STATE OF SOUTH CAROLINA COUNTY OF HORRY MIGUEL ANGEL GARCIA Appellant, v. STATE OF SOUTH CAROLINA Respondent.	IN THE SOUTH CAROLINA SUPREME COURT APPELLATE CASE NO. 2018-001914 AFFIDAVIT OF ANTONIO O. SIMMONS

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SC Court of Appeals

PERSONALLY appeared before me, Antonio O. Simmons, who being duly sworn, deposes and says:

1. I am the Appellant in the above captioned case.

2. In the December 2014 term, I was indicted by the Charleston County Grand Jury for five counts of armed robbery.

3. On March 20, 2018, I pled guilty to armed robbery (2014-GS-10-07111) in front of the Honorable R. Markley Dennis. I was represented by Michael Apicella. Judge Dennis sentenced me to thirty years' imprisonment suspended upon eighteen years' imprisonment, and twelve years' probation.

4. On September 19, 2019, I had a post-conviction relief (PCR) hearing held before the Honorable Michael G. Nettles. I was represented by Christopher Murphy. Judge Nettles found that I was sentence improperly because sentences for armed robbery convictions cannot be suspended.

5. On January 10, 2020, I had a resentencing hearing before the Honorably R. Markley Dennis. I was represented by Christopher R. Geel. I was sentenced to twenty-eight years' imprisonment by Judge Dennis.

6. On January 17, 2020, my sentencing counsel, Christopher R. Geel, filed a notice of appeal.

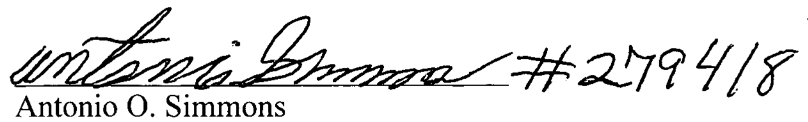
7. On July 14, 2020, my case was assigned to Victor Seeger, Esquire with the Office of Appellate Defense. On July 30, 2021, I spoke to Mr. Seeger by phone regarding my intention to withdraw my direct appeal.

8. I understand that I am entitled to an appeal of my conviction, and that, because I am indigent, I am entitled to the assistance of an attorney from the South Carolina Office of Appellate Defense. I have been informed that if I drop my direct appeal that I forever waive those issues that could be raised.

9. In light of the risks which have been explained to me, it is my desire that the South Carolina Office of Appellate Defense drop the appeal formerly filed on my behalf.

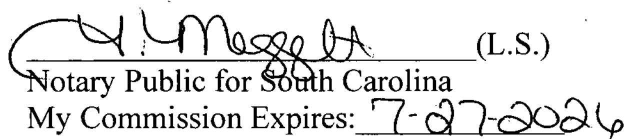
10. I have made this decision on my own, with a full understanding of all the possible consequences of this action.

11. I do not wish to appeal.



Antonio O. Simmons

SWORN TO before me this 25th day of August, 2021.



__________________________(L.S.)
Notary Public for South Carolina
My Commission Expires: 7-27-2026

I would like to drop my appear, And I am asking you to grant me a new P.C.R, for the Velation of my old P.C.R please and I Thank you

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ARGUMENTS IN REPLY

1. Appellant's motion to withdraw his guilty plea was properly made at his resentencing hearing because the original negotiated sentence was ruled invalid where Appellant only plead guilty because he was promised he would receive a negotiated sentence, but now that he could not receive that sentence Appellant should have been allowed to move to withdraw his guilty plea.

Appellant's motion to withdraw his guilty plea was properly made at his resentencing hearing. At Appellant's guilty plea hearing on March 20, 2018, Appellant pled guilty because he was promised a negotiated sentence between seventeen and twenty-eight years' imprisonment. Tr. 4, ll. 9 – 19. The plea court specifically recognized that Appellant was pleading guilty pursuant to the promise of the negotiated sentence. Tr. 29, ll. 2 – 7. Appellant was sentenced to thirty years' imprisonment suspended upon eighteen years' imprisonment and twelve years' probation, with the probationary sentence terminated upon two years of counseling and regularly taking his medication. Tr. 37, l. 4 – 39, l. 21.

After the guilty plea hearing, Appellant successfully challenged the legality of his sentence at his post-conviction relief (PCR) hearing. The PCR court found that Appellant's sentence was invalid because no portion of the sentence could be suspended and remanded his case to the lower court for resentencing. PCR Order, p. 11 – 12, R, p. *. At the resentencing hearing on January 10, 2020, Appellant moved to withdraw his guilty plea now that the negotiated sentence was no longer promised. Resentencing hearing, p. 11, l. 13 – 12, l. 13. Since Appellant's guilty plea was induced by the promise of a negotiated sentence and it was not until the resentencing hearing that Appellant learned he was not going to be resentenced pursuant to the negotiated range, he should have been allowed to withdraw his guilty plea at the resentencing hearing.

Guilty pleas operate under contract law principles. See Puckett v. U.S., 556 U.S. 129, 136 – 37 (2009). When a defendant pleads guilty because he was promised a particular sentence, he or she is allowed to move to withdraw their guilty plea if the plea court will not accept the negotiated sentence or will sentence the defendant outside the negotiated range. Id.

Respondent's argument that Appellant's withdrawal of his guilty plea was not timely made was incorrect. BOR, at 10 – 11. The fact that Appellant's motion to withdraw his guilty plea was two years later in time from the guilty plea hearing was of no consequence in this context.

