
- 10 Q All right. So you told Judge Russo you agreed with
11 the facts of the case?
- 12 A Correct.
- 13 Q And the facts as the solicitor stated was -- was
14 that you and Mr. Toots went to commit the armed robbery on
15 Mr. Richardson?
- 16 A Correct.
- 17 Q Mr. Toots is -- knew Mr. Richardson because
18 Mr. Toots had done some work for Mr. Richardson; is that
19 correct?
- 20 A That's what he said, yes, that's correct.
- 21 Q And Mr. Toots hit Mr. Richardson over the head with
22 a bottle; is that correct?
- 23 A Correct.
- 24 Q A wine bottle?
- 25 A Correct.

Michael C. Kennedy - Cross-Examination by Mr. Spencer

- 1 Q And then you pulled Mr. Richardson down the stairs?
- 2 A That's not correct.
- 3 Q You didn't tell Judge Russo that wasn't correct,
4 though, did you?
- 5 A I didn't.
- 6 Q Why didn't you?
- 7 A Because of my counsel's advising.
- 8 Q Are you saying that Mr. Brown told you to just
9 agree with whatever they say?
- 10 A Correct.
- 11 Q Then you took that wallet from Mr. Richardson,
12 right?
- 13 A Correct.
- 14 Q You ripped his pants pocket in the process of doing
15 so?
- 16 A Correct.
- 17 Q Whether or not he was thrown down the stairs or
18 fell down the stairs, Mr. Richardson fell down the stairs;
19 is that right?
- 20 A Correct.
- 21 Q You helped Mr. Toots commit that armed robbery,
22 right?
- 23 A Correct.
- 24 Q You guys didn't ask him for his money first, you
25 just went ahead and assaulted him off the bat, is that

Michael C. Kennedy - Cross-Examination by Mr. Spencer

1 correct?

2 A Correct.

3 Q And you were -- were you 18 or 19 at the time of

4 the crime?

5 A 18.

6 Q You were 18. Okay.

7 Were you working at the time?

8 A No, I was in school.

9 Q Were you in school full time?

10 A Yes, sir.

11 Q And Mr. Richardson, I believe, was 86 at the time,

12 right?

13 A Correct. I believe so.

14 Q How tall are you?

15 A I'm 6'1".

16 Q 6'1". About how tall you were back when you

17 committed this armed robbery?

18 A Correct..

19 Q About how heavy would you have been at this time?

20 A I was about 185, 190.

21 Q 185, 190?

22 A Correct.

23 Q So you and Mr. Toots took it upon yourselves to rob

24 this 86-year-old man, hit him over the head with a wine

25 bottle. He gets -- even under your version of facts, he

Michael C. Kennedy - Cross-Examination by Mr. Spencer

1 gets pushed down or falls down a set of stairs. You guys
2 don't even bother to ask him for his money, you just go
3 ahead and assault him?

4 MS. ARMSTRONG: Your Honor; I'm sorry, I've let
5 this go on, but I don't understand the relevance of this.
6 The transcript speaks for itself. The facts are clearly
7 laid out. There's not really a question here. I'm going
8 to object to relevance.

9 MR. SPENCER: It is completely relevant. There's
10 two reasons why it's relevant. One, is first the decision
11 to plead guilty because this was a heinous crime; and
12 second of all, we're talking about mitigation and the flip
13 coin of mitigation, the aggravated circumstances that ended
14 up as a result of this.

15 THE COURT: I'll allow it. Go ahead.

16 MR. SPENCER: Thank you, Your Honor.

17 BY MR. SPENCER:

18 Q So basically, you and Mr. Toots assault and then
19 rob Mr. Richardson, right?

20 A I didn't assault Mr. Richardson.

21 Q Mr. Toots did, right?

22 A Correct.

23 Q And you went there with him to commit that armed
24 robbery, right?

25 A Correct.

Michael C. Kennedy - Cross-Examination by Mr. Spencer

- 1 Q Did you stop Mr. Toots?
- 2 A No, I didn't.
- 3 Q Did you at any point in time say it was a bad idea?
- 4 A Yeah, I did.
- 5 Q What point was that?
- 6 A That was before.
- 7 Q You went ahead and did it anyway though, didn't
- 8 you?
- 9 A Correct.
- 10 Q Mr. Toots was a little bit younger than you, right?
- 11 A Correct.
- 12 Q You were 18, right?
- 13 A Correct.
- 14 Q That's a man, right?
- 15 A Correct.
- 16 Q You weren't no boy, you're a man?
- 17 A Correct,
- 18 Q And quite frankly, you were a mean man because you
- 19 picked on an 86 year old man and threw him down the stairs.
- 20 You took his wallet. You ganged up on him. It was two on
- 21 one. What's mitigating about that?
- 22 A I didn't throw him down the stairs.
- 23 Q What's mitigating about that armed robbery that you
- 24 committed on an 86-year-old man? There is none, is there?
- 25 MR. SPENCER: Your Honor, I withdraw that question

1 based after about -- I'd say four or five seconds of
2 silence. I have no further questions.

3 THE COURT: Okay. Anything further?

4 MS. ARMSTRONG: No, Your Honor.

5 THE COURT: You can step down.

6 Anything else?

7 MS. ARMSTRONG: Nothing for us.

8 MR. SPENCER: Nothing further from the State, Your
9 Honor.

10 THE COURT: Okay. All right. I'm going to take a
11 five minute break. I want to see both counsel in chambers.

12 MR. FRANCHOT BROWN: May I be excused?

13 THE COURT: Any objection to him being excused?

14 MR. SPENCER: No objection, Your Honor.

15 MS. ARMSTRONG: No objection, Your Honor.

16 MR. FRANCHOT BROWN: Thank y'all, I appreciate it.

17 (WHEREUPON a recess was observed.)

18 THE COURT: Okay. I have at least reviewed part of
19 this file. I will read the rest of the file and let y'all
20 know my decision. My understanding from our conversation
21 in chambers is that you would like thirty days to admit any
22 additional briefs of the law.

23 MS. ARMSTRONG: Yes, Your Honor, I'd appreciate
24 that.

25 THE COURT: I'll give you the same to respond.

1 MR. SPENCER: Thank you, Your Honor.
2 THE COURT: I'll let y'all know.
3 MR. SPENCER: Thank you.
4 MS. ARMSTRONG: Thank you, Your Honor.
5 * * * * * END OF TRANSCRIPT. * * * * *
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I, THE UNDERSIGNED, Brenda J. Sigwald, Official Court Reporter for the Fifth Judicial Circuit of the State of South Carolina, do hereby certify that I reported the proceedings in the captioned case in the Court of General Sessions in and for the State of South Carolina on the 9th day of July, 2013.

I FURTHER CERTIFY that the 53 foregoing pages, constitute a true, accurate and complete transcript of said hearing.

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

IN WITNESS WHEREOF, I have hereunto set my hand and seal at Aiken County, this 5th day of March, 2014.

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