

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Beaufort County

Jennifer B. McCoy, Circuit Court Judge

OSIEL NARCISO GOMEZ,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2020-000202

APPENDIX

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1 Q. Mr. Narciso, did you talk to Mr. Rios about the State
2 agreeing to consent to giving you an appeal?

3 A. No.

4 Q. How did you find out you were going to get an appeal?

5 A. Through him, my attorney told me when he came here.

6 Q. And did Mr. Rios review with you a checklist that your
7 attorney showed you?

8 A. No.

9 Q. Is your signature at the bottom of the checklist or at
10 the last page of the checklist? I believe it's the bottom.

11 A. Yes.

12 Q. And you signed the document?

13 A. Yes.

14 Q. And what did you think that you were signing when you
15 signed the document?

16 A. That I was going to go to court.

17 Q. Did you review the consent order with Mr. Rios?

18 A. No.

19 Q. Did you sign the consent order?

20 A. Yes.

21 Q. Did you know that when you signed the consent order that
22 you were giving up the chance to raise any other claims?

23 A. No, they never explained that to me well.

24 Q. Did you talk to Mr. Rios about any other claims you
25 wanted to raise?

1 A. I don't remember.

2 MS. WILSON: Thank you.

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

4 MS. RUFF: Your Honor, I think that's all we have.

5 THE COURT: Anything from the State?

6 MS. WILSON: Nothing from the State.

7 MS. RUFF: This matter is before you to decide whether
8 the petitioner knowingly and voluntarily waived his right to
9 file a PCR, and there are cases -- our legal support is very
10 strong. The 2001 Brannon case requires that such a waiver
11 have a complete record. You can have colloquy between the
12 Court and the petitioner.

13 THE COURT: Do you have a case that says any kind of
14 withdrawal or waiver has to be on the record of the court, it
15 can't be done by document?

16 MS. RUFF: Yes. In fact, it says petitioner's knowing
17 and voluntary waiver of a statutory or constitutional right
18 must be established by a complete record. That's must. It
19 may be accomplished by colloquy between the Court and the
20 petitioner, between the Court and the petitioner's counsel or
21 both. Here we have no colloquy; nothing on the record
22 whatsoever. That in and of itself, there should be a finding
23 that there's nothing on the record --

24 THE COURT: Is that in the brief?

25 MS. RUFF: Yes, it is. In addition to that the

1 petitioner's waiver was not knowing and voluntary. We have a
2 few witnesses that testified --

3 THE COURT: Let me ask you something, when you file your
4 application, don't you have to list all your grounds for your
5 application?

6 MS. RUFF: Yes, you do.

7 THE COURT: And if you fail to list them and it doesn't
8 get litigated, then you've given up that ground, is that
9 correct, whether there's a record or no record.

10 MS. RUFF: Well, you're correct, Your Honor, but this
11 man doesn't know what his allegations should have been. He
12 had an attorney that met him a couple of hours beforehand.

13 THE COURT: I don't know what this man knew at the time
14 he filed his application. Somebody filed his application and
15 assisted him with it. He alleged the only ground he had was
16 he wasn't given an appeal.

17 MS. RUFF: And I think that was because his ineffective
18 assistance of counsel was, oh, my God, I don't have an
19 appeal, the guy didn't even file an appeal for me. Kind of a
20 hail Mary. You're probably right, he probably should have
21 filed everything, and Mr. Rios should have argued everything
22 in that PCR hearing, but it wasn't done.

23 THE COURT: Mr. Rios said based on his experience,
24 reviewing the transcript, he didn't believe there was another
25 ground to raise, that your client didn't give him another

1 ground to raise.

2 MS. RUFF: But in the appellate brief that the woman in
3 Columbia wrote she had several grounds upon which she said
4 could have gone forward.

5 THE COURT: Well, unfortunately you've only got one bite
6 at that apple, and that's with the lawyer that you had at the
7 time you filed it or you filed it yourself so --

8 MS. RUFF: Well, the remanded issue is just the knowing
9 and voluntary waiver of his rights, and that's why we're
10 here, and it's our position that he did not knowingly and
11 voluntarily waive these rights.

12 THE COURT: Would you agree that if that document that
13 Mr. Rios prepared and was signed by your client was made an
14 exhibit at the time that the order was signed that that would
15 have ended the matter?

16 MS. RUFF: It would make it a more uphill battle, but I
17 do also believe that my client -- it was written in English.
18 My client doesn't understand English. It was given to him
19 moments before. I believe that he was told, if you want to
20 go back to court, this is the only way you go back to court.

21 THE COURT: Well, unfortunately he's in a court system
22 that English is the prevailing language. He's entitled to an
23 interpreter, a translator, and he had one, which you all have
24 not been able to indicate that that translator was never
25 available at some point in time when some of these

1 discussions took place. All right. Anything else?

2 MS. RUFF: Well, I just also want to say that our second
3 legal argument is that he did not knowingly and voluntarily
4 waive it because of White versus State, and this Roe versus
5 Flores Ortega, that's a United States Supreme Court out of
6 2000, when counsel's constitutional deficient performance
7 deprived the petitioner of an appeal that he otherwise would
8 have taken, the petitioner has made out a successful
9 ineffective assistance of counsel claim entitling to him an
10 appeal. He was entitled to this appeal. He didn't have to
11 give up anything. It can't be voluntary if you're pressured
12 into giving up something you have as a right. He was
13 entitled to his direct appeal. We believe that he was under
14 duress, this is the only way you're going back to Court,
15 that's why he signed this waiver. That's all I have. Thank
16 you, Your Honor.

17 THE COURT: All right.

18 MS. WILSON: May it please the Court, Your Honor, the
19 State would just ask that you find that Mr. Narciso freely
20 and voluntarily waived his right to pursue the other
21 allegations.

22 THE COURT: All right. We're going to take a recess and
23 I want to see you all in my office.

24 (Recess held.)

25 --- END OF TRANSCRIPT OF RECORD ---

1 CERTIFICATE OF REPORTER

2 STATE OF SOUTH CAROLINA

3 COUNTY OF BEAUFORT

4
5 I, the undersigned Ruth L. Mott, Official Court Reporter
6 for the State of South Carolina, do hereby certify that the
7 foregoing is a true, accurate and complete transcript of
8 record of all the proceedings had and evidence introduced in
9 the matter of Osiel Gomez Narciso v. State of South Carolina,
10 relative to appeal, in the 14th Judicial Circuit Court for
11 Beaufort County, South Carolina, on the 20th of
12 February, 2014.

13 I further certify that I am neither related to nor
14 counsel for any party to the cause pending or interested in
15 the events thereof.

16 July 19, 2014

17
18 /S/ Ruth L. Mott

19 Official Court Reporter
20
21
22
23
24
25

THE STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED

JUN 18 2014

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

S.C. Supreme Court

The Honorable James R. Barber, Circuit Court Judge

Case No. 2007-CP-07-2195

Osiel Narciso,.....Respondent,

v.

State of South Carolina,.....Petitioner.

NOTICE OF APPEAL

The State of South Carolina appeals the order of the Honorable James R. Barber dated June 5, 2014. Petitioner received written notice of entry of this order on June 9, 2014. Enclosed is a copy of the above referenced order.

June 18, 2014



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RECEIVED

JUN 18 2014

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS	S.C. Supreme Court
	)	CASE NO.: 2007CP0702195	
OSEIL GOMEZ NARCISO,	)		
PETITIONER	)		
V.	)	ORDER	
THE STATE OF SOUTH CAROLINA,	)		
RESPONDENT	)		

This matter came before the Court on February 20, 2014. In its decision of March 14, 2012, the South Carolina Supreme Court held that the record of the PCR hearing in this case did not "adequately demonstrate whether Petitioner's waiver was in accordance with [the Court's] waiver jurisprudence." *Narciso v. State*, 397 S.C. 24, 33, 723 S.E.2d 369, 374 (S.C. 2012). The case was remanded to this Court for a determination of this issue remand from the South Carolina Supreme Court.

An evidentiary hearing was held on February 20, 2014. Present at the hearing were: Petitioner; Petitioner's attorney Carol C. Ruff; and Assistant Attorney General Ashleigh Wilson, Esq. Rebecca McCann, Donald Colongeli, and Phillip Rios were called as witnesses by the Applicant to testify during the evidentiary hearing. The State submitted as State's Exhibit 1 a handwritten checklist drafted by Phillip Rios, Esq. and reviewed with Petitioner.

Upon due and careful consideration of the testimony and exhibits admitted in evidence at the hearing, the arguments of counsel, and applicable law, the following are this Court's Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. Petitioner was tried and convicted of trafficking cocaine on January 18, 2007, and sentenced to 25 years in prison.
2. Petitioner's trial lawyer, Donald Colongeli, failed to appeal Petitioner's conviction, despite Petitioner's request that he do so.

3. Petitioner later filed a PCR application, and Phillip Rios was appointed as his PCR lawyer.

4. At a PCR hearing held on August 26, 2008, the Attorney General offered Petitioner the opportunity to appeal his conviction, but only if Petitioner waived his right to PCR. Mr. Rios recommended Petitioner sign a Consent Order memorializing this bargain. There was no colloquy or other court record of Petitioner's waiver other than the following:

THE COURT: What's - what we got this morning?

MR. FRIEDMAN: Your Honor, the first one is Oseil Gomez Narciso

THE COURT: All right.

MR. FRIEDMAN: May we approach on this one?

THE COURT: Yeah. (Bench conference.)

MR. FRIEDMAN: Thank you, Your Honor.

THE COURT: Okay. Appreciate it. Thank you.

--- END OF TRANSCRIPT OF RECORD ---

(See Exhibit 1)

5. Mr. Rios also did not pursue an appeal of Petitioner's conviction, but instead made the aforementioned bargain with the Attorney General's office.

6. Petitioner is a native of Mexico. Spanish is his native language. He moved to the United States when he was 19 years old. Petitioner does not speak or read English adequately enough to understand legal proceedings or his statutory and constitutional rights.

7. Specifically, Petitioner could not read or understand the Consent Order presented to him by Mr. Rios, which was written in English. No one read the Consent Order to Petitioner, in Spanish either on or off the record. No one translated the Consent Order into Spanish for Petitioner. There was no translating equipment used in the PCR hearing that allowed Petitioner to hear and understand anything said about his case.

CONCLUSIONS OF LAW

1. A defendant's knowing and voluntary waiver of statutory or constitutional rights must be established by a complete record, and may be accomplished by colloquy between court and defendant, between court and defendant's counsel, or both. *Brannon v. State*, 345 S.C. 437, 548 S.E. 2d 866 (2001).

2. A valid waiver of the right to PCR must be knowing, intelligent and voluntary; and in making this determination, a court must examine the particular facts and circumstance surrounding the case, including the background, experience and the conduct of the accused. *Spoone v. State*, 370 S.C. 138, 665 S.E.2d 605 (2008).

3. Based on the facts that (1) Petitioner is a non-English speaker who could not read the Consent Order, (2) there was no colloquy whatsoever with the judge at the PCR hearing to establish that Petitioner understood the Consent Order and/or his waiver of PCR rights, and (3) Petitioner may have been entitled to an appeal anyway without having to waive his PCR rights under the case of *White v. State*, 263 S.C. 110, 208 S.E.2d 35 (1974), the record does not adequately demonstrate that Petitioner's waiver was knowing, intelligent and voluntary, and accordingly the PCR waiver fails the tests outlined in *Brannon* and *Spoone*.

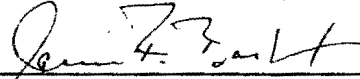
IT IS THEREFORE ORDERED that:

1. The Petitioner's purported waiver of his PCR rights in the Consent Order is hereby declared null, void and of no effect;

2. The Petitioner's request to bring a PCR application is hereby granted; and

3. Counsel may seek reimbursement from the Office of Indigent Defense for their time and expenses pursuant to standard policy.

AND IT IS SO ORDERED.



The Honorable James R. Barber, III
Presiding Judge
Court of Common Pleas
Fourteenth Judicial Circuit

Beaufort, South Carolina

~~Jude~~
~~April~~ 5, 2014

STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

OSIEL NARCISO

Respondent,

vs

STATE OF SOUTH CAROLINA,

Petitioner.

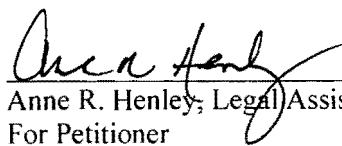
IN THE SOUTH CAROLINA SUPREME
COURT

Case No. 2007-CP-07-2195

AFFIDAVIT OF SERVICE BY MAIL

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

Carol Ruff
 Harley Ruff
 Ruff and Ruff LLC
 17 Professional Village Circle
 Beaufort, SC 29907


 Anne R. Henley, Legal Assistant
 For Petitioner

SWORN to before me this
 18th day of June, 2014.


 Notary Public for South Carolina.
 My Commission Expires: 

(L.S.)

RECEIVED
 JUN 18 2014
 S.C. Supreme Court

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Beaufort County
Court of Common Pleas
The Honorable James R. Barber, III, Circuit Court Judge

Appellate Case No. 2014-001327

OSIEL NARCISO,

Respondent,

v.

STATE OF SOUTH CAROLINA,

Petitioner.

PETITION FOR WRIT OF CERTIORARI

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DEC 22 2014

S.C. Supreme Court

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ISSUE PRESENTED

I. Did the lower court err by finding the Respondent's waiver of all other post-conviction relief claims was not entered knowingly and voluntarily when post-conviction relief counsel fully advised the Respondent of the rights he was waiving, the Respondent signed and initialed a written waiver of rights form drafted by counsel, and at the time of the waiver the Respondent had no other post-conviction relief claims he wished to pursue?

STATEMENT OF THE CASE

On January 16-18, 2007, the Respondent proceeded to trial before a jury and was convicted of trafficking cocaine in excess of 100 grams (2005-GS-07-1304). The Honorable Howard P. King sentenced the Respondent to confinement for twenty-five years.

On August 1, 2007, the Respondent filed an application for post-conviction relief. In the application, the Respondent alleged “ineffective assistance of counsel” (App. 3) and asked the court for “leave to file a belated appeal”. (App.6). In a document attached to the application, the Respondent alleged “my allegation of ineffective assistance of counsel is presently based entirely upon the fact that my attorney did not file a notice of appeal, after stating for the court and upon the record that he would do so”. (App. 8). The Petitioner filed a Return on May 15, 2008.

An evidentiary hearing was held on August 26, 2008. At the hearing, counsel for the Respondent called the case and the parties approached the bench briefly to speak to the Honorable J. Cordell Maddox who was presiding. The contents of the bench conference were not put on the record. (App. 25). Shortly thereafter, Judge Maddox, the Respondent, and counsel for both parties signed a consent order granting the Respondent a direct appeal pursuant to White v. State. The consent order stated “[t]he White v. State issue is the Applicant’s only allegation in the PCR application. The Applicant understands that he must proceed on all PCR claims at this time and anything not raised now is waived. The Applicant wishes to waive all other PCR claims and proceed with a belated direct appeal.” (App. 28).

The Respondent filed a Notice of Appeal to this Court to effectuate an appeal pursuant to White v. State. On appeal, the Respondent asked this Court to review the waiver of the Respondent’s other post-conviction relief allegations. In its opinion, this Court affirmed the Respondent’s conviction and remanded his case to the post-conviction relief court for a

determination as to whether or not the Respondent knowingly and voluntarily waived his right to raise additional PCR claims. (App. 54-56). The Remittitur was issued on March 30, 2012.

On February 20, 2014, after the Court's remand, a second evidentiary hearing was held in the Respondent's post-conviction relief matter. The Respondent was represented by Carol Ruff, Esquire, and Harley Ruff, Esquire. Present and testifying at the hearing were Philip Rios, Esquire, Rebecca McCann, Donald Colongeli, Esquire, and the Respondent. An interpreter was also present to assist the Respondent at the hearing. By Order dated June 5, 2014, the lower court found "the PCR waiver fails the test outlined in Brannon and Spooone", "the Petitioner's purported waiver of his PCR rights in the Consent Order is hereby declared null, void, and of no effect", and "the Petitioner's request to bring a PCR application is hereby granted". (App. 140). This Appeal by the State follows.

ARGUMENT

The lower court erred by finding the Respondent's waiver of all other post-conviction claims was not entered freely and voluntarily when the record reflects post-conviction relief counsel fully advised the Respondent that he could amend his application to raise additional claims and that by signing the consent order granting him an appeal pursuant to White v. State he would be waiving his ability to raise any additional claims.

While the transcript of the Respondent's first post-conviction relief hearing does not reflect the circumstances surrounding the waiver of the Respondent's right to raise any other PCR allegations, the record now established in this matter on remand supports the conclusion that the Respondent knowingly and voluntarily waived his right to raise any other PCR allegations. This Court should reverse the post-conviction relief court's finding that the Respondent is now entitled to bring his remaining post-conviction relief claims. The Petitioner submits there is no evidence in the record to support the lower court's findings.

The waiver of a constitutional or statutory right requires a showing on the record that the defendant made the waiver knowingly and intelligently. State v. Reed, 332 S.C. 35, 45, 503 S.E.2d 747, 752 (1998). The waiver inquiry "has two distinct dimensions": waiver must be "voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception," and "made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." Berghuis v. Thompkins, 560 U.S. 370, 382-83, 130 S. Ct. 2250, 2260, 176 L. Ed. 2d 1098 (2010).

When addressing the waiver of collateral-attack rights, the Court must examine "the particular facts and circumstances surrounding the case." Spoone v. State, 379 S.C. 138, 143, 665 S.E.2d 605, 607 (2008) (citing United States v. Broughton-Jones, 71 F.3d 1143, 1146 (4th Cir.1995)). In Spoone, this Court looked at background, experience, and conduct of the accused, the text of the agreement, and the transcript of the proceeding. Id. at 143-144. On appeal, this

Court must reverse the circuit court's grant of relief when there is no probative evidence to support the findings of the circuit court. Wolfe v. State, 326 S.C. 158, 485 S.E.2d 369 (1997); Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

The record established on remand reflects the Respondent's waiver of his right to raise any other post-conviction relief claims was knowingly and voluntarily entered. The Petitioner submits a formal colloquy between the Court and the defendant is not the only way to establish a valid waiver of rights. The record reflects prior to the signing of the consent order a colloquy took place between the Respondent and his initial post-conviction relief counsel during which counsel, with the assistance of an Spanish speaking interpreter, fully advised the Respondent of his right to pursue additional post-conviction relief claims and the consequences of waiving such right. The record also reflects counsel's colloquy with the Respondent was memorialized in a signed waiver of rights form drafted by post-conviction relief counsel and signed and initialed by the Respondent.

Counsel provided credible testimony that prior to the Respondent signing the consent order granting him an appeal pursuant to White v. State, he spoke with the Respondent about the consent order and advised him that "he would be waiving his right forever" and "that he's only given one application for PCR". (App. 112-113). Counsel also testified that with the assistance of the interpreter, he reviewed with the Respondent the written consent order and a handwritten checklist that he created which outlined the rights the Respondent would be waiving by signing the consent order. Counsel testified further he was able to effectively communicate with the Respondent with the assistance of the interpreter. (App. 155).

The checklist drafted by counsel was signed by the Respondent and clearly reflects counsel's full advisement of the Respondent's rights and the consequences of the Respondent's

waiver. Counsel reviewed the handwritten waiver form with the Respondent with the assistance of a Spanish speaking interpreter. The form reads as follows:

"I understand that although Mr. Rios has offered to amend the application and raise other allegations, I am unwilling to raise new allegations.

I understand that I am forever waiving my right to raise any other allegations of ineffective assistance of counsel against Mr. Colongeli and am raising my right and agreeing to a belated appeal only.

My attorney, Phillip J. Rios, has reviewed with me the terms of the consent order and the legal consequences of those terms (through the assistance of translator Rocio-Maria-Riley) and I understand the terms and am in agreement with them.

Mr. Rios advised me that my appeal may or may not be successful and has not promised a successful appeal or a new trial.

My attorney Philip J. Rios has answered all my questions to my satisfaction and has communicated to me often and throughout the period of his representation of me.

I have been informed and advised by my attorney, Philip J. Rios, about my PCR application, the legal meaning of its substantive content, the standard of relief in PCR cases, and the waiver of issues and all other matters arising out of my PCR application.

I am not under the influence of any alcohol, and drugs and nothing today would impair my ability to make decisions concerning the PCR application and hearing today.

My attorney Philip J. Rios has not promised or guaranteed me anything to induce me into making decisions today.

I have not been coerced or threatened into entering into the Consent Order agreeing to its limited relief and am entering into the agreement in the Consent Order freely, intelligently, and voluntarily.

It is not my desire to amend the PCR application and raise new allegations against Mr. Colongeli although Mr. Rios has provided me the opportunity and has offered to amend the application.

I am satisfied with my attorney, Philip J. Rios, and the representation that he has provided me." (App. 89-91).

The form reflects the Respondent signed his name and initialed under the word “Yes” after the advisement of each right listed on the waiver form.¹

While the record does not reflect an oral waiver of rights before the court, this checklist drafted by post-conviction relief counsel and signed by the Respondent reflects a clear explanation by post-conviction relief counsel and a written waiver of rights by Respondent. The waiver form reflects the Respondent was made aware that he was “forever waiving [his] right to raise any other allegations of ineffective assistance of counsel against Mr. Colongeli and [was] raising [his] right and agreeing to a belated appeal only.” (App. 89).

The plain language in the consent order signed by the Respondent is also evidence of the knowing and voluntary waiver of the Respondent’s right to raise any other post-conviction relief claims. As this Court correctly noted in the Respondent’s direct appeal opinion, the consent order signed by the Petitioner is straightforward. (App. 56). The record established on remand reflects that the plain language of the order was explained to the Respondent by counsel with the assistance of a Spanish speaking interpreter. (App. 112-113). Counsel’s use of an interpreter when during his discussions with the Respondent should quiet any of this Court’s concerns about the Respondent’s limited command of the English language. All of counsel’s communications with the Respondent including his written correspondence to the Respondent took place in the Respondent’s native language of Spanish.

Lastly, the fact that the Respondent has no interest in pursuing any other claims during his initial post-conviction relief proceeding is further evidence of the voluntariness of his waiver of all other post-conviction relief claims. The Respondent’s PCR application, counsel’s testimony, and the written waiver of rights form signed by the Respondent reflect the sole issue

¹ The record reflects the Respondent identified his signature on the written waiver form drafted by post-conviction relief counsel. (App. 127).

the Respondent wanted to pursue in his post-conviction relief proceeding was counsel's failure to file an appeal.