Appellant's guilty plea was induced by the state's promise that he would be sentenced pursuant to the negotiated range. Tr. 29, ll. 2 – 7. It was only after the PCR court determined that the sentence imposed was invalid and after the resentencing court decided to not resentence Appellant pursuant to the negotiated range, that Appellant could withdraw his guilty plea. Other than at his resentencing hearing, there was no opportunity for Appellant to withdraw his guilty plea. In effect, Appellant was forced to uphold his end of the guilty plea bargain while the state was not bound by their agreement to sentence him pursuant to the negotiated sentencing range. Accordingly, since Appellant's guilty plea was induced by the promise of a negotiated sentencing range and the resentencing court stated it was not going to follow the negotiated range, Appellant properly moved to withdraw his guilty plea at that time and the resentencing court should not have failed to exercise its discretion over the withdrawal motion. Harden v. State, 276 S.C. 249, 255 – 56, 277 S.E.2d 692, 695 (1981) ("Where a defendant pleads guilty pursuant to a plea agreement and the judge decides that the final disposition should not include… sentence concessions, withdrawal of the plea may be permitted in the discretion of the judge.")

2. <u>The severity of Appellant's sentence drastically increased after his resentencing hearing and Appellant's challenge to the increased sentence was preserved for review as defense counsel warned the resentencing court about the presumption of vindictiveness when a defendant receives a more severe sentence after resentencing.</u>

Defense counsel raised the issue of Appellant's dramatically increased sentence at the resentencing hearing such that the issue was properly preserved for review by this Court. Resentencing hearing, p. 5, ll. 4 – 10. Appellant was initially sentenced to thirty years' imprisonment suspended upon eighteen years' imprisonment and twelve years' probation, with the probationary sentence terminated upon two years of counseling and regularly taking his medication. Tr. 37, l. 4 – 39, l. 21.

At the resentencing hearing, plea counsel pointed out to the lower court that the department of corrections would have treated Appellant's initial sentence as "a eighteen year sentence" and cited North Carolina v. Pearce, 395 U.S. 711 (1969) for the proposition that there must be a valid reason for imposing a harsher sentence after a reconsideration. Resentencing hearing, p. 5, ll. 15 – 22. In effect, defense counsel was putting the resentencing court on notice that imposing an active sentence longer than eighteen years of imprisonment must not motivated by a desire to punish Appellant for being successful at post-conviction relief (PCR). Accordingly, Appellant's current challenge to his twenty-eight-year imprisonment sentence was preserved for review.

Moreover, in the initial brief of respondent, the state's argument that the issue was not properly raised before the resentencing court was undermined by its other argument that the "plea judge repeatedly explained – he did not revise the sentence to punish Appellant." BOR, p. 22 – 23, 30 – 31. The fact that the resentencing judge needed to "repeatedly" explain that he was not

increasing Appellant's sentence to punish him for being successful at PCR showed that the issue was raised at the resentencing hearing.

Furthermore, the fact that the resentencing judge felt the need to explain the reasons for revising Appellant's sentence showed that his new sentence was more severe. Resentencing hearing, p. 11, l. 14 – 12, l. 13. The new sentence of twenty-eight years' imprisonment was undoubtedly a substantial increase in severity. The fact that the "aggregate" sentence of thirty years' imprisonment suspended upon eighteen years' imprisonment and twelve years' probation, was "longer" was of no consequence in this context. It should go without saying that a day on probation is not equivalent to a day in prison. Gall v. U.S., 552 U.S. 38, 48 (2007) (recognizing that custodial sentences are qualitatively more severe than probationary sentences of equivalent terms).

Tellingly, the South Carolina Code categorizes probation as "a form of clemency." S.C. Code Ann. § 24-21-410. Moreover, our Courts have held that probationary sentences are an "act of grace" from the sentencing court. State v. Ross, 423 S.C. 504, 510 – 11, 815 S.E.2d 754, 757 (2018); see State v. Spare, 374 S.C. 264, 268, 647 S.E.2d 706, 708 (Ct. App. 2007) (citing State v. Hamilton, 333 S.C. 642, 684, 511 S.E.2d 94, 97 (Ct. App. 1999)). There can be no doubt that the twenty-eight years' imprisonment that Appellant received after resentencing was a far harsher punishment than the thirty years' imprisonment suspended upon eighteen years' imprisonment and twelve years' probation initially imposed. Tr. 37, l. 4 – 39, l. 21

Despite the resentencing court's purported explanation as to why he was resentencing Appellant more harshly, the rest of the record showed that Appellant was being punished for being successful at PCR. Resentencing hearing, p. 8, ll. 13 – 18; Resentencing hearing, p. 9, l. 21 – 10, l. 6. Notably, the initial brief of respondent failed to mention that the resentencing court expressed

annoyance at Appellant for successfully challenging the original sentence at PCR. Resentencing hearing, p. 8, ll. 13 – 18. The resentencing court specifically stated it was "trying to give Appellant a break" with the original suspended sentence and complained about Appellant challenging a negotiated sentence. Id.

The resentencing court saying that the original sentence was an attempt at giving Appellant "a break," illustrated the vindictive nature of the much harsher current sentence of twenty-eight years' imprisonment. Evinced by the resentencing court's own admission, the initial sentence was much more lenient than the near maximum sentence Appellant received after resentencing. Accordingly, the issue of Appellant's sentence being improperly increased as a means to punish him for being successful at PCR was preserved for review.

Antonio Simmons #279418
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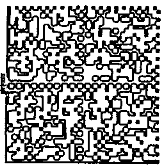

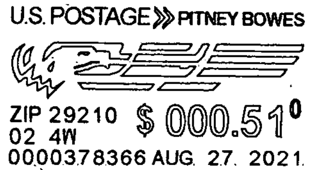

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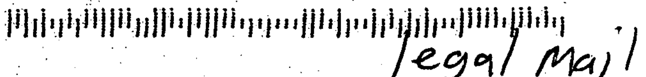

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