In the Respondent's application for post-conviction relief he states "my allegation of ineffective assistance of counsel is presently based entirely upon the fact that my attorney did not file a notice of appeal, after stating for the court and upon the record that he would do so". (App. 8). Counsel testified he spoke with the Respondent multiple times about amending his application to raise additional claims, but that the Respondent was interested solely in pursuing a belated appeal. (App. 110, 113, 119).

The written waiver form signed by the Respondent reflects "I understand that although Mr. Rios has offered to amend the application and raise other allegations, I am unwilling to raise new allegations. I understand that I am forever waiving my right to raise any other allegations of ineffective assistance of counsel against Mr. Colongeli and am raising my right and agreeing to a belated appeal only." (App. 89).

Because the Respondent had no interest in pursuing any claims other than counsel's failure to file an appeal, the waiver of his right to pursue any other PCR claims (which the record reflects did not exist) in the consent order aligns with his desire to solely obtain a belated appeal. The Respondent was entitled to a direct appeal and the Petitioner did not consent to an appeal pursuant to White v. State in exchange for the waiver of all other post-conviction relief claims as Respondent's second post-conviction relief counsel asserts. Had the Respondent been interested in pursuing claims other than trial counsel's failure to file an appeal, an evidentiary hearing would have been held on the Respondent's remaining claims.

Based on the evidence and testimony presented to the lower court on remand, the record now demonstrates the Respondent's waiver of his right to raise any additional post-conviction

relief claims in the consent order granting him a belated appeal was knowingly and voluntarily entered. The Petitioner submits there is no probative evidence to support the lower court's claim that the waiver of the Respondent's rights to raise any other PCR claims was invalid. The Respondent's waiver was made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. The Petitioner asks this Court to grant this Petition, proceed with further briefing, and reverse the lower court's finding that the Respondent is entitled to bring a new post-conviction relief application.

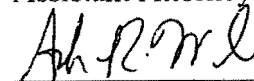
CONCLUSION

Based on the foregoing, Petitioner respectfully submits that the Petition for Writ of Certiorari be granted.

Respectfully submitted,

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Attorney General

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December 22, 2014

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal From Beaufort County
The Honorable James R. Barber, III Circuit Court Judge

OSIEL NARCISO

Respondent,

v.

STATE OF SOUTH CAROLINA,

Petitioner.

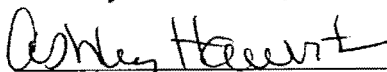
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari and the Appendix To The SC Supreme Court has been served upon the respondent's attorney Carmen Ganjehansi, this 22th day of December 2014.



Anne R. Henley
Legal Assistant

SWORN to before me this
22nd day of December, 2014.

 (L.S.)
Notary Public for South Carolina.
My Commission Expires: 3-18-23

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Beaufort County

James R. Barber, III, Circuit Court Judge

RECEIVED

APR 6 2015

S.C. Supreme Court

OSIEL NARCISO,

RESPONDENT,

V.

STATE OF SOUTH CAROLINA,

PETITIONER

APPELLATE CASE NO. 2014-001327

RETURN TO PETITION FOR WRIT OF CERTIORARI

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ATTORNEY FOR RESPONDENT

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STATEMENT OF QUESTION PRESENTED

Did the lower court err by finding the Respondent's waiver of all other post-conviction relief claims was not entered knowingly and voluntarily when post-conviction relief counsel fully advised the Respondent of the rights he was waiving, the Respondent signed and initialed a written waiver of rights form drafted by counsel, and at the time of the waiver the Respondent had no other post-conviction relief claims he wished to pursue?

COUNTER-STATEMENT OF QUESTION PRESENTED

Whether the remand court's findings that Narciso's waiver of all other post-conviction relief claims was not knowing, intelligent, voluntary and fails the tests outlined in Brannon v. State, 345 S.C. 437, 548 S.E.2d 866 (2001) and Spoone v. State, 370 S.C. 138, 665 S.E.2d 605 (2008) were supported by "any evidence" presented at the remand hearing?

COUNTER-STATEMENT OF THE CASE

Respondent Oriel Narciso was indicted by the Beaufort County grand jury for trafficking cocaine. On January 16-18, 2007, he was tried before the Honorable Howard P. King and a jury. Narciso was represented by Donald Colongeli, Esquire. He was convicted and sentenced to 25 years incarceration.

PCR Application, PCR Hearing, and Consent Order

On August 1, 2007, Narciso filed an Application for Post-Conviction Relief alleging ineffective assistance of counsel for failing to file a timely appeal. App. 1. On May 15, 2008, the State filed its Return. App. 10. On August 26, 2008, the parties appeared before the Honorable J. Cordell Maddox. Narciso was represented by Philip John Rios and the State was represented by Assistant Attorney General Matthew J. Friedman. No testimony or colloquy took place on the record; the transcript only reflects that an off-the-record bench conference took place. App. 22. The parties executed a Consent Order Granting Belated Direct Appeal, which was approved by the court and filed August 26, 2008. App. 27. The Consent Order contained the following: "The Applicant understands that he must proceed on all PCR claims at this time and anything not raised now is waived. The Applicant wishes to waive all other PCR claims and proceed with a belated direct appeal." Thus, the Order directed that "Applicant waived his right to raise any other PCR allegations." App. 28.

Petition for Certiorari

On July 14, 2009, appellate defender Elizabeth Franklin-Best filed a Petition for Certiorari and Brief of Appellant pursuant to White v. State¹ on behalf of Narciso. On December 16, 2010,

¹ 263 S.C. 110, 208 S.E.2d 35 (1974).

this Court granted the petition for writ of certiorari and ordered further briefing with respect to Petitioner's Question II: "Narciso signed a Consent Order Granting Belated Direct Appeal and 'waived his right to raise any other PCR allegations.' Narciso respectfully asks this Court to remand his case to determine whether that waiver was entered into knowingly and voluntarily." Ms. Franklin-Best filed the Brief of Petitioner on March 21, 2011, followed by an Amended Brief of Petitioner on August 11, 2011. App. 29. The State, represented by Assistant Attorney General Matthew Friedman, filed its Brief of Respondent on September 12, 2011. App. 38. On March 14, 2012, this Court issued its opinion affirming the circuit court's denial of Narciso's motion to suppress but remanding the case for a determination as to whether Petitioner's waiver of his PCR allegations was in accordance with the Court's waiver jurisprudence. App. 47; Narciso v. State, 397 S.C. 24, 723 S.E.2d 369 (2012).

Remand Hearing and Order Granting Relief

An evidentiary hearing on the remanded issue was held before the Honorable James R. Barber, III on February 20, 2014. Narciso was represented by Carol C. Ruff and Harley D. Ruff, and the State was represented by Assistant Attorney General Ashleigh R. Wilson. App. 92. Narciso's counsel filed a Petitioner's Brief in Support of Finding PCR Waiver Invalid, along with exhibits. App. 59 – 88. The witnesses included Rebecca McCann, the Spanish interpreter at Narciso's PCR hearing; Donald Colongeli, original trial counsel; Phillip Rios, PCR counsel; and Narciso.

On June 27, 2014, Judge Barber issued an Order granting Petitioner's request to bring a PCR application. App. 138. In support of this decision, Judge Barber stated:

Based on the facts that (1) Petitioner is a non-English speaker who could not read the Consent Order, (2) there was no colloquy whatsoever with the judge at the PCR hearing to establish that

Petitioner understood the Consent Order and/or his waiver of PCR rights, and (3) Petitioner may have been entitled to an appeal anyway without having to waive his PCR rights under the case of White v. State, 263 S.C. 110, 208 S.E.2d 35 (1975), the record does not adequately demonstrate that Petitioner's waiver was knowing, intelligent and voluntary, and accordingly the PCR wavier fails the tests outlined in Brannon and Spoone.

App. 143.

The State filed its Petition for Writ of Certiorari on December 22, 2014. This Return follows.

ARGUMENT

The remand court's findings that Narciso's waiver of all other post-conviction relief claims was not knowing, intelligent, and voluntary and fails the tests outlined in Brannon v. State, 345 S.C. 437, 548 S.E.2d 866 (2001) and Spoone v. State, 379 S.C. 138, 665 S.E.2d 605 (2008) were supported by "any evidence" presented at the remand hearing.

- A. There was ample evidence to support the remand court's findings that Narciso's waiver of his other PCR claims was not knowing, intelligent, and voluntary where the Consent Order signed by Narciso was not read or translated into Narciso's native language of Spanish, there was no colloquy on the record at the PCR hearing regarding Narciso's understanding of the Consent Order and/or his waiver of PCR rights, and the granting of his belated direct appeal pursuant to *White v. State* was not incumbent upon the waiver of any other PCR claims.

There was no incentive for Narciso to waive any other PCR allegations because he was entitled to file a belated White v. State appeal even without the State's consent. This case illustrates how the State can take advantage of an unknowing defendant and PCR attorney, resulting in a serious deprivation of rights. The sole issue on remand was whether Narciso's waiver of his PCR allegations was in accordance with this Court's waiver jurisprudence. App. 56. The remand court² applied the correct law to the facts of the case and determined that the waiver was not knowing, intelligent and voluntary and not in compliance with the requirements of Brannon and Spoone. In support of this determination, the court cited the facts that Narciso is a non-English speaker who could not read the Consent Order and the original PCR hearing contained "no colloquy whatsoever with the judge" regarding Narciso's waiver of his PCR rights. The court also found that Narciso may have been entitled to a belated direct appeal even without having to waive his PCR rights. App. 140. Narciso should not be in any worse position because his trial attorney fumbled the filing of the notice of intent to file a direct appeal.

² For ease of reference, when referring to the August 26, 2008 proceedings, Respondent uses "PCR hearing" and "PCR court" and when referring to the February 20, 2014 proceedings, Respondent uses "remand hearing" and "remand court."

Upon appellate review, this Court gives great deference to the PCR court's findings of fact and conclusions of law. Dempsey v. State, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005). This court also "gives great deference to a PCR court's findings where matters of credibility are involved." Simuel v. State, 390 S.C. 267, 270, 701 S.E.2d 738, 739 (2010). It is well settled that "[i]n reviewing the PCR court's decision, an appellate court is concerned only with whether any evidence of probative value exists to support that decision." Jamison v. State, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014); Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013); Davie v. State, 381 S.C. 601, 675 S.E.2d 416 (2009); Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989). Accordingly, the Court will affirm if *any evidence* of probative value in the record exists to support the finding of the PCR court. Cherry, 300 S.C. at 119, 386 S.E.2d at 626. In the present case, there was far more evidence supporting the remand court's findings than the minimal amount required for this Court to affirm. The State's contention that there is "no evidence" to support the Court's finding is baseless. Pet. for Cert., 6.

1. Failure to Translate Consent Order into Spanish

The remand court found that Narciso's native language is Spanish and that he "does not speak or read English adequately enough to understand legal proceedings or his statutory and constitutional rights." App. 139. This finding was supported by Narciso's testimony that he is a native of Mexico and does not understand written or spoken English. App. 125, l. 7 – 126, l. 2. Nonetheless, his attorney allowed him to sign a Consent Order written in English, whereby he waived his rights to pursue any other PCR claims beyond the failure of trial counsel to file a timely notice of direct appeal. Additionally, contrary to the State's contention in its prior Return to the Petition for Certiorari, Narciso's PCR attorney, Rios, is not fluent in Spanish and could not communicate with Narciso in his native language without aid of a court interpreter or a translator at

his office. Compare App. 44 – 45 (State’s Return to Cert., Sept. 12, 2011) with App. 107, ll. 15-16; App. 108, ll. 1-6; App. 109, ll. 9-12; App. 114, ll. 20-24.

The court found that the Consent Order was never translated into Spanish and that its contents were not read to Narciso in Spanish on or off the record. App. 139. Additionally, because neither the Consent Order nor its terms were read into the record, the Spanish interpreter present at the PCR hearing gave no interpretation of the document or its terms on the record. These findings are supported by interpreter McCann’s inability to confirm that she ever translated the Consent Order for Narciso and Narciso’s testimony that the document was never read to or translated for him. App. 102, ll. 16-21; App. 126, l. 8 – 127, l. 2.

In response to the court’s question regarding whether PCR counsel had any document that indicated that he advised his client that he would be waiving his rights forever, that he’s only given one application for PCR, and that it could affect his rights in the future on any habeas matter, PCR counsel pointed to a handwritten document contained in his case file. App. 112, l. 23 – 113, l. 12. While PCR counsel initially called the document “the consent order” he then described the document as being handwritten, indicating that he was not referring to the Consent Order actually executed by the parties and approved by the Court but rather a document only signed by Narciso. App. 113, 8-10; App. 89 – 91 (State’s Ex. 1). However, he later stated that both the Consent Order and handwritten list were presented to Narciso together. App. 118, ll. 20-24. The interpreter testified that she believed that she was set to arrive at the courthouse on the morning of the hearing at 8:45 a.m. and does not recall translating the Consent Order for Narciso. App. 104, l. 1-3; App. 124, ll. 1-20. Thus, her testimony does not corroborate PCR counsel’s testimony that the translator met him at the detention center between 7:30 and 8:30 a.m. and assisted in his communication with Narciso regarding the Consent Order and handwritten checklist. App. 116, l. 17 – 117, l. 4. It was

the duty of the remand court to weigh the evidence, such that it could believe or disbelieve all or a part of any of the witness testimony. Thus, the evidence presented at the remand hearing supported the court's finding that the Consent Order signed by Narciso was not read or translated into Narciso's native language of Spanish. This meets the low threshold of "any evidence" required for affirmance of the remand court.

2. Failure to Conduct Any "On the Record" Colloquy

In addition to the failure to translate the Consent Order or even read the Consent Order to Narciso, the remand court cited the fact that there was no colloquy between the judge and Narciso or his attorney of a waiver of Narciso's PCR rights. App. 145 – 146. Though the State provides no authority to support its position, it contends that "a formal colloquy between the Court and the defendant is not the only way to establish a valid waiver of rights." Pet. for Cert., 7. However, the State makes no attempt to reconcile this with the mandate of Brannon v. State, that "[a] defendant's knowing and voluntary waiver of statutory or constitutional rights *must* be established by a complete record, and may be accomplished by colloquy between court and defendant, between court and defendant's counsel, or both." 345 S.C. 437, 439, 548 S.E.2d 866, 867 (2001) (emphasis added). Further, even if the lack of colloquy alone is not sufficient to render the waiver invalid, the other evidence before the remand court supported its finding that Narciso's waiver was not knowing, intelligent, and voluntary.

Though Spoone dealt with the waiver of collateral review subject to a plea agreement, it is instructive regarding how to evaluate the circumstances surrounding a waiver of the right to pursue allegations in PCR. See Narciso v. State, 397 S.C. 24, 723 S.E.2d 369 (2012) ("The State argues that Petitioner's case is distinguishable from Spoone because in that case the issue was 'whether the right to appellate review and post-conviction review may be waived by a written plea

agreement ...,' and that '[Petitioner] proceeded to trial and was convicted.' This is a distinction without a difference. The key issue in Spoone and in Petitioner's case is the circumstances surrounding the waiver of the right to appeal PCR allegations.''). However, Narciso's conviction after a trial is important to the extent that this Court distinguishes between the advisement of rights regarding appeal required after a trial versus after a guilty plea. See Turner v. State, 384 S.C. 451, 456, 682 S.E.2d 792, 794-95 (2009)). This distinction is at least in part to the far greater potential for viable issues on direct appeal following a trial rather than a guilty plea. Roe v. Flores-Ortega, 528 U.S. 470, 120 S.Ct. 1029 (2000) ("Although not determinative, a highly relevant factor in this inquiry will be whether the conviction follows a trial or a guilty plea, both because a guilty plea reduces the scope of potentially appealable issues and because such a plea may indicate that the defendant seeks an end to judicial proceedings.''). There is likewise a greater potential for viable issues in post-conviction relief proceedings following a trial.

In Spoone, the Court noted that the waiver of a right to collateral review is much the same as the waiver of any other constitutional or statutory rights. 379 S.C. at 142, 665 S.E.2d at 607. "[S]uch a waiver will be held effective only if it is knowing and voluntary." Id. The Court recognized that in determining the effectiveness of a waiver in the Fourth Circuit, "the court examines the particular facts and circumstances surrounding the case, including the background, experience and conduct of the accused." Id. at 143, 665 S.E.2d at 607. Applying that principle in Spoone's case, the Court determined that it must evaluate "(1) the background, experience and conduct of the accused, (2) the text of the plea agreement, and (3) the transcript of the plea hearing." Id. at 143, 665 S.E.2d at 608. Though noting that Spoone had only a ninth grade education, in finding that Spoone's waiver was effective, the Court cited the straightforwardness of the written plea agreement and the plea colloquy in which the trial court specifically asked

Spoone about the waiver both in the language of the plea agreement and in plain language. Id. at 143-44, 665 S.E.2d at 608. Spooner was also represented by two attorneys who signed the plea agreement, which Spooner also signed.

In United States v. Wessells, 936 F.2d 165 (4th Cir. 1991), the defendant challenged the waiver of his right to direct appeal of his sentence, which was included in his written plea agreement. 936 F.2d at 167. The Fourth Circuit found the waiver unenforceable, however, because the plea court did not question the defendant “specifically concerning the waiver provision of the plea agreement” and the defendant “himself gave no indication of the degree to which he understood the waiver’s import.” Id. at 168. In distinguishing Spoone from Wessells, this Court found that in Spoone “the trial court did specifically question petitioner about the waiver provision more than one time and in more than one manner.” 379 S.C. at 144 n. 5, 665 S.E.2d at 608 n. 5.

Like the Fourth Circuit, this Court requires that the record establish a knowing and voluntary waiver of statutory right, stating that such can be accomplished by a colloquy between the court and either the defendant, defense counsel, or both. Brannon, 345 S.C. at 439, 548 S.E.2d at 867. In Brannon, the PCR court informed Brannon at the evidentiary hearing that he wanted a reduction in sentence, which the court advised it did not have the authority to order. Id. at 438, 548 S.E.2d at 867. PCR counsel then indicated that Brannon wished to withdraw his PCR application, and the motion was granted without further discussion. Id. Though the written order stated that Brannon was questioned to ensure that the withdrawal of his PCR application was free and voluntary, the record did not reflect that any such questioning took place. Id. This Court found that there was nothing in the record to support the PCR court’s finding that the withdrawal of the PCR application was knowing and voluntary. Id. at 439, 548 S.E.2d at 867.

The case was remanded for an evidentiary hearing on whether Brannon's withdrawal was knowing and voluntary, with instructions that if the court found in the negative that Brannon may proceed with his PCR application. Id.

In applying the factors announced in Spoone to the present case, the court correctly evaluated the background and experience of Narciso as a Spanish speaking defendant without the benefit of translation or interpretation. It also noted the failure of the Consent Order itself or the PCR transcript to indicate that the waiver was knowing and voluntary. Unlike Spoone, the content of the Consent Order was not straightforward, as it gives no explanation as to why Narciso was being made to bring any and all other PCR claims at that time when he was entitled to a belated direct appeal regardless of the waiver. It also fails to address how the waiver would apply to any PCR issues not apparent until after the direct appeal, such as error preservation issues. Moreover, Narciso testified that no one explained to him why he had to give up his PCR rights in order to get a direct appeal or the fact that he was giving up his chance to raise any other claims by signing the Consent Order. App. 128, ll. 10-14; App. 130, ll. 21-23. He further testified that he was told that the only way to go back to court was by signing the Consent Order. App. 128, ll. 15-19; App. 130, ll. 9-20.

Additionally, unlike Spoone, neither the record of the PCR hearing nor the testimony at the remand hearing reflected any colloquy with the court regarding Narciso's waiver. Rather, like Brannon and Wessells, there was nothing on the record in the present case to support any finding that Narciso's waiver of his PCR rights was knowing and voluntary. The record of the PCR hearing itself reflected only that an off-the-record bench conference was held, with no indication that Narciso was present at the bench or had any sworn interpreter assisting him. App. 371. There was ***no evidence*** presented at the remand hearing that Narciso was present at the off the

record bench conference and questioned by the court as to his understanding of the nature and consequences of the waiver or that the court questioned PCR counsel about his discussions and advisements to Narciso regarding the waiver.

Therefore, the evidence at the remand hearing supported the court's finding that there was no colloquy whatsoever with the judge at the PCR hearing to establish that Petitioner understood the Consent Order and/or his waiver of PCR rights. The Court also considered the other relevant circumstances and determined that they did not point to a knowing and voluntary waiver either. This meets the low threshold of "any evidence" required for affirmance of the remand court.

3. Lack of Any Benefit of the Bargain to Narciso

Lastly, the Court found that Petitioner may have been entitled to an appeal anyway without having to waive his PCR rights under the case of White v. State, 263 S.C. 110, 208 S.E.2d 35 (1975). App. 146. In Spoone, the court noted that with respect to plea bargains generally, South Carolina has recognized and followed federal precedent. 379 S.C. at 142, 665 S.E.2d at 607. This includes the fact that a plea bargain rests on contractual principles such that "each party should receive the benefit of the bargain." Id. In the present case, there was no benefit to Narciso from the waiver of all other PCR claims such that he gained *nothing* from signing the Consent Order other than the belated appeal to which he was *already entitled*.

Trial counsel testified the he filed an appeal on Narciso's behalf. However, the appeal was not filed timely. App. 105, ll. 14-15. He took responsibility for the error and did everything that he could to try to correct his error. App. 105, ll. 16-20. Trial counsel believed that had he filed the appeal timely, then Narciso would have retained his PCR rights as well as his appellate rights. App. 106, ll. 13-15.

While there is currently no avenue for Narciso to allege ineffective assistance of PCR counsel, it is difficult to fathom under what circumstance PCR counsel would affirmatively advise his client to dismiss all other PCR allegations with prejudice. This is especially true in light of the fact that the direct appeal itself may reveal problems with trial counsel's representation, such as a ruling that a direct appeal issue was not properly preserved. There was no need to have the State's consent to the belated to direct appeal if they were unwilling to give it without a waiver of any other PCR allegations. Rather than entering into sort of consent agreement, PCR counsel could have insisted on a brief PCR hearing, at which trial counsel's testimony would undoubtedly have resulted in the granting of Narciso's belated appeal. If the Attorney General convinced the PCR court that all PCR allegations should have to be raised at the hearing, PCR counsel had have, at the very least, requested a continuance to prepare to go forward on other PCR claims.

While PCR counsel confirmed that it was not necessary for Narciso to give up any and all other PCR claims, his testimony as a whole reflects his belief that if Narciso did not amend his application to include other allegations that day he could not pursue them later. App. 110, ll. 14-23. The Consent Order itself, signed by both the Attorney General and PCR counsel, also stated "[t]he Applicant understands that he *must* proceed on all PCR claims at this time and anything not raised now is waived." App. 28 (emphasis added). Further, PCR counsel could not recall whether he had any conversation with Narciso advising that he should preserve his PCR rights. App. 121, ll. 17-20. This is likely because PCR counsel seemed to be under the misapprehension that if the PCR issues were not addressed at the PCR hearing they could not be dismissed without prejudice.

Moreover, the PCR court did not believe PCR counsel's testimony that the State's consent to the belated appeal was not contingent upon the waiver of any other PCR allegations. It instead found that "the Attorney General offered Petitioner the opportunity to appeal his conviction, but

only if Petitioner waived his right to PCR.” App. 139 (emphasis added). If PCR counsel’s averment that the State’s consent to the belated appeal was not contingent upon the waiver were true, then dismissal without prejudice should have been a viable option. A waiver made without proper counsel from his attorney regarding all of his options can certainly not be found to be knowing.

Thus, the language of the Consent Order itself, along with Narciso’s testimony that he thought he had to sign the Consent Order to go back to court and common sense, are enough to support the court’s findings that the Attorney General’s consent to the belated appeal was offered “only if Petitioner waived his right to PCR” and that Narciso may not have had to make such a waiver in order to pursue the belated appeal. This especially true where trial counsel admits that he mishandled the appeal, making a belated direct appeal pursuant to White v. State inevitable. This meets the low threshold of “any evidence” required for affirmance of the remand court.

Based on the foregoing, there was more than the minimal required evidence at the remand hearing to support the court’s findings that Narciso’s waiver was not knowing, intelligent, and voluntary and was not in compliance with this Court’s jurisprudence. Therefore, the State’s Petition for a Writ of Certiorari should be denied.

B. Neither PCR counsel’s testimony and admission of the executed handwritten checklist nor the executed Consent Order are sufficient to reflect that Narciso was fully advised of the nature of the rights being abandoned by his waiver.

Despite the ample evidence to support the remand court’s findings, see discussion supra Part A, the State points to PCR counsel’s alleged advisement accompanied by the execution of a handwritten checklist, along with the “plain language” of the Consent Order signed by Narciso, as evidence that the waiver was knowing, intelligent, and voluntary. The Attorney General goes so

far as to state that “a *colloquy* took place between the Respondent and his initial post-conviction relief counsel.” Pet. for Cert. 7 (emphasis added). The State further contends that PCR counsel’s use of a Spanish translator or interpreter in his communications with Narciso “should quiet any of this Court’s concerns about the Respondent’s limited command of the English language.” Pet. for Cert. 9.

Importantly, “the validity of a defendant’s waiver does not turn on his communication with counsel, but rather on the presence of a record supporting the validity of that waiver.” Moore v. State, 399 S.C. 641, 732 S.E.2d 871 (2012). In Moore, this Court found that both the trial and PCR courts conducted a deficient analysis of the petitioner’s waiver of his right to jury trial and observed the State’s “fundamental misunderstanding of what this Court’s waiver jurisprudence commands.” Id. at 641, 732 S.E.2d at 874. The Moore majority found that trial counsel’s testimony did not necessitate affirmance because it “illustrates a trial strategy, and decision-making process, incompatible with the demands of this Court’s waiver jurisprudence.”³ Id. at 641 n.2, 732 S.E.2d at 875 n.2. Thus, this Court stated that “[t]he bare fact that this testimony exists, does not mean that this testimony constitutes evidence of a valid waiver, even under a deferential standard of review.” Id. This Court further noted in Moore that “[a] ‘colloquy’ is defined as ‘any formal discussion, such as an oral exchange between a judge, the

³ In Moore, the majority found that the record was “devoid of any evidence to support the PCR court’s finding that trial counsel’s discussions regarding the waiver were at ‘length’ or ‘detailed.’” 399 S.C. at 641, 732 S.E.2d at 874. Trial counsel could not testify that he definitely explained to Moore the differences between a jury trial and a bench trial or whether he had any questions regarding that distinction. Id. However, he was “inexplicably able to testify that Petitioner definitely wanted to move forward with a bench trial.” Id. Further, there was *no* colloquy between the court and trial counsel or Moore regarding the waiver. Id. The Court also considered that Moore completed only the seventh grade, cannot read or write, and testified that he did not know ahead of time that he was going to have a bench trial and not a jury trial but wanted a jury trial. Id. at 641, 732 S.E.2d at 874-75.

prosecutor, the defense counsel, and a criminal defendant in which the judge ascertains the defendant's understanding of the proceedings and of the defendant's rights.” Id. at 641 n.1, 732 S.E.2d at 874 n.1. It found that the exchange in Moore did not meet “even a banal definition of colloquy, and falls far short of the ‘high-level serious discussion’ necessary to support the waiver of a defendant’s constitutional right to a jury of his peers.” Id.

Thus, contrary to the State’s assertions, PCR counsel’s testimony and admission of the handwritten checklist are not the dispositive. See App. 113, ll. 8-16; App. 116, l. 11 – 117, l. 4. The checklist does not reflect a “colloquy,” which requires formality and the court’s determination that the waiver is knowing, intelligent, and voluntary. See Moore, 399 S.C. at 641 n.1, 732 S.E.2d at 874 n.1. Further, though Narciso confirmed that his initials and signature appear on the document, he further testified that he thought by signing the document that he was “going to go to court.” App. 127, ll. 9 – 128, l. 4; App. 130, ll. 6-16. Thus, his initials next to each line fail to demonstrate the content of what actual discussion, if any, was held. Notably, the document does not indicate that PCR counsel had any discussion with Narciso about preserving his PCR rights, but rather indicates that Narciso understands that he is “forever waiving my right to raise any other allegations of ineffective assistance of counsel against Mr. Colangeli and am raising my right and agreeing to a belated appeal only.” App. 89. As more fully discussed supra in Part A.3, PCR counsel’s testimony and the checklist establish that PCR counsel failed to advise Narciso of the importance of preserving his PCR rights because PCR counsel was under the misapprehension that his client had to pursue any and all PCR allegations other than the belated appeal that day.

The State further contends that the plain language of the Consent Order signed by Narciso is evidence of the knowing and voluntary waiver. However, as discussed more fully supra in Part A.1, the remand court properly found that the Consent Order was not translated for Narciso or read to

him in Spanish. Moreover, while the failure to communicate to Narciso in Spanish is important, the paramount concern is the content of what was communicated to Narciso, which was never confirmed on the record and did not include any advice to preserve any other PCR claims.

The Consent Order itself is no more a reflection of a knowing and voluntary waiver than the signing of any other document. Otherwise, Narciso's signature alone would have been sufficient such that no remand would have been necessary to determine if his waiver was knowing, intelligent, and voluntary. The Consent Order did not even contain a statement that Narciso was questioned to ensure that the withdrawal of his PCR application was free and voluntary. See Brannon, 345 S.C. at 439, 548 S.E.2d at 867 (finding that the PCR court erred in failing to ascertain the voluntariness of Brannon's withdrawal prior to dismissing his application with prejudice where the order stated that such questioning took place but the record revealed that "there was no inquiry conducted to ascertain the voluntariness of the withdrawal, nor was Brannon advised his withdrawal would result in a dismissal with prejudice"). Rather, the content of the Consent Order only indicates that Narciso understands that all PCR claims must be brought "at this time" and wishes to waive all other PCR claims and proceed with a belated direct appeal. Thus, it misrepresents that Narciso had no option to preserve any other PCR allegations.

Therefore, the PCR court properly weighed the evidence and focused on that which is probative of whether Narciso's waiver was in accordance with South Carolina's waiver jurisprudence. Moore makes clear that off-the-record discussions between an attorney and his client do not constitute a "colloquy" such that neither PCR counsel's testimony regarding such discussion nor the handwritten checklist never introduced at the PCR hearing can overcome the absence of any formal colloquy with the PCR court. The Consent Order likewise is not a sufficient

substitute for the required “on the record” colloquy. Thus, the State’s contentions fail to overcome the low threshold for affirmance required in this matter and its Petition for a Writ of Certiorari should be denied.

C. Neither Narciso’s assertion of only the belated direct appeal allegation in his PCR application nor his failure to amend his application to include any additional allegations bear on the validity of his waiver, and judicial economy does not favor a requirement that an applicant immediately waive or pursue any other PCR claims where the State consents to the belated appeal.

The State suggests that Narciso’s failure to include any PCR allegations in his application beyond the failure to timely file a notice of appeal is further evidence that his waiver was voluntary. Pet. for Cert. 10. However, Narciso’s inclusion of only the belated appeal allegation in his PCR application and failure to amend is of little consequence in this case, especially in light of his inability to read or speak English and PCR counsel’s failure to effectively advise him. Moreover, the existence and legitimacy of any other PCR allegations is a matter to be considered by a subsequent PCR court, as the remand court had only the matter of whether Narciso’s waiver was in accordance with this Court’s waiver jurisprudence to decide. The Attorney General also contends that Narciso was not required to bargain away his PCR rights in exchange for the State’s consent to the belated direct appeal. Pet. for Cert. 10. If that were truly its position, it is unclear why the State filed its Petition for Writ of Certiorari rather than allowing Narciso to proceed with his PCR application pursuant to the remand court’s Order. It is because the State maintains that, though its consent was *not dependent* on the waiver, any other PCR claims *must* be heard at the 2008 PCR hearing. Pet. for Cert. 10. This is the same misapprehension under which PCR counsel operated at the PCR hearing. The language of the Uniform Post-Conviction Relief Act allows an applicant to retain his or her rights to raise any further PCR allegations in the future and just proceed with the

belated direct appeal, a procedure supported by the interests of judicial economy. See S.C. Code Ann. § 17-27-90.

Though PCR counsel testified that he wrote to Narciso and asked him if he wished to amend his application, there is no indication that PCR counsel advised him of what types of allegations could be raised or that Narciso understood the content of the letters. App. 111, ll. 3-10; App. 113, ll. 17-25; App. 118, ll. 13-16. Despite PCR counsel's testimony that he did not see any additional allegations to raise, appellate counsel noted several potential PCR allegations in her brief including ineffective assistance of counsel related to an initial plea offer, failure to object to extensive hearsay, failure to object to a *Doyle*⁴ violation, and failure to raise a claim under S.C. Const. Art. 1, § 10 with respect to the search and South Carolina's "right to privacy." See App. 111, ll. 11-14; App. 121, ll. 23-25; App. 34 (Amended Brief of Petitioner Aug. 11, 2011). Such allegations can be difficult to ascertain by any defendant, much less one like Narciso with limited legal experience and no understanding on the English language. That is why a PCR applicant is appointed an attorney, whose responsibility it is to review the transcript and assist the applicant in identifying any other PCR allegations. Additionally, some PCR allegations may not be apparent from review of a transcript, as they often relate to deficiencies such as a failure to investigate, failure to request or review discovery, failure to call a particular witness, failure to fully advise the defendant regarding his constitutional rights, or even affirmative coercion by counsel toward the defendant. These matters can only be discovered through a thorough discussion of the client's case, not by simply asking a defendant if there is anything else he would like to amend his application to raise any additional allegations. Despite this, PCR counsel testified that his discussions with Narciso did not

⁴ Doyle v. Ohio, 426 U.S. 610, 96 S.Ct. 2240 (1976).

focus on other potential PCR allegations. App. 111, ll. 14-16. Narciso should not be prejudiced by PCR counsel's unskilled representation.

While PCR counsel testified that the waiver of Narciso's PCR rights was not done in "exchange" for the State's consent to the belated appeal, this testimony was obviously not believed by the remand court which found that "the Attorney General offered Petitioner the opportunity to appeal his conviction, but only if Petitioner waived his right to PCR." App. 108, ll. 9-19; App. 139. The PCR Court's finding was supported by an overall view of the facts and and Narciso's testimony that he thought he had to sign those documents in order to go back to court. App. 128, ll. 15-19. Additionally, the Consent Order itself said "[t]he Applicant understands that he *must* proceed on all PCR claims at this time and anything not raised now is waived" App. 28 (emphasis added). As discussed supra in Part A.3, if PCR counsel's averment that the State's consent to the belated appeal was not contingent upon the waiver were true, then dismissal without prejudice should have been a viable option and would have been the best option due to the potential that a PCR allegation may not be evident until after the Court's ruling on direct appeal. Depending on the result of the direct appeal a hearing on the other PCR allegations may not even be necessary, for instance if a new trial were granted. Moreover, whether the consent and waiver were contingent does not affect the reality that per the terms of the Consent Order Narciso waived his right to raise any other PCR allegations and such a waiver must be knowing, intelligent, and voluntary.

Further, both PCR counsel and the State seem to be under the misapprehension that Narciso had to pursue any other PCR claims on the day of the hearing. This is not what South Carolina law requires. See S.C. Code Ann. § 17-27-90 ("All grounds for relief available to an applicant under this chapter must be raised in his original, supplemental or amended application. Any ground finally adjudicated or not so raised, or knowingly, voluntarily and intelligently waived in the

proceeding that resulted in the conviction or sentence or in any other proceeding the applicant has taken to secure relief, may not be the basis for a subsequent application, *unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental or amended application.*”) (emphasis added). Though Rule 243(i)(1), SCACR, provides for review of a PCR court’s finding that the right to direct appeal was not knowingly and intelligently waived along with all other post-conviction relief issues petitioner seeks to have reviewed, this is not an affirmative requirement that all potential PCR issues be reviewed by the PCR court at the same time as the White v. State issue. Rather, as S.C. Code Ann. § 17-27-90 indicates, there may be sufficient reason to delay consideration of the remaining PCR allegations. Rule 243(i)(1) simply requires that all allegations that were considered by the PCR court and that petitioner wishes to have reviewed be raised in the petition for writ of certiorari along with the White v. State issue.

Beyond the factual inaccuracy of the Consent Order that Narciso was required to “proceed on all PCR claims at this time and that anything not raised now is waived,” such a requirement where the State consents to the filing of a belated appeal is inefficient. Under the State’s suggested procedure, even where the State consents to the filing of a belated appeal, a PCR applicant is required to raise any other allegations against trial counsel in his PCR application or an amendment thereto and proceed to a hearing on those allegations immediately. Consequently, if the applicant is unsuccessful on any of his other PCR allegations, then the subsequent Petition for Certiorari would have to include both the issue of whether the applicant was entitled to a belated direct appeal and any other denied PCR issues. See Rule 243(i)(1), SCACR (“When the post-conviction relief judge has affirmatively found that the right to a direct appeal was not knowingly and intelligently waived, the petition shall contain a question raising this issue along with all other post-

conviction relief issues petitioner seeks to have reviewed.”). Appellate counsel would also file a White v. State brief on the direct appeal issue along with the Petition for Certiorari. Id. (“At the same time the petition is served, petitioner shall serve and file a brief addressing the direct appeal issues.”).

This procedure results in the pendency of the belated direct appeal and review of the other PCR allegations simultaneously. If the PCR court were to grant relief on one of the other PCR issues, such could potentially result in the granting of a resentencing hearing or new trial, this would further muddy the waters as to when the new trial should occur vis-a-vis resolution of a belated direct appeal issue that may result in acquittal, i.e. a directed verdict issue. Additionally, the applicant should undoubtedly be permitted to file a subsequent PCR application alleging either ineffective assistance of trial counsel based on failure to preserve an issue for appellate review were such revealed in the direct appeal decision or ineffective assistance of appellate counsel, at which point another PCR hearing would be held followed by another potential Petition for Certiorari. In a circumstance where the State contests the granting of a belated direct appeal, this may be the best alternative, but such is not the case where the State consents, leading to the almost inevitable grant of certiorari and review of the direct appeal.

Conversely, if only the belated appeal issue were addressed at the PCR hearing, appellate counsel would need only file the Petition for Certiorari on the issue of whether the applicant was entitled to a belated direct appeal and the White v. State brief on the direct appeal issue. If certiorari were granted, which it likely would be if the State consents, the Court would then address the direct appeal issue. Upon final resolution of the direct appeal and any subsequent proceedings necessitated as a result of the decision, an applicant could then file a PCR application alleging claims regarding his original trial, any subsequent new trial, plea, or re-sentencing, and his appeals,

all as a part of one application to be addressed at one evidentiary hearing. This is a much more efficient procedure and decreases the likelihood of successive PCR applications which are disfavored.

There could be a fear that the State would be less inclined to consent to a belated appeal if the PCR applicant preserves his or her PCR rights, but professional judgment will likely be unaffected in those cases where the State would be willing to consent based on trial counsel's admission that the failure to timely file for an appeal was his own and not the fault of the applicant. Any delay in the resolution of any other PCR allegations is minimal considering that the Uniform Post-Conviction Relief Act requires:

An application for relief filed pursuant to this chapter must be filed within one year after the entry of a judgment of conviction or within one year after the sending of the remittitur to the lower court from an appeal or the filing of the final decision upon an appeal, whichever is later.

S.C. Code Ann. § 17-27-45(A). The delay would be only the time it takes to file the PCR application based on White v. State and execute the consent order granting belated appeal, a process which effective PCR counsel can help accelerate.

Thus, the content of Narciso's original PCR application and failure to amend his application are not relevant to the question of whether his waiver of any other allegations was in accordance with this State's waiver jurisprudence. Further, a PCR applicant should not be forced to go forward on his or her other PCR claims where the State consents to the filing of a belated appeal because judicial economy supports preservation of any remaining PCR issues until completion of the direct appeal process.

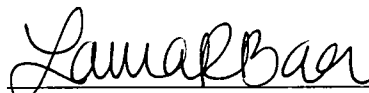
The waiver required of Narciso at the PCR hearing was the result of the Attorney General taking advantage of a foreign defendant and inexperienced PCR attorney. Had Narciso understood

that he gained no benefit by waiving any additional PCR allegations, there is no question that he would have chosen to preserve them. Unfortunately, he was a Spanish speaking applicant with no meaningful legal representation, resulting in his signature on a document that he did not understand. Beyond the obvious injustice of allowing Narciso to be put into a worse position merely because his trial attorney admittedly failed to timely file his direct appeal, is the more the basic fact that the remand court's findings are supported by far beyond the "any evidence" required for affirmance. Therefore, the State's Petition for a Writ of Certiorari should be denied.

CONCLUSION

For the reasons set forth herein, Respondent Osiel Narciso requests this Court to deny the State's Petition for a Writ of Certiorari.

Respectfully submitted,

A handwritten signature in cursive script, reading "Laura R. Baer".

Laura R. Baer
Appellate Defender

ATTORNEY FOR RESPONDENT.

This 6th day of April, 2015.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

 Certiorari to Beaufort County

 James R. Barber, III, Circuit Court Judge

OSIEL NARCISO,

RESPONDENT,

V.

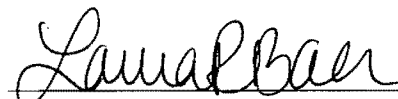
STATE OF SOUTH CAROLINA,

PETITIONER

APPELLATE CASE NO. 2014-001327

 CERTIFICATE OF SERVICE

I certify that a true copy of the return to petition for writ of certiorari in this case have been served on Ashleigh R Wilson, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 and Osiel Narciso at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 6th day of April, 2015.



Laura R. Baer
Appellate Defender

ATTORNEY FOR RESPONDENT

SWORN TO BEFORE ME this 6th day
of April, 2015.



Notary Public for South Carolina
My Commission Expires: October 24, 2021

The Supreme Court of South Carolina

Osiel Narciso, Respondent,

v.

State of South Carolina, Petitioner.

Appellate Case No. 2014-001327

Lower Court Case No. 2007-CP-07-02195

ORDER

This matter is before the Court on a petition for a writ of certiorari. The petition is denied.


C.J.
FOR THE COURT

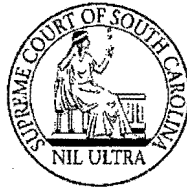
June 17, 2015

Columbia, South Carolina

cc:

Ashleigh Rayanna Wilson, Esquire

Laura Ruth Baer, Esquire



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA
29211
1231 GERVAIS STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1080
FAX: (803) 734-1499
www.sccourts.org

July 06, 2015

The Honorable Jerri Ann Roseneau
PO Box 1128
Beaufort SC 29901-1128

REMITTITUR

Re: Osiel Narciso v. State
Lower Court Case No. 2007CP0702195
Appellate Case No. 2014-001327

Dear Clerk of Court:

The above referenced matter is hereby remitted to the lower court or tribunal. A copy of the judgment of this Court is enclosed.

Very truly yours,

Daniel E. Shearouse
ES

CLERK

cc:

Ashleigh Rayanna Wilson, Esquire
Laura Ruth Baer, Esquire

FORM 5

STATE OF SOUTH CAROLINA)

COUNTY OF BEAUFORT)Osiel Narciso Gomez, #319935)
Full name and prison number (if any) of Applicant.)

v.)

State of South Carolina)

2015-CP-07-2196
IN THE COURT OF COMMON PLEAS

APPLICATION FOR

POST-CONVICTION RELIEF

INSTRUCTIONS - READ CAREFULLY

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

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

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

1. Place of detention SCDC MCI. 386 Redemption Way, McCormick, SC 29899
2. Name and location of Court which imposed sentence Beaufort County Court SC
3. Name(s) of co-defendant(s) (if any) No.
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) 2005-GS-07-01304 (Trafficking Cocaine)
 - (b) _____
 - (c) _____
5. The date upon which sentence was imposed and the terms of the sentence:
 - (a) (25) Years - January 18, 2007
 - (b) _____

- (c) _____
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty _____
- (b) after a plea of not guilty x _____
- (c) after a plea of nolo contendere _____
7. Did you appeal from the judgment of conviction or the imposition of sentence?
 NO _____
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
- i. _____
- ii. _____
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. _____
- ii. _____
- iii. _____
- (c) the date of each such result:
- i. _____
- ii. _____
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. _____
- ii. _____
- iii. _____
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) Trial Counsel failed to file notice of appeal. _____
- (b) _____
- (c) _____
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

- (a) Fourth (4th) Amendment Violation.
- (b) Ineffective Assistance of Trial counsel.
- (c) _____
11. State concisely and in the same order the facts which support each of the grounds set out in (10):
- (a) (For Brevity Purposes, see attached "MEMORANDUM OF LAW.")
- (b) (For Brevity Purposes, see attached "MEMORANDUM OF LAW.")
- (c) _____
12. Prior to this application have you filed with respect to this conviction:
- (a) any petition in a State Court under South Carolina Law? YES
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? _____
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? _____
- (d) any other petitions, motions or applications in this or any other Court? _____
13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:
- (a) the specific nature thereof:
- i. Petition For a Writ of Certiorari
- ii. _____
- iii. _____
- iv. _____
- (b) the name and location of the Court in which each was filed:
- i. The Supreme Court of South Carolina
- ii. _____
- iii. _____
- iv. _____
- (c) the disposition thereof:
- i. (Currently Unavailable)
- ii. _____
- iii. _____

- iv. _____
- (d) the date of each such disposition:
- i. (Currently Unavailable) _____
- ii. _____
- iii. _____
- iv. _____
- (e) if known, citations of any written opinions or orders entered pursuant to each such disposition:
- i. (Currently Unavailable) _____
- ii. _____
- iii. _____
- iv. _____
14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?
- NO
15. If you answered "yes" to (14) identify:
- (a) which grounds have been presented:
- i. _____
- ii. _____
- iii. _____
- (b) the proceedings in which each ground was raised:
- i. _____
- ii. _____
- iii. _____
16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:
- (a) PCR' proper remedy _____
- (b) _____
- (c) _____
17. Were you represented by an attorney at any time during the course of:

- (a) your arraignment and plea? NO
- (b) your trial, if any? YES
- (c) your sentencing? YES
- (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? NO
- (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? YES
18. If you answered "yes" to one or more parts of (17), list:
- (a) the name and address of each attorney who represented you:
- i. Donald C. Colongeli, P.O. Box 6658 Hilton Head, SC 29938
- ii. _____
- iii. _____
- (b) the proceedings at which each such attorney represented you:
- i. Trial; Sentencing
- ii. _____
- iii. _____
19. State clearly the relief you seek in filing this application:
- Discharge For Imprisonment; Alternatively, New Trial
20. Are you now under sentence from any other court that you have not challenged?
- NO

STATE OF SOUTH CAROLINA)

County of BEAUFORT)

VERIFICATION

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

Osiel Narciso

Osiel Narciso Gomez, #319935

SWORN to and subscribed before me this 04
day of Sept., 2015.

FF Anklin (L.S.)
Notary Public

My Commission Expires: 12-16-2019

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

Osiel Narciso

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

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

Osiel Gomez

Applicant

Osiel Narciso Gomez, #319935

SWORN or affirmed to and subscribed before me this

04 day of Sept., 2015.

J. Franklin
Notary Public

My Commission Expires: 12-16-2019

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF BEAUFORT) CA NO: 2015-CP-07-2196
OSIEL Narciso Gomez, #319935,)
Applicant,)
vs.) MOTION FOR PRESERVATION OF
STATE OF SOUTH CAROLINA,) ALL RAISED ISSUES IN (APCR).
RESPONDENT.)

2015 SEP -9 PM 3:07
CLERK OF COURT S.C.

Now comes the applicant, Osiel Narciso Gomez, #319935, Who ask this Honorable Court to require the Court appointed attorney involved in this Post-Conviction Relief Action to be Meticulous in the preparation of any order or preposed orders prepared in this case. specifically, the applicant ask that each and every issue raised in the Post-Conviction relief application and any Amendment there of; the hearing, to be addressed in the order of the Court to be issued at the conclusion of the Evidentiary Hearing in this Matter. The reason for this Motion is that in Pruitt vs. STATE, 423 S.E.2d.127(1992), the Court Stated that this legal requirement under the law of South Carolina; pursuant to Statute, section §17-27-80. Also, see; Bryson vs. State, 328 S.C.236, 493 S.E.2d 500 (1997), Furthermore, in Land vs. State, 262 S.E.2d.at 737; "pursuant to §17-27-110, The Supreme Court of South Carolina, has adopted rules designed to aid in the Post-Conviction process, such as "rule 59(e), S.C.R.civP, which places upon appointed counsel the duty to asertion from the applicant whether He has included all grounds known to the applicant as a basis for attacking the judgement and sentence and to amend the application to include any claims Not already included. Land; supra,

THE APPLICANT; therefore, requests this Honorable Court grant the motion for the above stated reason.

Conclusion

For the reasons cited in the Post-Conviction relief application, and the amendment motion thereof, the applicant's conviction and sentence should be vacated, and Post-Conviction Relief granted.

Respectfully Submitted,

s/ Osiel Marciso

Date: 04 Sept 2015

Notary: J. Frankler

Expire: 12-16-2019

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
)
 COUNTY OF BEAUFORT) CA NO: 2015 CP 07-2196
)
 Osiel Narciso Gomez, #319935,)
)
 Applicant,)
)
 vs.) MEMORANDUM OF LAW IN SUPPORT
) OF APPLICATION FOR POST-CONVICTION
) RELIEF
 State of South Carolina,)
 Respondent.)

Above-Captioned Applicant will answer to Question Number 11(a)(b) of Application for Post-Conviction Relief ("APCR"), as accords to the answer to Question Number 10(a)(b) APCR, in the following manner.

Question 11(a), (APCR). I.

Fourth Amendment Violation

Illegal Search Incident to Arrest

Applicant's trial took place in (2007), two years prior to the United State Supreme Court holding in Arizona vs. Gant 556 U.S. 332 (2009). In Gant, the United States supreme Court the expansive searches allowed by Belton.* The Court noted that Belton had been widely understood to "allow a vehicle search incident to arrest of a recent occupant even if there is no possibility the arrestee could gain access to the vehicle at the time of the search." Id. at 1718. The Court found this reading incompatible with it's previous decisions regarding the basic scope of searches incident to lawful custodial arrests. Therefore the court held that "Police may search a vehicle incident to a recent occupant's arrest only when the arrestee unsecured and within reaching distance of the passenger compartment at the time of

search or when it is reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle." Id. *453 U.S.454 (1981).

Applicant appealed his conviction for trafficking cocaine and asserted on appeal that the circuit court erred in denying his motion to suppress drug evidence seized by police during a routine traffic stop. During the pendency of Applicant's appeal the United States Supreme Court decided Gant. Thus, the Court held that when the police conduct a search in objectively reasonable reliance on binding appellate precedent, the exclusionary rule does not apply. Therefore, the exclusion remedy was unavailable to Applicant.

However, the South Carolina Supreme Court agree with Applicant that the search incident to arrest in his case violated his Fourth Amendment Rights and Thus Gant applies Retroactively to this case, and Applicant may invoke its rule of substantive Fourth Amendment Law as a basis for seeking relief.*556 U.S. 332 (2009). See/ 397 S.C.24,29(S.C.1012), Attachment C(1)

ARGUMENT

The Fourth Amendment of the United States Constitution protects citizens from unreasonable searches and seizures. Arresting Applicant for a minor traffic violation when police testified they had reasonable suspicion to believe that Applicant was engaged in drug dealing, based on an "On-going investigation," was unreasonable because the facts law enforcement presented to the trial court did not rise to the level of reasonable suspicion and because their actions were taken solely to circumvent presenting their case to a magistrate.

FACTS

Applicant was charged with drugs that were found in his car after police officers pulled him for a minor traffic violation. Admittedly, Applicant was

the target in an "On-going investigation" that began earlier in the day. [A]fter, Applicant was transported to the police station for failing to own a South Carolina driver's licence, officers ran a drug dog around Applicant's vehicle. It is unclear whether he was arrested for not having a South Carolina driver's licence, which would not be illegal, or because he did not have any license at all. (Tr.p.80). The dog alerted, and the car was searched. The drugs were located in the luggage compartment of the car, and in the center console. Based on this find, the police charged Applicant with Trafficking Cocaine. Officer Florencio testified that the search was conducted incident to arrest for the driver's license violation, and also that the dog alerted on the car (after) Applicant was already taken into custody. (Tr.p.74,83,85-86). Florencio testified that it was not searched pursuant to an inventory search. (Tr.p. 87).

Applicant's seizure by the officers was unreasonable because the "On-going investigation" was not supported by probable cause, and the officers actions were clearly intended to circumvent a magistrate's finding of probable cause. The search, was illegal pursuant to the recent U.S. Supreme Court case Arizona v. Gant, 556 U.S. 332, 129 S.Ct. 1710 (2009).

Officer Florencio's Investigation of Applicant

Officer Florencio testified to the investigation the Task Force conducted in this case. The "On-going investigation" stated the day of the arrest. (Tr.p.198). It was based on some information he received the substance of which was never revealed either during pre-trial, or during the trial itself. (Tr.p.198). Florencio knew that Applicant, along with other Hispanic males were at the Suburban Lodge. (Tr.p.199). Applicant's employer, Savannah Heartscapes, was the actual renter of the room.(Tr.p.199). Applicant was observed by member of the surveillance team traveling to a couple of automotive stores.(Tr.p.200). He did not walk out of either of there places

carring anything at all. (Tr.p.202,205-206). He was then observed working on his car. (Tr.p.203). He and other Hispanic males were also working on a truck. (Tr.p.203). Florencio admitted that he did not actually view Applicant at these places, but the Lieutenant Woodward, Sergeant Kobel, Officer Haroug, Officer Harold and Officer Light did (Tr.p.206-207). These officers did not testify at Applicant's trial.

After Applicant finished working on the car, he was seen taking phone call. He then went upstairs. Another officer then saw him go into his room. Then he came out carring a white T.Shirt "with something in it," place it in the car, and drive away. (Tr.p.208-209). Florencio did not personally see Applicant place anything into the car. (Tr.p.211). He was not even sure who saw Applicant place the white T. shirt into the car.(Tr.p.211). The car did not belong to Applicant.(Tr.p.218). Based on Applicant's peregrinations and placement of an unknown item in the car, however, Florencio directed another officer to pull Applicant over. (Tr.p.215-216). Applicant was placed under arrest for not having a South Carolina drivers licence. (Tr.p.216). It appears that he did, though in fact, have a driver's licence issued by the State of South Carolina. (Tr.p.137-138). He was then transported to a Hilton Head police station. (Tr.p.217). This series of events did not amount to probable cause that would have justified a search of the vehicle had the case been presented to a magistrate. State v. Gentile, 373 S.C. 506, 646 S.E.2d 171 (Ct. App. 2007).

After Applicant was removed from the scene, officer Hiers ran a drug dog around the car. The dog alerted, and the car was searched. In two locations - in the back of the car in the luggage compartment, and in the console -- drugs were found. (Tr.p.149-152). The drugs were not in plain view. (Tr.p.223).

Florencio traveled to the Hilton Head station, informed Applicant of what was found in the car, and promptly arrested him for trafficking cocaine. (Tr.p.223 - 224).

Law Enforcement's Actions Violated Applicant's 4th Amendment Rights

U.S. Const. Amend. IV provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

Applicant's rights were violated by the law enforcement seizure of him, predicated on their "On-going investigation," because they had not developed facts sufficient to present to a magistrate to secure a warrant for search of the car. Their actions were taken to circumvent their obligation to do so. Therefore, the arrest was made in an "extraordinary manner, unusually harmful to [Applicant's] privacy or ... physical interests." When v. United States, 517 U.S. 806, 818, 116 S.Ct. 1769 (1996).

In this case, law enforcement sought to accomplish, by way of pulling Applicant for a minor traffic infraction, what they were otherwise not entitled to do. Law enforcement was quite clear that the purpose of the pull was to search the car for drugs. (Tr.p.74, 78). Their actions, then, rendered the subsequent search illegal because the search incident to arrest was then untethered from the exigency justification that allow for the warrant exception. See Arizona v. Gant, 556 U.S. 332, 129 S.Ct. 1710 (2009). And see, Chimel v. California, 395 U.S. 752, 89 S.Ct. 2034 (1969). Additionally, they did not have reasonable suspicion which would have justified a prolonged

detention, had Applicant remained at the car and had not been immediately arrested. State v. Tindall, 379 S.C. 304, 665 S.E.2d 188 (Ct. App. (2008)). Law enforcement's actions were abusive, and the United States Supreme Court, in Atwater v. City of Lego Vista, 532 U.S. 318, 121 S.Ct. 1536 (2001), suggests in footnote 25 that such actions would be objectionable. Any other conclusion renders the Fourth Amendment a nullity and effectively creates a judicial review free zone on the roadways. Further, the police actions in this case ignore the admonition in Terry v. Ohio, 392 U.S. 1, 19, 88 S.Ct. 1868 (1968), that "the scope of [a] search must be strickly tied to and justified by the circumstances which rendered its initiation permissible."

In this case, the police may have had probable cause to believe that a minor traffic violation occurred, but they did not have reasonable suspicion, much less probable cause to believe that Applicant was engaged in any illegal activity. The officer's simply used driver's license issue to effect an arrest so they could conduct a fishing expedition because they knew they did not have probable cause to secure a warrant. This conduct has been expressly forbidden by the decision in Arizona v. Gant,: "Police may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment of the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest." Id. at 1723. Applicant was arrested and whisked away to another location. The officers should have taken their case to a magistrate if they wanted to search Applicant's car. Instead, law enforcement orchestrated a series of events designed to avoid having to do what they were obligated to do by law - present their case to a neutral and detached magistrate to make a determination of probable cause. Respectfully, Applicant asks this court to reverse his conviction.

Question 11(b), (APCR)

(1) Trial counsel committed constitutionally Ineffective Assistance by Failing to move for Suppression of State's Drug Evidence on Specific Ground of lack of Sufficient Probable Cause of Criminal Activity that Surpassed Applicant's Statutory - based Defense to the Traffic Stop.

Relevant case-file reveals that on August 3, 2005, Applicant was actively employed by a company named Savannah Heartscapes; the State admitted no evidence into the Trial Record that shows company employed Applicant to comit violation of South Carolina law.

Documentary evidence shows that, well before trial, the State Evidence against Applicant consisted of approximately one hundred and eleven (111) grams of powder cocaine found in a compartment within the vehicle Applicant was driving on August 3, 2005; prior to Beaufort County law enforcement finding such evidence in vehicle, Applicant committed no incarcerative violations of South Carolina traffic laws to prompt Corporal Mark Cobb (then employed by the Beaufort County Sheriff's Office) into making on independent traffic stop of Applicant on the "Cross Island Expressway" (Parkway), situated in the Hilton Head section of Beaufort County.

The above - outlined factual points were nedessary for understanding the below-noted allegations.

1. DEFICIENT PERFORMANCE

As a house-keeping matter, it must be a re-clarified that the U.S. Supreme Court expounded upon a criminal defendant's Sixth Amendment right to "... the assistance of counsel for his defense" as needed "... in order to protect the fundamental right to a fair trial" <see Strickland v. Washington, 466 U.S. 668, 685, 684, 104 S.Ct. 2052, 2063, 80 L.Ed.2d 674 (1984)>; when a convicted criminal defendant claims that his convivtion should be reversed due to

defective assistance of counsel, that defendant must show "that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment."< Strickland, at U.S. 687, 104 S.Ct. at 2064>.

In the instant case, presuming trial counsel made a sufficient factual and legal investigation, it is highly inconceivable why trial counsel did not assert the grace period for procuring vehicle registration defense to the alleged probable cause Corporal Cobb allegedly operated off of to conduct the traffic stop.

South Carolina law clearly allows owners and/or operators of foreign vehicles being moved into this state a forty-five (45) day grace period in which to procure registration and/or transfer of license plates for South Carolina<see S.C. Code Ann. §56-3-210(A); accord S.C. Code Ann. §56-3-150((B), as Amended)>. In fact, the law further provides that even if Applicant chose to maintain Georgia domicile, yet obtain a South Carolina license for the limited purpose of his Savannah Heartscapes employment (to help support his family), the provisions underlying §56-3-150 granted such privilege to drive on South Carolina Highways for up to one hundred and fifty (150) days<Compare United States v. Johnson, 256 F.3d 214, 217 (4th Cir. 2001)("The mere display of a license plate from another state is not relevant at all as to whether Johnson had established a domicile in South Carolina or had been operating the vehicle in South Carolina for an accumulated period of greater than 150 days.")>; and even, as a matter of construction, if Applicant were to obtain vehicle registration in South Carolina, by requirements thereof, yet was somehow "Delinquent" in so obtaining due to negligent unawareness, S.C. Code Ann. §56-3-840 allows a thirty (30) day grace period to elapse before Applicant would have been able to be charged and found "guilty of a misdemeanor."<

accord S.C. OP. Atty. Gen., No.85-54,p.160 (1985)("Thirty-day grace period provided by §56-3-840 should be construed as being applicable to vehicles required to be registered annually pursuant to §56-3-375.")>. Considerably, it is quite possible that the Georgia license tags became expired sometime around the August 3, 2005 date - whereas, had they actually been expired over thirty-some days prior to August 3, 2005, Applicant would've surely been subject to provision of punishment under Georgia laws within his frequent trips between there and South Carolina for family visits during available off time<see O.C.G.A. §§40-2-8, et.seq.> as it is virtually inconceivable to have operated a vehicle in such a manner and not be cited by Georgia or South Carolina law enforcement prior to August 3, 2005.

Thus, trial counsel had the "grace period" defense available, following the factual and legal investigation he is presumed to have conducted prior to trial. Further thereon, when trial counsel became aware of the fact that then Sergeant Andres Florencio (Beaufort County Sheriff's Office) authored a Supplemental Incident Report which detailed the traffic stop of Applicant by Corporal Cobb, inter alia, Sgt. Florencio noted the vehicle as a "1999 Red Ford Explorer with Ga. vehicle tag [REDACTED]", and that Applicant "did not have a valid driver's license and that his vehicle registration/tag was expired". Congruent with Sgt. Florencio's Report failing to detail any reasonable articulable facts of criminal activity prompting an investigation of Applicant initially, Florencio's Report also fails to mention whether Applicant falls into the parameters of being in South Carolina for any amount of time, so as to determine the applicability of the "grace period" concerning the traffic stop. As such, trial counsel's failure to assert this defense to the traffic stop based on inadequate probable cause, in light of applicable "grace period", constitutes deficient performance for purposes of Strickland, supra.

2. PREJUDICE

Strickland is also clear in stating "[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment."< at U.S. 691, 104 S.Ct. at 2066 (citation omitted)>.

Applicant's trial record ("Tr.") discloses that the aforementioned one hundred and eleven (111) - some grams of powder cocaine was entered into State's Evidence under designation "1-A" [see Tr.pg. 265,ln.4-11], and was referred to by Solicitor Smith in her Opening Statements [Tr. pg. 124,ln.5-9;Tr. pg.125,ln.3-9] as well as her Closing Statements [Tr.pg.290,ln. 23 to Tr.pg.293,ln.4]; conclusively, the use of the cocaine at trial was essential to the State's case against Applicant.

Numerous points will illustrate that had trial counsel moved for suppression of the cocaine, on the specific ground of a lack of probable cause of criminal activity which surpassed Applicant's "grace period" defense, that the trial would not have proceeded beyond the motion to suppress itself.

First, it must be noted that if no reasonable articulable facts of unlawful conduct exist, then the "fruit of the poisonous tree" doctrine will require suppression of any items obtained within a traffic stop< see State v. Copeland, 321 S.C. 318, 323, 468 S.E.2d 620, 624 (S.C. 1996)(citing Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963)); compare United States v. Wilson, 205 F.3d 720,723 (4th Cir. 2000)("As a result, such a stop "must be justified by probable cause or a reasonable suspicion, based on specific and articulable facts, of unlawful conduct."")(citation omitted)>.

Secondly, as a matter of reference to the aforesaid point, Corporal Cobb did not inquire as to how long Applicant was operating the Explorer in South Carolina to determine if Applicant was in violation of the above-outlined laws

governing vehicle registration or, likewise, fell within the parameters of the "grace period"; and such inquiry is presumably outside of a law enforcement officer's discretion by ineptitude <see, e.g., State v. Butler, 343 S.C. 198, 205, 539 S.E.2d 414,418 (S.C. App. 2000)("To lawfully stop and detain Butler, Officer Lynch needed an objective, particularized, and articulable reason as to why he thought Butler was no longer within his forty-five day grace period or otherwise involved in criminal activity." "Lynch provided no such reason.") (Footnote 19 omitted).>.

Thirdly, and most importantly here, Strickland "Prejudice" can surely be found upon a trial counsel's failure to present evidentiary - base defenses to a State's charges < see, e.g., Winston v. Pearson, 683 F.3d 489, 505-506 (4th Cir. 2012) >; congruently, the South Carolina Supreme Court recently agreed that Applicant's very challenged violation of his Fourth Amendment rights occurred due to the fact having been presented to the trial court by police "did not rise to the level of "reasonable suspicion"..."<see Narciso v. State, 397 S.C. 24, 29, 723 S.E.2d 369, 371 (S.C. 2012)>, and it follows that the evidence could have been surely suppressed.

Therefore, a reasonable probability that the cocaine would've more than likely have been suppressed is sufficient to conclude that trial counsel's "deficient performance" "prejudiced" Applicant's defense.

Question 11(b)(ii),(APCR)

Trial Counsel Committed Constitutionally Ineffective Assistance by Failing to Accept a Plea Bargain of a Lesser Included Offense of 7-25 Years, which Would Have Significantly Reduced Applicant's Sentence.

In the above record of the Applicant, documentary evidence shows that on 6/27/2006, the Solicitor Office fax Mr. Donald Colongeli a plea offer

for a discretionary term of from 7 to 25 years for the lesser included offense of Trafficking Cocaine (28-99 grams)(see Attachment (s) A(1),(3)); Deputy Solicitor Angela McCall Tanner was very clear about having Mr. Colongeli inform Applicant about the impending expiration of the plea offer (Attachment A(2), as well as the official final expiration date itself (Attachment A(1)) being July 13, 2006 - sufficient time after Applicant's August 3, 2005 arrest date. Applicant also submits that Deputy Solicitor Tanner originally made an offer under the same terms on September 29, 2005 (see Attachment B(1)) which Mr. Colongeli did not inform Applicant of. And Applicant would've taken the discretionary term plea offer versus the mandatory twenty-five (25) years he faced by so refusing, as the benefit would've been more reasonable to Applicant at that time; Mr. Colongeli's deficient performance, in failing to notify Applicant about the plea offer, prejudiced Applicant's right to Effective Assistance<see Missouri v. Frye, 80 U.S.LW.4253, 132 S.Ct. 1399, 1408, 182 L.Ed.2d 379 (2012); accord United States v. Mason, 481 Fed. Appx. 815, 819 2012 WL 1997700,**3 (4th Cir. 2012); Bell v. State, 410 S.C. 436, 442-443, 765 S.E.2d 4, 7-8 (S.C. App. 2014)>.

Question 11(b)(iii), (APCR)

Trial Counsel committed Constitutionally Ineffective Assistance by failing to Object to Hearsay Testimony.

The record reveals that Florencio testified to the investigation the Task Force Conducted in the Applicant's Case. The "On-going investigation" stated the day of arrest. It was based on some information he received, the substance of which was never revealed either during pre-trial or during the trial itself. Florencio knew that Applicant and other Hispanic males were at the Suburban Lodge. Applicant employer, Savannah Heartscapes, was the actual renter of the room. Applicant was allegedly observed by members of the

Surveillance team traveling to a couple of automotive stores. Applicant did not walk out of either of these places carrying anything at all. Applicant was then seen working on his car. Applicant and other Hispanic males were also working on a truck. Florencio admitted that he did not actually view Applicant at these places, but that Lieutenant Woodward, Sergeant Kobel, Officer Haroog, Officer Harold, and Officer Light did. These officers did not testify at the Applicant's trial. The Applicant was denied a fair trial and was prejudiced by his attorney's failure to object to all this hearsay testimony by Officer Florencio throughout the record. (Tr.p. 198-228).

Defense counsel failed but should have objected to the prejudicial hearsay testimony in the record. see e.g. State v. Williams, 285 S.C. 544, 331 S.E.2d 354 (Ct. App. 1985); State v. Pollard, 260 S.C. 457, 196 S.E.2d 839 (1973); Cooper Corp. v. Jeffcoat, 217 S.C. 489, 61 S.E.2d 53 (1950). However, counsel cannot assert trial strategy as a defense for failure to object to comments which constitute an error of law and are inherently prejudicial. See Dawking v. State, 346 S.C. 151, 551 S.E.2d 260 (2001).

Question 11(b)(iv), (APCR)

Trial Counsel's failure to move for an Evidentiary Hearing under Franks v. Delaware, to demonstrate coordinated police introduction of information to Magistrate Judge with reckless disregard for truth of such information, prejudiced Applicant's 6th Amendment right to the Effective Assistance of Counsel.

Attorney Colongeli, whose acts prior to and during trial are presumed compliant with dictates of Strickland, above, is shown by relevant constructions of clear and convincing evidence to have performed 'Deficiently' while perfecting noted above 'acts'; Applicant states: (i) Presuming Mr.

Colongeli conducted the 'factual and legal investigation' as established by Strickland, following receipt of Initial Discovery items (including, without limitation, Police Reports, Warrants), Mr. Colongeli cannot explain why he did not move for an Evidentiary Hearing to challenge the veracity of Officer Florencio's assertion of there being a Traffic Stop grounded upon actual facts of Applicant committing a Traffic violation. An indication of Officer Florencio operating under a 'reckless disregard for the truth' of the information he gave to the Magistrate Judge for issuance of the Warrant(s) exists within the 'omission' of the relevant facts surrounding the Traffic Stop itself within the warrant for Trafficking Cocaine (see Attachment C). Presuming Mr. Colongeli discovered such omission from said investigation conducted, it was 'Deficient Performance' in failing to move for an Evidentiary Hearing pursuant to Franks v. Delaware, where reasonable attorneys test the probable cause supporting a Traffic Stop to, hopefully, move for suppression of any unlawful fruits of a search conducted pursuant to such Traffic Stop <see, e.g., United States v. Westover, 812 F.Supp. 38,39 (D.Vt. 1993)> (Motion to Reconsider request for Franks hearing granted where counsel filed an affidavit claiming affiant [Chisolm] "... omitted certain details and in one instance gave misleading information" >); 'sufficient' probable cause to justify a Traffic Stop is pretty well-established in Fourth Amendment law <see United States v. Sokolow, 490 U.S. 1, 109 S.Ct. 1581, 104 L.Ed.2d 1 (1989); accord United States v. Arvizu, 534 U.S. 266, 122 S.Ct. 744, 151 L.Ed.2d 740 (2002); United States v. Sprinkle, 106 F.3d 613 (4th Cir. 1997)> (Court found insufficient reasonable suspicion for the stop) >. Further, Mr. Conlongeli's noted deficient performance 'Prejudiced' Applicant's defense of Officer Florencio actually omitting details from the affidavit (to conceal the fact of

Applicant not having acted in violation of South Carolina's Traffic laws, codified under Title 56; see also GROUND 11(b)(1), above), as well as failing to state in the 'Supplemental Incident Report' (see Attachment D) the pertinent information facilitating the 'drug investigation' itself, by failing to move for a Franks hearing where there is a reasonable probability that, it Florencio was further questioned on his reason(s) for conducting the Traffic Stop through Corporal Cobb, and was found to have no sufficient probable cause for initiating the Traffic Stop and any resulting search, the Magistrate Judge or the Circuit Judge could've found the Trafficking Cocaine charges should be dismissed with discovered evidence suppressed due to Officer Florencio's 'reckless disregard for the truth' before the Magistrate Judge.

Mr. Colongeli was, therefore, Ineffective as interpreted by Strickland.

CONCLUSION

Wherefore, based upon the following PCR Application and Memorandum of Law in Support, Applicant moves this Honorable Court and would pray this Court to Vacate the current jury verdict and sentence within the circumstances as contained within the application for post conviction relief.

Respectfully submitted,

Dated 9/4, 2015

s/ Oseil Narciso
 Oseil Gomez Narciso, #319935
 McCormick Correctional Inst.
 386 Redemption Way - FLA-258
 McCormick, S.C. 29899

STATE OF SOUTH CAROLINA)

COUNTY OF BEAUFORT)

Oseil Gomez Narciso, #319935,)

Applicant,)

v.)

State of South Carolina,)

Respondent.)

IN THE COURT OF COMMON PLEAS

CA No: 2015 CP-07-2196

AFFIDAVIT OF SERVICE BY MAIL

2015 SEP -9 PM 3:07
 BEAUFORT COUNTY S.C.
 CLERK OF COURT

PERSONALLY appeared before me Oseil Gomez Narciso, #319935 who on oath, after being sworn, states the following:

1. Taht I am an inmate of the South Carolina Department of Corrections and housed at the address below.

2. That regular communication by mail exist throughout the State of South Carolina and this is a proper circumstance of service by mail.

3. That I have this day served a copy of my Application for Post Conviction Relief and my MEMORANDUM OF LAW IN SUPPORT OF MY ORIGINAL AND AMENDED APPLICATION for POST CONVICTION RELIEF in the above-captioned matter on the Respondent by depositing it in the United States mail, postage prepaid or by person to person, hand to hand service below:

Addressed:

OFFICE OF CLERK OF COURT
Post OFFICE DRAWER 1128
Beaufort South Carolina
29901-1128

Date 9/4/, 2015

SWORN and subscribed before me this
09 day of Sept, 2015

[Signature]
 Notary Public for South Carolina.
 My Commission Expires 12-16-2019

s/ Oseil Narciso
 Oseil Gomez Narciso #319935
 McCormick Correctional Inst.
 386 Redemption Way - FLA-258
 McCormick, SC 29899

STATE OF SOUTH CAROLINA
FOURTEENTH JUDICIAL CIRCUIT

Post Office Box 2226
Beaufort, South Carolina 29901



Telephone: (843) 470-3725
Facsimile: (843) 470-3732

ISAAC MCDUFFIE STONE, III
SOLICITOR

PLEA OFFER:

DEFENDANT'S NAME: Osiel Gomez Narciso

CHARGE(S):

Trafficking Cocaine (100 -199 grams)
2005-GS-07-01304

PLEA TO: lesser included offense:
Trafficking Cocaine (28 - 99 grams)

DISPOSITION OF OTHER CHARGES:

N/A

SENTENCE RECOMMENDATION / NEGOTIATION:

Sentence in the Judge's discretion.
*this offense carries 7 - 25 years
charge as indicted carries mandatory 25 years

OFFER EXPIRES: June 28, 2006
CASE MUST BE PLED BY: July 13, 2006

SOLICITOR: Angela McCall-Tanner
DEFENSE ATTORNEY:

DATE: 6-28-06
DATE:

State of South Carolina
OFFICE OF THE SOLICITOR
FOURTEENTH JUDICIAL CIRCUIT



ALLENDALE, BEAUFORT
COLLETON, HAMPTON AND
JASPER COUNTIES

POST OFFICE BOX 2226
BEAUFORT, SOUTH CAROLINA 29901
TELEPHONE: (843) 470-3725
FACSIMILE: (843) 470-3732

Isaac McDuffie Stone, III
SOLICITOR

June 27, 2006

Mr. Donald C. Colongeli, Esquire
Post Office Box 6658
Hilton Head Island, South Carolina 29938

Sent via facsimile: (843) 785-9712

Re: State v. Osiel Gomez Narciso

Dear Don,

Enclosed is a plea offer in the above named case, which is scheduled for review at the upcoming roster meeting on Wednesday, June 28th. Please inform your client that this offer **will expire** by the end of the meeting. If his decision is to decline the offer please have him sign the accompanying form. A trial date will then be scheduled in this matter.

I look forward to working with you on the disposition of this matter.

With kindest regards, I remain,

Sincerely,

Angela McCall-Tanner
Deputy Solicitor

STATE OF SOUTH CAROLINA
FOURTEENTH JUDICIAL CIRCUITPost Office Box 2226
Beaufort, South Carolina 29901Telephone: (843) 470-3725
Facsimile: (843) 470-3732ISSAC MCDUFFIE STONE, III
SOLICITOR*Attached
a D-1
Exhibit #1*

FACSIMILE TRANSMITTAL SHEET

TO: Mr. Donald C. Colongeli FROM: Angela McCall-Tanner

COMPANY: DATE: June 27, 2006

FAX NUMBER: 843-785-9712 TOTAL NO. OF PAGES INCLUDING COVER: 4

PHONE NUMBER: SENDER'S REFERENCE NUMBER:

RE: State v. Osiel Narciso YOUR REFERENCE NUMBER:

URGENT FOR REVIEW PLEASE COMMENT PLEASE REPLY PLEASE RECYCLE

NOTES/COMMENTS:

DC,
I have not been able to get a straight answer about the funds interest in this case. I sent a message that I
would like to know if my case any longer and I needed to see a copy of an indictment. Still no word
- so here is my plea offer.

(A-3)

STATE OF SOUTH CAROLINA
FOURTEENTH JUDICIAL CIRCUIT

Post Office Box 2226
Beaufort, South Carolina 29901



Telephone: (843) 470-3725
Facsimile: (843) 470-3732

RANDOLPH MURDAUGH, III
SOLICITOR

PLEA OFFER:

DEFENDANT'S NAME: Osiel Gomez Narciso

CHARGE(S): Trafficking Cocaine (100 - 199 grams)
2005-GS-07-1304

PLEA TO: Lesser Included offense:
Trafficking Cocaine (28 - 99 grams)



DISPOSITION OF OTHER CHARGES:

N/A

SENTENCE RECOMMENDATION / NEGOTIATION:

Judge's Discretion, offense carries Seven (7) to Twenty-Five (25) Years
(original charge carries mandatory Twenty-Five (25) years)

OFFER EXPIRES: October 5th, 2005

CASE MUST BE PLED BY: October 20th, 2005

SOLICITOR: Angela McCall-Tanner
DEFENSE ATTORNEY:

DATE: 9-29-05
DATE:

PLEA OFFER REJECTION

I acknowledge that I have been given a plea offer by the 14th Circuit Solicitor's Office. The offer was for me to plead to the following charges:

And be sentenced to the following:

I reject this plea offer and request a trial.

Defendant	Date

Attorney for the Defendant	Date

**THE STATE OF SOUTH CAROLINA
In The Supreme Court**

Osiel Gomez Narciso, Petitioner,

v.

State of South Carolina, Respondent.

ON WRIT OF CERTIORARI

Appeal From Beaufort County
J. Cordell Maddox, Jr., Circuit Court Judge

Opinion No. 27104
Heard January 25, 2012 - Filed March 14, 2012

AFFIRMED IN PART, REMANDED IN PART

Appellate Defender Elizabeth A. Franklin-Best, of
Columbia, for Petitioner.

Attorney General Alan Wilson, Chief Deputy Attorney
General John W. McIntosh, Assistant Deputy Attorney
General Salley W. Elliott, and Assistant Attorney General
Matthew J. Friedman, all of Columbia, for Respondent.

CHIEF JUSTICE TOAL: Oseil Gomez Narciso (Petitioner) appeals his conviction for trafficking cocaine, and asserts that the circuit court erred in denying his motion to suppress drug evidence seized by police during a routine traffic stop. Following his conviction, Petitioner signed a Consent Order Granting Belated Direct Appeal (Consent Order) and waived his right to raise any other post-conviction relief (PCR) allegations. Petitioner requests this Court remand his case to determine whether that waiver was entered into knowingly and voluntarily. We affirm the circuit court's order denying Petitioner's motion to suppress, and remand the case for a determination as to whether Petitioner's waiver was entered into knowingly and voluntarily.

FACTUAL/PROCEDURAL BACKGROUND

On August 3, 2005, the Beaufort County Sherriff's Office (BCSO) conducted a drug investigation focusing on Petitioner. Police believed that Petitioner may have been involved in the sale and distribution of cocaine in the Hilton Head/Bluffton area of Beaufort County. A sheriff's deputy received information that Petitioner might be operating a vehicle in the area with expired license plates and possibly no driver's license. The deputy conducted a traffic stop of Petitioner after confirming that his

EXHIBIT 1

386 removed him from the vehicle. Police then conducted a "K-9" search of the vehicle. The narcotics-detection dog used in the search alerted on drug residue on the vehicle, and police conducted a search of the cargo compartment. Police seized powdered cocaine from the vehicle, and charged Petitioner with knowingly and intentionally possessing a quantity of powder cocaine with a weight in excess of one hundred grams.

The Beaufort County Grand Jury indicted Petitioner for trafficking cocaine in excess of one hundred grams, and Petitioner proceeded to trial. The jury found Petitioner guilty as indicted. The circuit court sentenced Petitioner to twenty-five years imprisonment. Petitioner did not appeal his conviction or sentence, but subsequently filed a PCR application.

Petitioner claimed in his PCR application that his trial attorney failed to file a timely notice of appeal even after assuring Petitioner that he "had multiple grounds for appeal," and that he "would almost certainly be successful in overturning the convictions at the appellate level." According to the Consent Order, Petitioner's trial counsel admitted that he failed to file an appeal even though Petitioner requested one be filed. Thus, the State consented to granting Petitioner a belated direct appeal pursuant to *White v. State*, 263 S.C. 110, 208 S.E.2d 35 (1974)[1]. In the same Consent Order, Petitioner "waived his right to raise any other PCR allegations."

In a petition for writ of certiorari to this Court, Petitioner asserted that the PCR judge properly found that he did not waive his right to a direct appeal, and requested this Court remand his case to determine whether his waiver of any other PCR allegations was entered into knowingly or voluntarily. This Court granted the petition for writ of certiorari as to whether Petitioner knowingly and voluntarily waived his right to direct appeal, dispensed with further briefing on that question, and elected to proceed with further review of the direct appeal issue—the validity of the stop and search. Additionally, this Court granted review of whether Petitioner's waiver of any other PCR allegations was entered into knowingly and voluntarily.

ISSUES PRESENTED

- I. Whether the circuit court erred in admitting evidence obtained as a result of Petitioner's traffic stop.
- II. Whether Petitioner's waiver of PCR allegations, other than the belated direct appeal issue, was entered into knowingly and voluntarily.

STANDARD OF REVIEW

On appeal from a motion to suppress on Fourth Amendment grounds, this Court applies a deferential standard of review and will reverse only if there is clear error. *State v. Tindall*, 388 S.C. 518, 520, 698 S.E.2d 203, 205 (2010) (citation omitted). However, this Court is not barred from conducting its own review of the record to determine whether the trial judge's decision is supported by the evidence. *Id.*

On certiorari in a PCR action, the Court applies the "any evidence" standard. Accordingly, this Court will affirm if any evidence of probative value in the record exists to support the findings of the PCR court. *Ferry v. State*, 394 S.C. 62, 66, 714 S.E.2d 326, 328 (2011) (citation omitted).

LAW/ANALYSIS

I. Whether the circuit court erred in admitting evidence obtained as a result of Petitioner's traffic stop.

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"reasonable suspicion," and that he was "unreasonably seized." Thus, according to Petitioner, his Fourth Amendment rights were violated, and this Court should reverse his conviction. We agree with Petitioner that the search incident to arrest in this case violated his Fourth Amendment rights. However, for reasons explained below, the exclusion remedy is unavailable to Petitioner, and thus his conviction will stand.

In *New York v. Belton*, 453 U.S. 454 (1981), the United States Supreme Court initially explained the constitutionally permissible scope of a search incident to arrest. In that case, police ordered the driver of a speeding vehicle to pull over to the side of the road and stop. *Id.* at 455. The policeman asked to see the driver's license and automobile registration and simultaneously smelled burnt marijuana. *Id.* at 455-56. The officer directed the occupants out of the car and conducted a pat down of the four men. *Id.* at 456. The officer then conducted a search of the passenger compartment of the car, including a black leather jacket belonging to Belton. *Id.* He unzipped one of the pockets of the jacket and discovered cocaine. *Id.*

Belton argued that the cocaine had been seized in violation of the Fourth and Fourteenth Amendments. *Belton*, 453 U.S. at 456-57. The Court stressed the need to provide a "workable rule," and held that when a policeman has made a lawful custodial arrest of the occupant of an automobile, "he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile." *Id.* at 459-60. The Court reasoned that the police should also be allowed to examine the contents of any containers found within the passenger compartment, "for if the passenger compartment is within reach of the arrestee, so also will containers in it be within his reach." *Id.* at 460-61 (citations omitted).

It is undisputed before the stop that petitioner was involved in drugs

In the instant case, the police stopped Petitioner as part of an ongoing drug investigation, but primarily because the license tags on his automobile were expired. The police officer asked Petitioner for his driver's license, and verified that Petitioner did not possess a valid driver's license. Thus, he arrested Petitioner, and police searched Petitioner's vehicle incident to that arrest.

Petitioner challenged the search at trial. The circuit court judge initially expressed concern at the vehicle search following a mere traffic stop, but denied Petitioner's motion to suppress:

It concerns me that the law enforcement in this case would risk this investigation by making a search under these circumstances without obtaining a search warrant. It would have been a very easy thing to do. There was just no reason that it needed to be done the way that they did it But after looking especially at the case of *New York v. Belton*, 433 U.S. 454, is [sic] the only thing that tips the scales in the State's favor in this case; and that is that a search may be made incident to an arrest of the passenger compartment of the vehicle, including containers located in the passenger compartment where the search incident to arrest even if the detainee has been arrested and removed from the vehicle.

Petitioner's trial took place in 2007, two years prior to the United States Supreme Court's holding in *Arizona v. Gant*, 556 U.S. 332 (2009). In *Gant*, the United States Supreme Court limited the expansive searches allowed by *Belton*. The Court noted that *Belton* had been widely understood to "allow a vehicle search incident to arrest of a recent occupant even if there is no possibility the arrestee could gain access to the vehicle at the time of the search." *Id.* at 1718. The Court found this reading incompatible with its previous decisions regarding the basic scope of searches incident to lawful custodial arrests. *Id.* at 1719 (citation omitted). Therefore the Court held that police may search a vehicle incident to a recent occupant's arrest only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search or when it is reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle. *Id.* (citing *Thornton v. United States*, 541 U.S. 615, 624-25 (2004)).

on direct review or not yet final, with no exception for cases in which a new rule constitutes a 'clear break' with the past." *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987). Petitioner's conviction has not yet become final on direct review. Thus, *Gant* applies retroactively to this case, and Petitioner may invoke its rule of substantive Fourth Amendment law as a basis for seeking relief. However, our analysis of the instant case is further controlled by the United States Supreme Court's decision in *Davis v. United States*, 131 S.Ct. 2419 (2011).

In *Davis*, the defendant was charged and convicted of unlawful possession of a firearm based on discovery of a revolver in a stopped automobile in which he was the only passenger. *Id.* at 2425-26. During the pendency of Davis's appeal, the United States Supreme Court decided *Gant*. The Eleventh Circuit applied *Gant*'s new rule and held that the vehicle search incident to arrest violated Davis's Fourth Amendment rights. *Id.* at 2426 (citation omitted). However, the court concluded that penalizing the arresting officer for following binding appellate court precedent would do nothing to deter Fourth Amendment violations. *Id.* (citing *United States v. Davis*, 598 F.3d 1259, 1265-66 (2010)).

The United States Supreme Court agreed, and reasoned that the acknowledged absence of police culpability doomed Davis's claim. *Id.* at 2428. "Police practices trigger the harsh sanction of exclusion only when they are deliberate enough to yield 'meaningful deterrence' and culpable enough to be 'worth the price paid by the justice system.'" *Id.* (citing *Herring v. United States*, 555 U.S. 135, 144 (2009)). Excluding evidence in cases where the "constable" has scrupulously adhered to governing law deters no police conduct and imposes substantial social costs. *Davis*, 131 S.Ct. at 2434. Thus, the Court held that when the police conduct a search in objectively reasonable reliance on binding appellate precedent, the exclusionary rule does not apply. *Id.*

In the instant case, the search incident to arrest violated Petitioner's Fourth Amendment rights pursuant to *Gant*. However, excluding the evidence against Petitioner would not deter police misconduct because the police in this instance conducted a search incident to arrest pursuant to binding appellate precedent. *See id.* at 2426-28. Moreover, exclusion of the evidence in this case would result in severe social costs, including the articulation of an inexplicable and undecipherable message to law enforcement regarding how to conduct a legal search. The protection of the Fourth Amendment can only be realized if the police are acting under a set of rules which make it possible to reach a correct determination beforehand as to whether an invasion of privacy is justified in the interest of law enforcement. Wayne R. LaFave, "Case-By-Case Adjudication" Versus "Standardized Procedures": *The Robinson Dilemma*, 1974 Sup. Ct. Rev. 127, 142 (1974).

This Court will only reverse the circuit court's decision on a motion to suppress when there is clear error. *State v. Tindall*, 388 S.C. 518, 520, 698 S.E.2d 203, 205 (2010). The circuit court in this case applied the established law to a search executed pursuant to binding precedent. Thus, *Davis v. United States*, and our own standard of review, commands that the circuit court's decision be affirmed.[2]

You actually won your case!

II. Whether the Petitioner's waiver of PCR allegations, other than the belated direct appeal issue, was entered into knowingly and voluntarily.

Petitioner signed a consent order granting belated direct appeal and waived his right to raise any other PCR allegations. He now asks this court to remand his case for a determination as to whether he knowingly and voluntarily waived his right to raise additional PCR claims.

In order to determine whether a waiver is effective, the court examines the particular facts and circumstances surrounding the case, including the background, experience, and conduct of the accused. *Spoone v. State*, 379 S.C. 138, 143, 665 S.E.2d 605, 607 (2008) (citing *United States v. Broughton-*

conviction relief, provided they were knowing and voluntary. *Id.* at 143, 665 S.E.2d at 607. A ⁵⁸⁹ defendant's knowing and voluntary waiver of statutory or constitutional rights must be established by a complete record, and may be accomplished by a colloquy between the court and defendant, between the court and defendant's counsel, or both. *Brannon v. State*, 345 S.C. 437, 439, 548 S.E.2d 866, 867 (2001).

In *Spoone v. State*, 379 S.C. 138, 665 S.E.2d 605 (2008), this Court addressed whether a PCR court erred in enforcing a written plea agreement wherein the petitioner waived his right to direct appeal, PCR, and habeas corpus relief. The petitioner argued that his waiver was not knowing and intelligent because there was no discussion at the plea proceeding about the extent of his understanding of the waiver. *Id.* at 141, 665 S.E.2d at 607.

The Court took into account that although petitioner had only a ninth grade education, the text of the written plea agreement was straightforward. *Id.* at 143-44, 665 S.E.2d at 608. In addition, the plea colloquy showed that the PCR court specifically asked petitioner about the waiver both in the language of the plea agreement, and in "plain language." *Id.* Two attorneys accompanied petitioner to the plea hearing and both signed the written plea agreement along with petitioner. *Id.* Thus, this Court held that the PCR court correctly enforced the waiver and dismissed petitioner's PCR application. *Id.*

In this case, according to the Consent Order, Petitioner appeared before the PCR court on August 26, 2008. The Consent Order states that Petitioner waived his right to raise any other PCR allegations, but was "granted a belated direct appeal pursuant to *White v. State*." The record before this Court of the colloquy between the parties consists of the following:

The court: What's the—what we got this morning?

Mr. Friedman: Your Honor, the first one is Osiel Gomez Narcisco [sic].

The court: All right.

Mr. Friedman: May we approach on this one?

The court: Yeah

(Bench conference)

Mr. Friedman: Thank you, Your Honor.

The court: Okay. Appreciate it. Thank you.

The Consent Order signed by Petitioner is straightforward. However, Petitioner used an English-speaking interpreter throughout his original trial, and apparently has, at best, a limited command of the English language. The colloquy provided to this Court does not show that the PCR court specifically asked Petitioner about the waiver, either in the language of the Consent Order, or in "plain language."

The State argues that Petitioner's case is distinguishable from *Spoone* because in that case the issue was "whether the right to appellate review and post-conviction review may be waived by a written plea agreement . . .," and that "[Petitioner] proceeded to trial and was convicted." This is a distinction without a difference. The key issue in *Spoone* and in Petitioner's case is the circumstances surrounding the waiver of the right to appeal PCR allegations. Aside from the consent agreement, the record in this case does not support the conclusion that Petitioner entered into the agreement knowingly and voluntarily. Additionally, the colloquy between the court and the defendant in this case does not clearly establish that

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affirm the PCR court's findings if any evidence of probative value exists in the record. *Terry v. State*, 394 S.C. 62, 66, 714 S.E.2d 326, 328 (2011). However, finding that no such evidence exists in the instant case, we must remand for a determination as to whether Petitioner's waiver was entered into knowingly and voluntarily.

CONCLUSION

We affirm the circuit court's denial of Petitioner's motion to suppress. However, the record does not adequately demonstrate whether Petitioner's waiver was in accordance with this Court's waiver jurisprudence. Thus, we remand the case for a determination on that issue.

AFFIRMED IN PART, REMANDED IN PART.

PLEICONES, BEATTY, KITTREDGE and HEARN, JJ., concur.

[1] In *White v. State*, 263 S.C. 110, 113, 208 S.E.2d 35, 36 (1974), the defendant was convicted of burglary and sentenced to twenty years imprisonment. The defendant did not appeal his conviction or sentence, but subsequently filed a petition for PCR and a circuit court denied that relief in a full evidentiary hearing. *Id.* The defendant argued on appeal that the PCR judge should have ordered a new trial because the defendant did not knowingly and intelligently waive the right to appeal from his conviction and sentence. *Id.* at 117, 208 S.E.2d at 39. The defendant's trial counsel testified at the PCR hearing that he did not advise the defendant of his right to appeal because he was certain the defendant knew of his rights due to his prior criminal record. *Id.* The PCR judge found that the defendant did not knowingly and intelligently waive his right to appeal, and directed defendant's new counsel to secure a belated appeal to this Court from his conviction and sentence. *Id.* at 118, 208 S.E.2d at 39. This Court found that with regard to this belated appeal, no notice of appeal had been filed, and thus the Court had no jurisdiction over such an appeal. *Id.* at 119, 208 S.E.2d at 39. However, the Court reviewed the record in connection with the properly presented PCR appeal and ruled that "there was no reversible error in the trial and that there was not an arguably meritorious ground of appeal, even if notice of intention to appeal had been timely served" *White*, 263 S.C. at 119, 208 S.E.2d at 40.

[2] Respondent argues that due to *Gant*, the "search-incident-to-arrest logic is no longer appropriate grounds for denying the suppression motion," and urged this Court to find the search was justified under the automobile exception. However, the decision in *Davis* being dispositive, this Court need not reach the automobile exception, or any other grounds, for upholding the search. See *Futch v. McAllister Lumber Co. of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1998) (holding that appellate courts need not discuss remaining issues when determination of a prior issue is dispositive).

EXHIBIT 2

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

Osiel Narciso Gomez, #319935,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT

Case No.: 2015-CP-07-2196

**RETURN AND PARTIAL
MOTION TO DISMISS**

2015 SEP 28 PM 1:11
CLERK OF COURT, S.C.

Respondent, making its Return to the application for Post-Conviction Relief ("PCR") filed on September 9, 2015, would respectfully show this Court:

I.

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Beaufort County Clerk of Court. In August 2005, the Beaufort County Grand Jury indicted Applicant for trafficking cocaine, 10g to 28g, first offense (2005-GS-07-1304). That indictment was amended on the record on January 17, 2006, to trafficking cocaine in excess of 100 grams. Donald C. Colongeli, Esquire, represented Applicant. Assistant Solicitor Kimberly Smith, Esquire, prosecuted the case. On January 16, 2006, Applicant proceeded to trial before the Honorable Howard P. King. The jury found Applicant guilty as indicted. On January 18, 2007, Judge King sentenced Applicant to imprisonment for twenty-five years for trafficking cocaine in excess of 100 grams. Applicant did not appeal his conviction or sentence at the time.

2007-CP-07-2195

On August 1, 2007, Applicant filed an application for post-conviction relief. In an attachment to the application, Applicant wrote, "My allegation of ineffective assistance of counsel is presently

based entirely upon the fact that my attorney did not file a notice of appeal, after stating for the court and upon the record that he would do so.” Respondent made its return on May 15, 2008.

An evidentiary hearing into the matter was convened on August 26, 2008, before the Honorable J. Cordell Maddox. At the hearing, both parties signed a consent order granting Applicant a belated direct appeal pursuant to White v. State. The consent order stated, “The White v. State issue is Applicant’s only allegation in the PCR application. Applicant understands that he must proceed on all PCR claims at this time and anything not raised now is waived. Applicant wishes to waive all other PCR claims and proceed with a belated direct appeal.” Applicant subsequently filed a notice of appeal in which he asked the court to review the waiver of his other PCR allegations. The South Carolina Court of Appeals affirmed the conviction and remanded the case to the PCR court for a determination as to whether he knowingly and voluntarily waived his right to raise additional PCR claims. The remittitur was issued on March 30, 2012.

On February 20, 2014, after the court’s remand, a second evidentiary hearing was held into the PCR matter. Applicant was represented by Carol Ruff, Esquire, and Harley Ruff, Esquire. Present and testifying at the hearing were Philip Rios, Esquire, Rebecca McCann, Esquire, Donald Colongeli, Esquire, and Applicant. An interpreter was present to assist Applicant at the hearing. By order dated June 5, 2014, the court found “the PCR waiver fails the test outlined in Brannon and Spoone,” declared Applicant’s waiver of his PCR rights in the Consent Order to be null and void, and granted Applicant’s request to bring a PCR application. The State subsequently filed a petition for writ of certiorari on December 22, 2014. The South Carolina Supreme Court denied the petition on June 17, 2015. The remittitur was issued on July 6, 2015. Applicant subsequently filed his current PCR application on September 9, 2015.

Attached to this Return and incorporated by reference are the records of the Beaufort County Clerk of Court regarding the subject conviction, Applicant's records from the South Carolina Department of Corrections, the trial transcript, Applicant's appellate records, Applicant's previous PCR records, and the current application. Respondent reserves the right to amend this Return upon receipt of any relevant materials.

II.

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

1. "Fourth Amendment Violation."
 - a. "Illegal search incident to arrest"
 - b. "Applicant's trial took place in 2007, two years prior to Arizona v. Gant, 556 U.S. 332 (2009)."
 - c. "Law enforcement's actions violated Applicant's Fourth Amendment rights."
2. "Ineffective Assistance of Counsel."
 - a. "Trial Counsel committed constitutionally ineffective assistance by failing to move for suppression of State's drug evidence on specific ground of lack of sufficient probable cause of criminal activity that surpassed Applicant's statutory-based defense to the traffic stop."
 - b. "Failing to accept a plea bargain of a lesser included offense of 7-25 years, which would have significantly reduced Applicant's sentence."
 - c. "Failing to object to hearsay testimony."
 - d. "Failing to move for an evidentiary hearing under Franks v. Delaware to demonstrate coordinated police introduction of information to magistrate judge with reckless disregard for truth of such information, prejudiced Applicant's Sixth Amendment right to effective assistance of counsel."

III.

Applicant alleges Fourth Amendment violations in his application. This allegation raises a direct appeal issue that is procedurally barred by S.C. Code Ann. §17-27-20(b) (2003). Post-conviction relief is not a substitute for a direct appeal. Simmons v. State, 264 S.C. 417, 215 S.E.2d

883 (1974). A post-conviction relief application cannot assert any issues that could have been raised at trial or on direct appeal. Ashley v. State, 260 S.C. 436, 196 S.E.2d 501 (1973). Applicant could have raised this issue at trial or on appeal. His failure to do so has waived this allegation as a ground for relief. Therefore, the Court should summarily dismiss this allegation.

IV.

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

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland v. Washington, 466 U.S. 668. First, Applicant must prove that counsel's performance was deficient. Id.; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. (citing Strickland, 466 U.S. at 690). The Applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at

118, 386 S.E.2d at 625. Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

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

V.

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

VI.

Respondent therefore requests that this Court convene an evidentiary hearing on the allegations of ineffective assistance of counsel. As to all other allegations, Respondent moves for summary dismissal pursuant to § 17-27-70 of the South Carolina Code of Laws on the basis that

there is no genuine issue of material fact which would necessitate an evidentiary hearing and that those allegations should be dismissed as a matter of law.

VII.

Each and every allegation contained within the application not expressly admitted, qualified, or explained in this Return is hereby denied.

VIII.

WHEREFORE, Respondent requests that an evidentiary hearing be held on the claims of ineffective assistance of trial counsel.

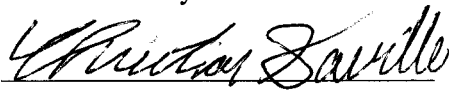
Respectfully submitted,

ALAN WILSON
Attorney General

W. JEFFREY YOUNG
Chief Deputy Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General

CHRISTIAN SAVILLE
Assistant Attorney General

By: 
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
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9/21, 2018

FORM 5

STATE OF SOUTH CAROLINA)

COUNTY OF BEAUFORT)Osiel Narciso Gomez, #319935)
Full name and prison number (if any) of Applicant.)

v.)

State of South Carolina)

2015-CP-07-2196
IN THE COURT OF COMMON PLEAS

APPLICATION FOR

POST-CONVICTION RELIEF

INSTRUCTIONS - READ CAREFULLY

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

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

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

1. Place of detention SCDC MCI. 386 Redemption Way, McCormick, SC 29899
2. Name and location of Court which imposed sentence Beaufort County Court SC
3. Name(s) of co-defendant(s) (if any) No.
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) 2005-GS-07-01304 (Trafficking Cocaine
 - (b) _____
 - (c) _____
5. The date upon which sentence was imposed and the terms of the sentence:
 - (a) (25) Years - January 18, 2007
 - (b) _____

- (c) _____
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty _____
- (b) after a plea of not guilty x _____
- (c) after a plea of nolo contendere _____
7. Did you appeal from the judgment of conviction or the imposition of sentence?
 NO _____
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
- i. _____
- ii. _____
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. _____
- ii. _____
- iii. _____
- (c) the date of each such result:
- i. _____
- ii. _____
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. _____
- ii. _____
- iii. _____
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) Trial Counsel failed to file notice of appeal. _____
- (b) _____
- (c) _____
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

- (a) Fourth (4th) Amendment Violation.
- (b) Ineffective Assistance of Trial counsel.
- (c) _____

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

- (a) (For Brevity Purposes, see attached "MEMORANDUM OF LAW.")
- (b) (For Brevity Purposes, see attached "MEMORANDUM OF LAW.")
- (c) _____

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

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

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

- (a) the specific nature thereof:
 - i. Petition For a Writ of Certiorari
 - ii. _____
 - iii. _____
 - iv. _____
- (b) the name and location of the Court in which each was filed:
 - i. The Supreme Court of South Carolina
 - ii. _____
 - iii. _____
 - iv. _____
- (c) the disposition thereof:
 - i. (Currently Unavailable)
 - ii. _____
 - iii. _____

iv. _____

(d) the date of each such disposition:

i. (Currently Unavailable) _____

ii. _____

iii. _____

iv. _____

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

i. (Currently Unavailable) _____

ii. _____

iii. _____

iv. _____

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

NO

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

(a) which grounds have been presented:

i. _____

ii. _____

iii. _____

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

i. _____

ii. _____

iii. _____

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

(a) PCR' proper remedy _____

(b) _____

(c) _____

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

- (a) your arraignment and plea? NO
- (b) your trial, if any? YES
- (c) your sentencing? YES
- (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? NO
- (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? YES

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

- (a) the name and address of each attorney who represented you:
 - i. Donald C. Colongeli, P.O. Box 6658 Hilton Head, SC 29938
 - ii. _____
 - iii. _____
- (b) the proceedings at which each such attorney represented you:
 - i. Trial; Sentencing
 - ii. _____
 - iii. _____

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

Discharge For Imprisonment; Alternatively, New Trial

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

NO

STATE OF SOUTH CAROLINA)

County of BEAUFORT)

VERIFICATION

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

Osiel Narciso

Osiel Narciso Gomez, #319935

SWORN to and subscribed before me this 04
day of Sept., 2015.

J. J. Franklin (L.S.)
Notary Public

My Commission Expires: 12-16-2019

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

Osiel Narciso

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

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

Osiel Gomez

Applicant

Osiel Narciso Gomez, #319935

SWORN or affirmed to and subscribed before me this

04 day of Sept., 2015.

J. Franklin
Notary Public

My Commission Expires: 12-16-2019

STATE OF SOUTH CAROLINA)
COUNTY OF BEAUFORT)
OSIEL Narciso Gomez, #319935,)
Applicant,)
vs.)
STATE OF SOUTH CAROLINA,)
RESPONDENT.)

IN THE COURT OF COMMON PLEAS

CA NO:

2015 CP 07-2198

2015 SEP -9 PM 3:07
CLERK OF COURT S.C.

MOTION FOR PRESERVATION OF
ALL RAISED ISSUES IN (APCR).

Now comes the applicant, Osiel Narciso Gomez, #319935, who ask this Honorable Court to require the Court appointed attorney involved in this Post-Conviction Relief Action to be Meticulous in the preparation of any order or proposed orders prepared in this case. specifically, the applicant ask that each and every issue raised in the Post-Conviction relief application and any Amendment there of; the hearing, to be addressed in the order of the Court to be issued at the conclusion of the Evidentiary Hearing in this Matter. The reason for this Motion is that in Pruitt vs. STATE, 423 S.E.2d.127(1992), the Court Stated that this legal requirement under the law of South Carolina; pursuant to Statute, section §17-27-80. Also, see; Bryson vs. State, 328 S.C.236, 493 S.E.2d 500 (1997), Furthermore, in Land vs. State, 262 S.E.2d.at 737; "pursuant to §17-27-110, The Supreme Court of South Carolina, has adopted rules designed to aid in the Post-Conviction process, such as "rule 59(e), S.C.R.civP, which places upon appointed counsel the duty to asertion from the applicant whether He has included all grounds known to the applicant as a basis for attacking the judgement and sentence and to amend the application to include any claims Not already included. Land; supra,

THE APPLICANT; therefore, requests this Honorable Court grant the motion for the above stated reason.

Conclusion

For the reasons cited in the Post-Conviction relief application, and the amendment motion thereof, the applicant's conviction and sentence should be vacated, and Post-Conviction Relief granted.

Respectfully Submitted,

s/ Ortiz Narciso

Date: 04 Sept 2015

Notary: J. J. Amkle

Expire: 12-16-2019

2015 SEP -9 PM 3:07
 COURT S.C.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF BEAUFORT	)	CA NO: 2015 CP 07-2196
	)	
Osiel Narciso Gomez, #319935,	)	
Applicant,	)	
vs.	)	MEMORANDUM OF LAW IN SUPPORT
	)	OF APPLICATION FOR POST-CONVICTION
	)	RELIEF
State of South Carolina,	)	
Respondent.	)	

Above-Captioned Applicant will answer to Question Number 11(a)(b) of Application for Post-Conviction Relief ("APCR"), as accords to the answer to Question Number 10(a)(b) APCR, in the following manner.

Question 11(a), (APCR). I.

Fourth Amendment Violation

Illegal Search Incident to Arrest

Applicant's trial took place in (2007), two years prior to the United State Supreme Court holding in Arizona vs. Gant 556 U.S. 332 (2009). In Gant, the United States supreme Court the expansive searches allowed by Belton.* The Court noted that Belton had been widely understood to "allow a vehicle search incident to arrest of a recent occupant even if there is no possibility the arrestee could gain access to the vehicle at the time of the search." Id. at 1718. The Court found this reading incompatible with it's previous decisions regarding the basic scope of searches incident to lawful custodial arrests. Therefore the court held that "Police may search a vehicle incident to a recent occupant's arrest only when the arrestee unsecured and within reaching distance of the passenger compartment at the time of

search or when it is reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle." Id. *453 U.S.454 (1981).

Applicant appealed his conviction for trafficking cocaine and asserted on appeal that the circuit court erred in denying his motion to suppress drug evidence seized by police during a routine traffic stop. During the pendency of Applicant's appeal the United States Supreme Court decided Gant. Thus, the Court held that when the police conduct a search in objectively reasonable reliance on binding appellate precedent, the exclusionary rule does not apply. Therefore, the exclusion remedy was unavailable to Applicant.

However, the South Carolina Supreme Court agree with Applicant that the search incident to arrest in his case violated his Fourth Amendment Rights and Thus Gant applies Retroactively to this case, and Applicant may invoke its rule of substantive Fourth Amendment Law as a basis for seeking relief.*556 U.S. 332 (2009). See/ 397 S.C.24,29(S.C.1012), Attachment C(1)

ARGUMENT

The Fourth Amendment of the United States Constitution protects citizens from unreasonable searches and seizures. Arresting Applicant for a minor traffic violation when police testified they had reasonable supicion to believe that Applicant was engaged in drug dealing, based on an "On-going investigation," was unreasonable because the facts law enforcement presented to the trial court did not rise to the level of reasonable suspicion and because their actions were taken solely to circumvent presenting their case to a magistrate.

FACTS

Applicant was charged with drugs that were found in his car after police officers pulled him for a minor traffic violation. Admittedly, Applicant was

the target in an "On-going investigation" that began earlier in the day. [A]fter, Applicant was transported to the police station for failing to own a South Carolina driver's licence, officers ran a drug dog around Applicant's vehicle. It is unclear whether he was arrested for not having a South Carolina driver's licence, which would not be illegal, or because he did not have any license at all. (Tr.p.80). The dog alerted, and the car was searched. The drugs were located in the luggage compartment of the car, and in the center console. Based on this find, the police charged Applicant with Trafficking Cocaine. Officer Florencio testified that the search was conducted incident to arrest for the driver's license violation, and also that the dog alerted on the car (after) Applicant was already taken into custody. (Tr.p.74,83,85-86). Florencio testified that it was not searched pursuant to an inventory search. (Tr.p. 87).

Applicant's seizure by the officers was unreasonable because the "On-going investigation" was not supported by probable cause, and the officers actions were clearly intended to circumvent a magistrate's finding of probable cause. The search, was illegal pursuant to the recent U.S. Supreme Court case Arizona v. Gant, 556 U.S. 332, 129 S.Ct. 1710 (2009).

Officer Florencio's Investigation of Applicant

Officer Florencio testified to the investigation the Task Force conducted in this case. The "On-going investigation" stated the day of the arrest. (Tr.p.198). It was based on some information he received the substance of which was never revealed either during pre-trial, or during the trial itself. (Tr.p.198). Florencio knew that Applicant, along with other Hispanic males were at the Suburban Lodge. (Tr.p.199). Applicant's employer, Savannah Heartscapes, was the actual renter of the room.(Tr.p.199). Applicant was observed by member of the surveillance team traveling to a couple of automotive stores.(Tr.p.200). He did not walk out of either of there places

carring anything at all. (Tr.p.202,205-206). He was then observed working on his car. (Tr.p.203). He and other Hispanic males were also working on a truck. (Tr.p.203). Florencio admitted that he did not actually view Applicant at these places, but the Lieutenant Woodward, Sergeant Kobel, Officer Haroug, Officer Harold and Officer Light did (Tr.p.206-207). These officers did not testify at Applicant's trial.

After Applicant finished working on the car, he was seen taking phone call. He then went upstairs. Another officer then saw him go into his room. Then he came out carring a white T.Shirt "with something in it," place it in the car, and drive away. (Tr.p.208-209). Florencio did not personally see Applicant place anything into the car. (Tr.p.211). He was not even sure who saw Applicant place the white T. shirt into the car.(Tr.p.211). The car did not belong to Applicant.(Tr.p.218). Based on Applicant's peregrinations and placement of an unknown item in the car, however, Florencio directed another officer to pull Applicant over. (Tr.p.215-216). Applicant was placed under arrest for not having a South Carolina drivers licence. (Tr.p.216). It appears that he did, though in fact, have a driver's licence issued by the State of South Carolina. (Tr.p.137-138). He was then transported to a Hilton Head police station. (Tr.p.217). This series of events did not amount to probable cause that would have justified a search of the vehicle had the case been presented to a magistrate. State v. Gentile, 373 S.C. 506, 646 S.E.2d 171 (Ct. App. 2007).

After Applicant was removed from the scene, officer Hiers ran a drug dog around the car. The dog alerted, and the car was searched. In two locations - in the back of the car in the luggage compartment, and in the console -- drugs were found. (Tr.p.149-152). The drugs were not in plain view. (Tr.p.223).

Florencio traveled to the Hilton Head station, informed Applicant of what was found in the car, and promptly arrested him for trafficking cocaine. (Tr.p.223 - 224).

Law Enforcement's Actions Violated Applicant's 4th Amendment Rights

U.S. Const. Amend. IV provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

Applicant's rights were violated by the law enforcement seizure of him, predicated on their "On-going investigation," because they had not developed facts sufficient to present to a magistrate to secure a warrant for search of the car. Their actions were taken to circumvent their obligation to do so. Therefore, the arrest was made in an "extraordinary manner, unusually harmful to [Applicant's] privacy or ... physical interests." When v. United States, 517 U.S. 806, 818, 116 S.Ct. 1769 (1996).

In this case, law enforcement sought to accomplish, by way of pulling Applicant for a minor traffic infraction, what they were otherwise not entitled to do. Law enforcement was quite clear that the purpose of the pull was to search the car for drugs. (Tr.p.74, 78). Their actions, then, rendered the subsequent search illegal because the search incident to arrest was then untethered from the exigency justification that allow for the warrant exception. See Arizona v. Gant, 556 U.S. 332, 129 S.Ct. 1710 (2009). And see, Chimel v. California, 395 U.S. 752, 89 S.Ct. 2034 (1969). Additionally, they did not have reasonable suspicion which would have justified a prolonged

detention, had Applicant remained at the car and had not been immediately arrested. State v. Tindall, 379 S.C. 304, 665 S.E.2d 188 (Ct. App. (2008)). Law enforcement's actions were abusive, and the United States Supreme Court, in Atwater v. City of Lego Vista, 532 U.S. 318, 121 S.Ct. 1536 (2001), suggests in footnote 25 that such actions would be objectionable. Any other conclusion renders the Fourth Amendment a nullity and effectively creates a judicial review free zone on the roadways. Further, the police actions in this case ignore the admonition in Terry v. Ohio, 392 U.S. 1, 19, 88 S.Ct. 1868 (1968), that "the scope of [a] search must be strickly tied to and justified by the circumstances which rendered its initiation permissible."

In this case, the police may have had probable cause to believe that a minor traffic violation occurred, but they did not have reasonable suspicion, much less probable cause to believe that Applicant was engaged in any illegal activity. The officer's simply used driver's license issue to effect an arrest so they could conduct a fishing expedition because they knew they did not have probable cause to secure a warrant. This conduct has been expressly forbidden by the decision in Arizona v. Gant,: "Police may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment of the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest." Id. at 1723. Applicant was arrested and whisked away to another location. The officers should have taken their case to a magistrate if they wanted to search Applicant's car. Instead, law enforcement orchestrated a series of events designed to avoid having to do what they were obligated to do by law - present their case to a neutral and detached magistrate to make a determination of probable cause. Respectfully, Applicant asks this court to reverse his conviction.

Question 11(b), (APCR)

(1) Trial counsel committed constitutionally Ineffective Assistance by Failing to move for Suppression of State's Drug Evidence on Specific Ground of lack of Sufficient Probable Cause of Criminal Activity that Surpassed Applicant's Statutory - based Defense to the Traffic Stop.

Relevant case-file reveals that on August 3, 2005, Applicant was actively employed by a company named Savannah Heartscapes; the State admitted no evidence into the Trial Record that shows company employed Applicant to comit violation of South Carolina law.

Documentary evidence shows that, well before trial, the State Evidence against Applicant consisted of approximately one hundred and eleven (111) grams of powder cocaine found in a compartment within the vehicle Applicant was driving on August 3, 2005; prior to Beaufort County law enforcement finding such evidence in vehicle, Applicant committed no incarcerative violations of South Carolina traffic laws to prompt Corporal Mark Cobb (then employed by the Beaufort County Sheriff's Office) into making on independent traffic stop of Applicant on the "Cross Island Expressway" (Parkway), situated in the Hilton Head section of Beaufort County.

The above - outlined factual points were nedessary for understanding the below-noted allegations.

1. DEFICIENT PERFORMANCE

As a house-keeping matter, it must be a re-clarified that the U.S. Supreme Court expounded upon a criminal defendant's Sixth Amendment right to "... the assistance of counsel for his defense" as needed "... in order to protect the fundamental right to a fair trial" <see Strickland v. Washington, 466 U.S. 668, 685, 684, 104 S.Ct. 2052, 2063, 80 L.Ed.2d 674 (1984)>; when a convicted criminal defendant claims that his convivtion should be reversed due to

defective assistance of counsel, that defendant must show "that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment."< Strickland, at U.S. 687, 104 S.Ct. at 2064>.

In the instant case, presuming trial counsel made a sufficient factual and legal investigation, it is highly inconceivable why trial counsel did not assert the grace period for procuring vehicle registration defense to the alleged probable cause Corporal Cobb allegedly operated off of to conduct the traffic stop.

South Carolina law clearly allows owners and/or operators of foreign vehicles being moved into this state a forty-five (45) day grace period in which to procure registration and/or transfer of license plates for South Carolina<see S.C. Code Ann. §56-3-210(A); accord S.C. Code Ann. §56-3-150((B), as Amended)>. In fact, the law further provides that even if Applicant chose to maintain Georgia domicile, yet obtain a South Carolina license for the limited purpose of his Savannah Heartscapes employment (to help support his family), the provisions underlying §56-3-150 granted such privilege to drive on South Carolina Highways for up to one hundred and fifty (150) days<Compare United States v. Johnson, 256 F.3d 214, 217 (4th Cir. 2001)("The mere display of a license plate from another state is not relevant at all as to whether Johnson had established a domicile in South Carolina or had been operating the vehicle in South Carolina for an accumulated period of greater than 150 days.")>; and even, as a matter of construction, if Applicant were to obtain vehicle registration in South Carolina, by requirements thereof, yet was somehow "Delinquent" in so obtaining due to negligent unawareness, S.C. Code Ann. §56-3-840 allows a thirty (30) day grace period to elapse before Applicant would have been able to be charged and found "guilty of a misdemeanor."<

accord S.C. OP. Atty. Gen., No.85-54,p.160 (1985)("Thirty-day grace period provided by §56-3-840 should be construed as being applicable to vehicles required to be registered annually pursuant to §56-3-375.")>. Considerably, it is quite possible that the Georgia license tags became expired sometime around the August 3, 2005 date - whereas, had they actually been expired over thirty-some days prior to August 3, 2005, Applicant would've surely been subject to provision of punishment under Georgia laws within his frequent trips between there and South Carolina for family visits during available off time<see O.C.G.A. §§40-2-8, et.seq.> as it is virtually inconceivable to have operated a vehicle in such a manner and not be cited by Georgia or South Carolina law enforcement prior to August 3, 2005.

Thus, trial counsel had the "grace period" defense available, following the factual and legal investigation he is presumed to have conducted prior to trial. Further thereon, when trial counsel became aware of the fact that then Sergeant Andres Florencio (Beaufort County Sheriff's Office) authored a Supplemental Incident Report which detailed the traffic stop of Applicant by Corporal Cobb, inter alia, Sgt. Florencio noted the vehicle as a "1999 Red Ford Explorer with Ga. vehicle tag [REDACTED]", and that Applicant "did not have a valid driver's license and that his vehicle registration/tag was expired". Congruent with Sgt. Florencio's Report failing to detail any reasonable articulable facts of criminal activity prompting an investigation of Applicant initially, Florencio's Report also fails to mention whether Applicant falls into the parameters of being in South Carolina for any amount of time, so as to determine the applicability of the "grace period" concerning the traffic stop. As such, trial counsel's failure to assert this defense to the traffic stop based on inadequate probable cause, in light of applicable "grace period", constitutes deficient performance for purposes of Strickland, supra.

2. PREJUDICE

Strickland is also clear in stating "[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment."< at U.S. 691, 104 S.Ct. at 2066 (citation omitted)>.

Applicant's trial record ("Tr.") discloses that the aforementioned one hundred and eleven (111) - some grams of powder cocaine was entered into State's Evidence under designation "1-A" [see Tr.pg. 265,ln.4-11], and was referred to by Solicitor Smith in her Opening Statements [Tr. pg. 124,ln.5-9;Tr. pg.125,ln.3-9] as well as her Closing Statements [Tr.pg.290,ln. 23 to Tr.pg.293,ln.4]; conclusively, the use of the cocaine at trial was essential to the State's case against Applicant.

Numerous points will illustrate that had trial counsel moved for suppression of the cocaine, on the specific ground of a lack of probable cause of criminal activity which surpassed Applicant's "grace period" defense, that the trial would not have proceeded beyond the motion to suppress itself.

First, it must be noted that if no reasonable articulable facts of unlawful conduct exist, then the "fruit of the poisonous tree" doctrine will require suppression of any items obtained within a traffic stop< see State v. Copeland, 321 S.C. 318, 323, 468 S.E.2d 620, 624 (S.C. 1996)(citing Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963)); compare United States v. Wilson, 205 F.3d 720,723 (4th Cir. 2000)("As a result, such a stop "must be justified by probable cause or a reasonable suspicion, based on specific and articulable facts, of unlawful conduct."")(citation omitted)>.

Secondly, as a matter of reference to the aforesaid point, Corporal Cobb did not inquire as to how long Applicant was operating the Explorer in South Carolina to determine if Applicant was in violation of the above-outlined laws

governing vehicle registration or, likewise, fell within the parameters of the "grace period"; and such inquiry is presumably outside of a law enforcement officer's discretion by ineptitude <see, e.g., State v. Butler, 343 S.C. 198, 205, 539 S.E.2d 414,418 (S.C. App. 2000)("To lawfully stop and detain Butler, Officer Lynch needed an objective, particularized, and articulable reason as to why he thought Butler was no longer within his forty-five day grace period or otherwise involved in criminal activity." "Lynch provided no such reason.") (Footnote 19 omitted).>.

Thirdly, and most importantly here, Strickland "Prejudice" can surely be found upon a trial counsel's failure to present evidentiary - base defenses to a State's charges < see, e.g., Winston v. Pearson, 683 F.3d 489, 505-506 (4th Cir. 2012) >; congruently, the South Carolina Supreme Court recently agreed that Applicant's very challenged violation of his Fourth Amendment rights occurred due to the fact having been presented to the trial court by police "did not rise to the level of "reasonable suspicion"... "<see Narciso v. State, 397 S.C. 24, 29, 723 S.E.2d 369, 371 (S.C. 2012)>, and it follows that the evidence could have been surely suppressed.

Therefore, a reasonable probability that the cocaine would've more than likely have been suppressed is sufficient to conclude that trial counsel's "deficient performance" "prejudiced" Applicant's defense.

Question 11(b)(ii),(APCR)

Trial Counsel Committed Constitutionally Ineffective Assistance by Failing to Accept a Plea Bargain of a Lesser Included Offense of 7-25 Years, which Would Have Significantly Reduced Applicant's Sentence.

In the above record of the Applicant, documentary evidence shows that on 6/27/2006, the Solicitor Office fax Mr. Donald Colongeli a plea offer

for a discretionary term of from 7 to 25 years for the lesser included offense of Trafficking Cocaine (28-99 grams)(see Attachment (s) A(1),(3)); Deputy Solicitor Angela McCall Tanner was very clear about having Mr. Colongeli inform Applicant about the impending expiration of the plea offer (Attachment A(2), as well as the official final expiration date itself (Attachment A(1)) being July 13, 2006 - sufficient time after Applicant's August 3, 2005 arrest date. Applicant also submits that Deputy Solicitor Tanner originally made an offer under the same terms on September 29, 2005 (see Attachment B(1)) which Mr. Colongeli did not inform Applicant of. And Applicant would've taken the discretionary term plea offer versus the mandatory twenty-five (25) years he faced by so refusing, as the benefit would've been more reasonable to Applicant at that time; Mr. Colongeli's deficient performance, in failing to notify Applicant about the plea offer, prejudiced Applicant's right to Effective Assistance<see Missouri v. Frye, 80 U.S.LW.4253, 132 S.Ct. 1399, 1408, 182 L.Ed.2d 379 (2012); accord United States v. Mason, 481 Fed. Appx. 815, 819 2012 WL 1997700,**3 (4th Cir. 2012); Bell v. State, 410 S.C. 436, 442-443, 765 S.E.2d 4, 7-8 (S.C. App. 2014)>.

Question 11(b)(iii), (APCR)

Trial Counsel committed Constitutionally Ineffective Assistance by failing to Object to Hearsay Testimony.

The record reveals that Florencio testified to the investigation the Task Force Conducted in the Applicant's Case. The "On-going investigation" stated the day of arrest. It was based on some information he received, the substance of which was never revealed either during pre-trial or during the trial itself. Florencio knew that Applicant and other Hispanic males were at the Suburban Lodge. Applicant employer, Savannah Heartscapes, was the actual renter of the room. Applicant was allegedly observed by members of the

Surveillance team traveling to a couple of automotive stores. Applicant did not walk out of either of these places carrying anything at all. Applicant was then seen working on his car. Applicant and other Hispanic males were also working on a truck. Florencio admitted that he did not actually view Applicant at these places, but that Lieutenant Woodward, Sergeant Kobel, Officer Haroog, Officer Harold, and Officer Light did. These officers did not testify at the Applicant's trial. The Applicant was denied a fair trial and was prejudiced by his attorney's failure to object to all this hearsay testimony by Officer Florencio throughout the record. (Tr.p. 198-228).

Defense counsel failed but should have objected to the prejudicial hearsay testimony in the record. see e.g. State v. Williams, 285 S.C. 544, 331 S.E.2d 354 (Ct. App. 1985); State v. Pollard, 260 S.C. 457, 196 S.E.2d 839 (1973); Cooper Corp. v. Jeffcoat, 217 S.C. 489, 61 S.E.2d 53 (1950). However, counsel cannot assert trial strategy as a defense for failure to object to comments which constitute an error of law and are inherently prejudicial. See Dawking v. State, 346 S.C. 151, 551 S.E.2d 260 (2001).

Question 11(b)(iv), (APCR)

Trial Counsel's failure to move for an Evidentiary Hearing under Franks v. Delaware, to demonstrate coordinated police introduction of information to Magistrate Judge with reckless disregard for truth of such information, prejudiced Applicant's 6th Amendment right to the Effective Assistance of Counsel.

Attorney Colongeli, whose acts prior to and during trial are presumed compliant with dictates of Strickland, above, is shown by relevant constructions of clear and convincing evidence to have performed 'Deficiently' while perfecting noted above 'acts'; Applicant states: (i) Presuming Mr.

Colongeli conducted the 'factual and legal investigation' as established by Strickland, following receipt of Initial Discovery items (including, without limitation, Police Reports, Warrants), Mr. Colongeli cannot explain why he did not move for an Evidentiary Hearing to challenge the veracity of Officer Florencio's assertion of there being a Traffic Stop grounded upon actual facts of Applicant committing a Traffic violation. An indication of Officer Florencio operating under a 'reckless disregard for the truth' of the information he gave to the Magistrate Judge for issuance of the Warrant(s) exists within the 'omission' of the relevant facts surrounding the Traffic Stop itself within the warrant for Trafficking Cocaine (see Attachment C). Presuming Mr. Colongeli discovered such omission from said investigation conducted, it was 'Deficient Performance' in failing to move for an Evidentiary Hearing pursuant to Franks v. Delaware, where reasonable attorneys test the probable cause supporting a Traffic Stop to, hopefully, move for suppression of any unlawful fruits of a search conducted pursuant to such Traffic Stop <see, e.g., United States v. Westover, 812 F.Supp. 38,39 (D.Vt. 1993)> (Motion to Reconsider request for Franks hearing granted where counsel filed an affidavit claiming affiant [Chisolm] "... omitted certain details and in one instance gave misleading information")>; 'sufficient' probable cause to justify a Traffic Stop is pretty well-established in Fourth Amendment law <see United States v. Sokolow, 490 U.S. 1, 109 S.Ct. 1581, 104 L.Ed.2d 1 (1989); accord United States v. Arvizu, 534 U.S. 266, 122 S.Ct. 744, 151 L.Ed.2d 740 (2002); United States v. Sprinkle, 106 F.3d 613 (4th Cir. 1997)> (Court found insufficient reasonable suspicion for the stop)>. Further, Mr. Conlongeli's noted deficient performance 'Prejudiced' Applicant's defense of Officer Florencio actually omitting details from the affidavit (to conceal the fact of

Applicant not having acted in violation of South Carolina's Traffic laws, codified under Title 56; see also GROUND 11(b)(1), above), as well as failing to state in the 'Supplemental Incident Report' (see Attachment D) the pertinent information facilitating the 'drug investigation' itself, by failing to move for a Franks hearing where there is a reasonable probability that, it Florencio was further questioned on his reason(s) for conducting the Traffic Stop through Corporal Cobb, and was found to have no sufficient probable cause for initiating the Traffic Stop and any resulting search, the Magistrate Judge or the Circuit Judge could've found the Trafficking Cocaine charges should be dismissed with discovered evidence suppressed due to Officer Florencio's 'reckless disregard for the truth' before the Magistrate Judge.

Mr. Colongeli was, therefore, Ineffective as interpreted by Strickland.

CONCLUSION

Wherefore, based upon the following PCR Application and Memorandum of Law in Support, Applicant moves this Honorable Court and would pray this Court to Vacate the current jury verdict and sentence within the circumstances as contained within the application for post conviction relief.

Respectfully submitted,

Dated

9/4, 2015

s/ Oseil Narciso
 Oseil Gomez Narciso, #319935
 McCormick Correctional Inst.
 386 Redemption Way - FLA-258
 McCormick, S.C. 29899

STATE OF SOUTH CAROLINA)

COUNTY OF BEAUFORT)

Oseil Gomez Narciso, #319935,)

Applicant,)

v.)

State of South Carolina,)

Respondent.)

IN THE COURT OF COMMON PLEAS

CA No: 2015 CP-07-2196

AFFIDAVIT OF SERVICE BY MAIL

2015 SEP -9 PM 3:07
CLERK OF COURT
COUNTY S.C.

PERSONALLY appeared before me Oseil Gomez Narciso, #319935 who on oath, after being sworn, states the following:

1. That I am an inmate of the South Carolina Department of Corrections and housed at the address below.

2. That regular communication by mail exist throughout the State of South Carolina and this is a proper circumstance of service by mail.

3. That I have this day served a copy of my Application for Post Conviction Relief and my MEMORANDUM OF LAW IN SUPPORT OF MY ORIGINAL AND AMENDED APPLICATION for POST CONVICTION RELIEF in the above-captioned matter on the Respondent by depositing it in the United States mail, postage prepaid or by person to person, hand to hand service below:

Addressed:

OFFICE OF CLERK OF COURTPost Office Drawer 1128Beaufort South Carolina29901-1128Date 9/4/, 2015SWORN and subscribed before me this 04 day of Sept, 2015St. Ample
Notary Public for South Carolina.My Commission Expires 12-16-2019s/ Oseil NarcisoOseil Gomez Narciso #319935
McCormick Correctional Inst.
386 Redemption Way - FlA-258
McCormick, SC 29899

STATE OF SOUTH CAROLINA
FOURTEENTH JUDICIAL CIRCUIT

Post Office Box 2226
Beaufort, South Carolina 29901



Telephone: (843) 470-3725
Facsimile: (843) 470-3732

ISAAC MCDUFFIE STONE, III
SOLICITOR

PLEA OFFER:

DEFENDANT'S NAME: Osiel Gomez Narciso

CHARGE(S):

Trafficking Cocaine (100 -199 grams)
2005-GS-07-01304

PLEA TO: lesser included offense:
Trafficking Cocaine (28 - 99 grams)

DISPOSITION OF OTHER CHARGES:

N/A

SENTENCE RECOMMENDATION / NEGOTIATION:

Sentence in the Judge's discretion.

*this offense carries 7 - 25 years

charge as indicted carries mandatory 25 years

OFFER EXPIRES: June 28, 2006

CASE MUST BE PLED BY: July 13, 2006

SOLICITOR: Angela McCall-Tanner
DEFENSE ATTORNEY:

DATE: 6-28-06
DATE:

State of South Carolina
OFFICE OF THE SOLICITOR
FOURTEENTH JUDICIAL CIRCUIT



ALLENDALE, BEAUFORT
COLLETON, HAMPTON AND
JASPER COUNTIES

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TELEPHONE: (843) 470-3725
FACSIMILE: (843) 470-3732

Isaac McDuffie Stone, III
SOLICITOR

June 27, 2006

Mr. Donald C. Colongeli, Esquire
Post Office Box 6658
Hilton Head Island, South Carolina 29938

Sent via facsimile: (843) 785-9712

Re: State v. Osiel Gomez Narciso

Dear Don,

Enclosed is a plea offer in the above named case, which is scheduled for review at the upcoming roster meeting on Wednesday, June 28th. Please inform your client that this offer **will expire** by the end of the meeting. If his decision is to decline the offer please have him sign the accompanying form. A trial date will then be scheduled in this matter.

I look forward to working with you on the disposition of this matter.

With kindest regards, I remain,

Sincerely,

Angela McCall-Tanner
Deputy Solicitor

STATE OF SOUTH CAROLINA
FOURTEENTH JUDICIAL CIRCUITPost Office Box 2226
Beaufort, South Carolina 29901ISSAC MCDUFFIE STONE, III
SOLICITORTelephone: (843) 470-3725
Facsimile: (843) 470-3732*Attached
a Disk A #1
Exhibit A #1*

FACSIMILE TRANSMITTAL SHEET

TO: Mr. Donald C. Colongeli	FROM: Angela McCall-Tanner
COMPANY:	DATE: [REDACTED]
FAX NUMBER: 843-785-9712	TOTAL NO. OF PAGES INCLUDING COVER: 4
PHONE NUMBER:	SENDER'S REFERENCE NUMBER:
RE: State v. Osiel Narciso	YOUR REFERENCE NUMBER:

URGENT FOR REVIEW PLEASE COMMENT PLEASE REPLY PLEASE RECYCLE

NOTES/COMMENTS:

DC,
[REDACTED]
[REDACTED] interest in the case. I sent a message to [REDACTED]
[REDACTED] my case any longer and I needed to see a copy of an indictment. Still no word
- so here's my offer.

STATE OF SOUTH CAROLINA
FOURTEENTH JUDICIAL CIRCUIT

Post Office Box 2226
Beaufort, South Carolina 29901



Telephone: (843) 470-3725
Facsimile: (843) 470-3732

RANDOLPH MURDAUGH, III
SOLICITOR

PLEA OFFER:

DEFENDANT'S NAME: Osiel Gomez Narciso

CHARGE(S): Trafficking Cocaine (100 - 199 grams)
2005-GS-07-1304

PLEA TO: Lesser Included offense:
Trafficking Cocaine (28 - 99 grams)



RECEIVED
10/5/05

DISPOSITION OF OTHER CHARGES:

N/A

SENTENCE RECOMMENDATION / NEGOTIATION:

Judge's Discretion, offense carries Seven (7) to Twenty-Five (25) Years
(original charge carries mandatory Twenty-Five (25) years)

OFFER EXPIRES: October 5th, 2005

CASE MUST BE PLED BY: October 20th, 2005

SOLICITOR: Angela McCall-Tanner
DEFENSE ATTORNEY:

DATE: 9-29-05
DATE:

PLEA OFFER REJECTION

I acknowledge that I have been given a plea offer by the 14th Circuit Solicitor's Office. The offer was for me to plead to the following charges:

And be sentenced to the following:

I reject this plea offer and request a trial.

Defendant	Date

Attorney for the Defendant	Date

**THE STATE OF SOUTH CAROLINA
In The Supreme Court**

Osiel Gomez Narciso, Petitioner,

v.

State of South Carolina, Respondent.

ON WRIT OF CERTIORARI

Appeal From Beaufort County
J. Cordell Maddox, Jr., Circuit Court Judge

Opinion No. 27104
Heard January 25, 2012 - Filed March 14, 2012

AFFIRMED IN PART, REMANDED IN PART

Appellate Defender Elizabeth A. Franklin-Best, of
Columbia, for Petitioner.

Attorney General Alan Wilson, Chief Deputy Attorney
General John W. McIntosh, Assistant Deputy Attorney
General Sailey W. Elliott, and Assistant Attorney General
Matthew J. Friedman, all of Columbia, for Respondent.

CHIEF JUSTICE TOAL: Oseil Gomez Narciso (Petitioner) appeals his conviction for trafficking cocaine, and asserts that the circuit court erred in denying his motion to suppress drug evidence seized by police during a routine traffic stop. Following his conviction, Petitioner signed a Consent Order Granting Belated Direct Appeal (Consent Order) and waived his right to raise any other post-conviction relief (PCR) allegations. Petitioner requests this Court remand his case to determine whether that waiver was entered into knowingly and voluntarily. We affirm the circuit court's order denying Petitioner's motion to suppress, and remand the case for a determination as to whether Petitioner's waiver was entered into knowingly and voluntarily.

FACTUAL/PROCEDURAL BACKGROUND

On August 3, 2005, the Beaufort County Sheriff's Office (BCSO) conducted a drug investigation focusing on Petitioner. Police believed that Petitioner may have been involved in the sale and distribution of cocaine in the Hilton Head/Bluffton area of Beaufort County. A sheriff's deputy received information that Petitioner might be operating a vehicle in the area with expired license plates and possibly no driver's license. The deputy conducted a traffic stop of Petitioner after confirming that his

EXHIBIT 1

630 removed him from the vehicle. Police then conducted a "K-9" search of the vehicle. The narcotics-detection dog used in the search alerted on drug residue on the vehicle, and police conducted a search of the cargo compartment. Police seized powdered cocaine from the vehicle, and charged Petitioner with knowingly and intentionally possessing a quantity of powder cocaine with a weight in excess of one hundred grams.

The Beaufort County Grand Jury indicted Petitioner for trafficking cocaine in excess of one hundred grams, and Petitioner proceeded to trial. The jury found Petitioner guilty as indicted. The circuit court sentenced Petitioner to twenty-five years imprisonment. Petitioner did not appeal his conviction or sentence, but subsequently filed a PCR application.

Petitioner claimed in his PCR application that his trial attorney failed to file a timely notice of appeal even after assuring Petitioner that he "had multiple grounds for appeal," and that he "would almost certainly be successful in overturning the convictions at the appellate level." According to the Consent Order, Petitioner's trial counsel admitted that he failed to file an appeal even though Petitioner requested one be filed. Thus, the State consented to granting Petitioner a belated direct appeal pursuant to *White v. State*, 263 S.C. 110, 208 S.E.2d 35 (1974)[1]. In the same Consent Order, Petitioner "waived his right to raise any other PCR allegations."

In a petition for writ of certiorari to this Court, Petitioner asserted that the PCR judge properly found that he did not waive his right to a direct appeal, and requested this Court remand his case to determine whether his waiver of any other PCR allegations was entered into knowingly or voluntarily. This Court granted the petition for writ of certiorari as to whether Petitioner knowingly and voluntarily waived his right to direct appeal, dispensed with further briefing on that question, and elected to proceed with further review of the direct appeal issue—the validity of the stop and search. Additionally, this Court granted review of whether Petitioner's waiver of any other PCR allegations was entered into knowingly and voluntarily.

ISSUES PRESENTED

- I. Whether the circuit court erred in admitting evidence obtained as a result of Petitioner's traffic stop.
- II. Whether Petitioner's waiver of PCR allegations, other than the belated direct appeal issue, was entered into knowingly and voluntarily.

STANDARD OF REVIEW

On appeal from a motion to suppress on Fourth Amendment grounds, this Court applies a deferential standard of review and will reverse only if there is clear error. *State v. Tindall*, 388 S.C. 518, 520, 698 S.E.2d 203, 205 (2010) (citation omitted). However, this Court is not barred from conducting its own review of the record to determine whether the trial judge's decision is supported by the evidence. *Id.*

On certiorari in a PCR action, the Court applies the "any evidence" standard. Accordingly, this Court will affirm if any evidence of probative value in the record exists to support the findings of the PCR court. *Ferry v. State*, 394 S.C. 62, 66, 714 S.E.2d 326, 328 (2011) (citation omitted).

LAW/ANALYSIS

- I. Whether the circuit court erred in admitting evidence obtained as a result of Petitioner's traffic stop.

"reasonable suspicion," and that he was "unreasonably seized." Thus, according to Petitioner, his 631 Fourth Amendment rights were violated, and this Court should reverse his conviction. We agree with Petitioner that the search incident to arrest in this case violated his Fourth Amendment rights. However, for reasons explained below, the exclusion remedy is unavailable to Petitioner, and thus his conviction will stand.

In *New York v. Belton*, 453 U.S. 454 (1981), the United States Supreme Court initially explained the constitutionally permissible scope of a search incident to arrest. In that case, police ordered the driver of a speeding vehicle to pull over to the side of the road and stop. *Id.* at 455. The policeman asked to see the driver's license and automobile registration and simultaneously smelled burnt marijuana. *Id.* at 455-56. The officer directed the occupants out of the car and conducted a pat down of the four men. *Id.* at 456. The officer then conducted a search of the passenger compartment of the car, including a black leather jacket belonging to Belton. *Id.* He unzipped one of the pockets of the jacket and discovered cocaine. *Id.*

Belton argued that the cocaine had been seized in violation of the Fourth and Fourteenth Amendments. *Belton*, 453 U.S. at 456-57. The Court stressed the need to provide a "workable rule," and held that when a policeman has made a lawful custodial arrest of the occupant of an automobile, "he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile." *Id.* at 459-60. The Court reasoned that the police should also be allowed to examine the contents of any containers found within the passenger compartment, "for if the passenger compartment is within reach of the arrestee, so also will containers in it be within his reach." *Id.* at 460-61 (citations omitted).

It was never established before the stop that petitioner was involved in drugs

In the instant case, the police stopped Petitioner as part of an ongoing drug investigation, but primarily because the license tags on his automobile were expired. The police officer asked Petitioner for his driver's license, and verified that Petitioner did not possess a valid driver's license. Thus, he arrested Petitioner, and police searched Petitioner's vehicle incident to that arrest.

Petitioner challenged the search at trial. The circuit court judge initially expressed concern at the vehicle search following a mere traffic stop, but denied Petitioner's motion to suppress:

It concerns me that the law enforcement in this case would risk this investigation by making a search under these circumstances without obtaining a search warrant. It would have been a very easy thing to do. There was just no reason that it needed to be done the way that they did it But after looking especially at the case of *New York v. Belton*, 433 U.S. 454, is [sic] the only thing that tips the scales in the State's favor in this case; and that is that a search may be made incident to an arrest of the passenger compartment of the vehicle, including containers located in the passenger compartment where the search incident to arrest even if the detainee has been arrested and removed from the vehicle.

Petitioner's trial took place in 2007, two years prior to the United States Supreme Court's holding in *Arizona v. Gant*, 556 U.S. 332 (2009). In *Gant*, the United States Supreme Court limited the expansive searches allowed by *Belton*. The Court noted that *Belton* had been widely understood to "allow a vehicle search incident to arrest of a recent occupant even if there is no possibility the arrestee could gain access to the vehicle at the time of the search." *Id.* at 1718. The Court found this reading incompatible with its previous decisions regarding the basic scope of searches incident to lawful custodial arrests. *Id.* at 1719 (citation omitted). Therefore the Court held that police may search a vehicle incident to a recent occupant's arrest only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search or when it is reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle. *Id.* (citing *Thornton v. United States*, 541 U.S. 615, 624-25

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on direct review or not yet final, with no exception for cases in which a new rule constitutes a 'clear break' with the past." *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987). Petitioner's conviction has not yet become final on direct review. Thus, *Gant* applies retroactively to this case, and Petitioner may invoke its rule of substantive Fourth Amendment law as a basis for seeking relief. However, our analysis of the instant case is further controlled by the United States Supreme Court's decision in *Davis v. United States*, 131 S.Ct. 2419 (2011).

In *Davis*, the defendant was charged and convicted of unlawful possession of a firearm based on discovery of a revolver in a stopped automobile in which he was the only passenger. *Id.* at 2425-26. During the pendency of Davis's appeal, the United States Supreme Court decided *Gant*. The Eleventh Circuit applied *Gant*'s new rule and held that the vehicle search incident to arrest violated Davis's Fourth Amendment rights. *Id.* at 2426 (citation omitted). However, the court concluded that penalizing the arresting officer for following binding appellate court precedent would do nothing to deter Fourth Amendment violations. *Id.* (citing *United States v. Davis*, 598 F.3d 1259, 1265-66 (2010)).

The United States Supreme Court agreed, and reasoned that the acknowledged absence of police culpability doomed Davis's claim. *Id.* at 2428. "Police practices trigger the harsh sanction of exclusion only when they are deliberate enough to yield 'meaningful deterrence' and culpable enough to be 'worth the price paid by the justice system.'" *Id.* (citing *Herring v. United States*, 555 U.S. 135, 144 (2009)). Excluding evidence in cases where the "constable" has scrupulously adhered to governing law deters no police conduct and imposes substantial social costs. *Davis*, 131 S.Ct. at 2434. Thus, the Court held that when the police conduct a search in objectively reasonable reliance on binding appellate precedent, the exclusionary rule does not apply. *Id.*

In the instant case, the search incident to arrest violated Petitioner's Fourth Amendment rights pursuant to *Gant*. However, excluding the evidence against Petitioner would not deter police misconduct because the police in this instance conducted a search incident to arrest pursuant to binding appellate precedent. See *id.* at 2426-28. Moreover, exclusion of the evidence in this case would result in severe social costs, including the articulation of an inexplicable and undecipherable message to law enforcement regarding how to conduct a legal search. The protection of the Fourth Amendment can only be realized if the police are acting under a set of rules which make it possible to reach a correct determination beforehand as to whether an invasion of privacy is justified in the interest of law enforcement. Wayne R. LaFare, "Case-By-Case Adjudication" Versus "Standardized Procedures": *The Robinson Dilemma*, 1974 Sup. Ct. Rev. 127, 142 (1974).

This Court will only reverse the circuit court's decision on a motion to suppress when there is clear error. *State v. Tindall*, 388 S.C. 518, 520, 698 S.E.2d 203, 205 (2010). The circuit court in this case applied the established law to a search executed pursuant to binding precedent. Thus, *Davis v. United States*, and our own standard of review, commands that the circuit court's decision be affirmed.[2]

You actually won your case

II. Whether the Petitioner's waiver of PCR allegations, other than the belated direct appeal issue, was entered into knowingly and voluntarily.

Petitioner signed a consent order granting belated direct appeal and waived his right to raise any other PCR allegations. He now asks this court to remand his case for a determination as to whether he knowingly and voluntarily waived his right to raise additional PCR claims.

In order to determine whether a waiver is effective, the court examines the particular facts and circumstances surrounding the case, including the background, experience, and conduct of the accused. *Spoone v. State*, 379 S.C. 138, 143, 665 S.E.2d 605, 607 (2008) (citing *United States v. Broughton-*

conviction relief, provided they were knowing and voluntary. *Id.* at 143, 665 S.E.2d at 607. A defendant's knowing and voluntary waiver of statutory or constitutional rights must be established by a complete record, and may be accomplished by a colloquy between the court and defendant, between the court and defendant's counsel, or both. *Brannon v. State*, 345 S.C. 437, 439, 548 S.E.2d 866, 867 (2001).

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In *Spoone v. State*, 379 S.C. 138, 665 S.E.2d 605 (2008), this Court addressed whether a PCR court erred in enforcing a written plea agreement wherein the petitioner waived his right to direct appeal, PCR, and habeas corpus relief. The petitioner argued that his waiver was not knowing and intelligent because there was no discussion at the plea proceeding about the extent of his understanding of the waiver. *Id.* at 141, 665 S.E.2d at 607.

The Court took into account that although petitioner had only a ninth grade education, the text of the written plea agreement was straightforward. *Id.* at 143-44, 665 S.E.2d at 608. In addition, the plea colloquy showed that the PCR court specifically asked petitioner about the waiver both in the language of the plea agreement, and in "plain language." *Id.* Two attorneys accompanied petitioner to the plea hearing and both signed the written plea agreement along with petitioner. *Id.* Thus, this Court held that the PCR court correctly enforced the waiver and dismissed petitioner's PCR application. *Id.*

In this case, according to the Consent Order, Petitioner appeared before the PCR court on August 26, 2008. The Consent Order states that Petitioner waived his right to raise any other PCR allegations, but was "granted a belated direct appeal pursuant to *White v. State*." The record before this Court of the colloquy between the parties consists of the following:

The court: What's the—what we got this morning?

Mr. Friedman: Your Honor, the first one is Osiel Gomez Narcisco [sic].

The court: All right.

Mr. Friedman: May we approach on this one?

The court: Yeah

(Bench conference)

Mr. Friedman: Thank you, Your Honor.

The court: Okay. Appreciate it. Thank you.

The Consent Order signed by Petitioner is straightforward. However, Petitioner used an English-speaking interpreter throughout his original trial, and apparently has, at best, a limited command of the English language. The colloquy provided to this Court does not show that the PCR court specifically asked Petitioner about the waiver, either in the language of the Consent Order, or in "plain language."

The State argues that Petitioner's case is distinguishable from *Spoone* because in that case the issue was "whether the right to appellate review and post-conviction review may be waived by a written plea agreement . . .," and that "[Petitioner] proceeded to trial and was convicted." This is a distinction without a difference. The key issue in *Spoone* and in Petitioner's case is the circumstances surrounding the waiver of the right to appeal PCR allegations. Aside from the consent agreement, the record in this case does not support the conclusion that Petitioner entered into the agreement knowingly and voluntarily. Additionally, the colloquy between the court and the defendant in this case does not clearly establish that

affirm the PCR court's findings if any evidence of probative value exists in the record. *Terry v. State*, 394 S.C. 62, 66, 714 S.E.2d 326, 328 (2011). However, finding that no such evidence exists in the instant case, we must remand for a determination as to whether Petitioner's waiver was entered into knowingly and voluntarily.

CONCLUSION

We affirm the circuit court's denial of Petitioner's motion to suppress. However, the record does not adequately demonstrate whether Petitioner's waiver was in accordance with this Court's waiver jurisprudence. Thus, we remand the case for a determination on that issue.

AFFIRMED IN PART, REMANDED IN PART.

PLEICONES, BEATTY, KITTREDGE and HEARN, JJ., concur.

[1] In *White v. State*, 263 S.C. 110, 113, 208 S.E.2d 35, 36 (1974), the defendant was convicted of burglary and sentenced to twenty years imprisonment. The defendant did not appeal his conviction or sentence, but subsequently filed a petition for PCR and a circuit court denied that relief in a full evidentiary hearing. *Id.* The defendant argued on appeal that the PCR judge should have ordered a new trial because the defendant did not knowingly and intelligently waive the right to appeal from his conviction and sentence. *Id.* at 117, 208 S.E.2d at 39. The defendant's trial counsel testified at the PCR hearing that he did not advise the defendant of his right to appeal because he was certain the defendant knew of his rights due to his prior criminal record. *Id.* The PCR judge found that the defendant did not knowingly and intelligently waive his right to appeal, and directed defendant's new counsel to secure a belated appeal to this Court from his conviction and sentence. *Id.* at 118, 208 S.E.2d at 39. This Court found that with regard to this belated appeal, no notice of appeal had been filed, and thus the Court had no jurisdiction over such an appeal. *Id.* at 119, 208 S.E.2d at 39. However, the Court reviewed the record in connection with the properly presented PCR appeal and ruled that "there was no reversible error in the trial and that there was not an arguably meritorious ground of appeal, even if notice of intention to appeal had been timely served" *White*, 263 S.C. at 119, 208 S.E.2d at 40.

[2] Respondent argues that due to *Gant*, the "search-incident-to-arrest logic is no longer appropriate grounds for denying the suppression motion," and urged this Court to find the search was justified under the automobile exception. However, the decision in *Davis* being dispositive, this Court need not reach the automobile exception, or any other grounds, for upholding the search. See *Futch v. McAllister*, *People v. George*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1998) (holding that appellate courts need not discuss remaining issues when determination of a prior issue is dispositive).

EXHIBIT 2

STATE OF SOUTH CAROLINA

IN THE COURT OF GENERAL SESSIONS

COUNTY OF
STATE

Beaufort

VS.

Oziel Naraiso Gomez

05-GS-07-1204

INDICTMENT/CASE#:

AKA:

Race: H

Sex: M

Age:

DOB:

SS#:

Address:

City, State, Zip

DL#

SID#

A/V# 4915578

Date of Offense: 8/8/05

S.C. Code §: 44-53-270(E)(2)(c)

CDR Code #: 0 / 2 / 8 / 0

SENTENCE SHEET

In disposition of the said indictment comes now the Defendant who was ☒ CONVICTED OF or ☐ PLEADSTO: Trafficking in excess of 100 grams Cocainein violation of §44-53-270 S.C. Code of Laws, bearing CDR Code # 0280☐ NON-VIOLENT☒ VIOLENT☒ SERIOUS☐ MOST SERIOUS☐ Mandatory GPS (CSO☐ §17-25-45w/minor 1st or Lowd Act)The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. (Defendant initial)The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

Kensley Smith

Solicitor

Oziel N

Defendant

[Signature]

Attorney for Defendant

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,for a determinate term of 25 days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years

and/or to pay a fine of \$ _____; provided that upon the service of _____ days/months/years and/or payment of \$ _____ plus costs and

assessments as applicable; the balance is suspended with probation for _____ months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

☐ CONCURRENT or ☐ CONSECUTIVE to sentence on;☒ The Defendant is to be given credit for time served pursuant to S.C. Code §24-13-40 to be calculated and applied by the State Department of Corrections.☐ The Defendant is to be placed on Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.☐ RESTITUTION: ☐ Heard, ☐ Waived, ☐ Ordered

Total: \$ _____ plus 20% fee: \$ _____

Payment Terms:

☐ set by SCDPPPS

Recipient:

*Fine:

§14-1-206 (Assessments 107.5%)

§14-1-211(A)(1) (Conv. Surcharge)

§14-1-211(A)(2) (DUI Surcharge)

§56-5-2895 (DUI Assessment)

§35-13 (Public Def/Prob)

§73.3, 1B TP (Law Enforce. Funding)

§33.7, 1B TP (Drug Court Surcharge)

§50-21-114(BUI Breath Test Fee)

§56-5-2842(J) (Vehicle Assessment)

3% to County (if paid in installments)

TOTAL

SPECIAL CONDITIONS:

PTUP

days/hours Public Service Employment

Obtain GED

Attend Voc. Rehab. or Job Corp.

May serve W/E beginning

Substance Abuse Counseling

Random Drug/Alcohol Testing

Fine may be pd. in equal, consecutive weekly/monthly

pmts. of \$ _____ beginning

\$ _____ paid to Public Defender Fund

Other:

☐ Appointed PD or appointed other counsel, §35.13 TP

Requires \$500 be paid to Clerk during probation.

Joni Fields

Clerk of Court / Deputy Clerk

Court Reporter:

Dianne Rutledge

PRESIDING JUDGE

Judge Code:

Sentence Date:

Howard P. King
21110179
Jan 18, 2007

Certified - A True Copy

[Signature]
Joni Ann Rosenblatt - Clerk of Court
Beaufort County, SC - Pam Burles

STATE OF SOUTH CAROLINA)
COUNTY OF BEAUFORT)

IN THE COURT OF GENERAL SESSIONS
FOURTEENTH JUDICIAL CIRCUIT
C/A NO.: 2005-GS-07-1304

STATE OF SOUTH CAROLINA,)

Plaintiff,)

v.)

OSIEL NARCISO GOMEZ,)

Defendant.)

VERDICT

We the Jury, by unanimous consent, on the charge of Trafficking in Cocaine in excess of 100 grams, find the Defendant, Osiel Narciso Gomez:

X

Guilty;

OR

Not Guilty.

Dated this 18th day of January, 2007,
at Beaufort, South Carolina.

Don J. Wimmer
FOREPERSON

When you have reached a unanimous verdict in the case, please knock on the door of your jury room and a bailiff will assist you.

STATE OF SOUTH CAROLINA)
COUNTY OF BEAUFORT)

INDICTMENT
2005-GS-07-01304

At a Court of General Sessions, convened on 08/25/2005 the
Grand Jurors of BEAUFORT COUNTY present upon their oath:

Drugs/Traf cocaine, 10g/more to 28g-1st
=====

44-53-0370 (E) (2) (C)

THAT ON OR ABOUT 08/03/05, THE DEFENDANT, OSIEL NARCISO, ^{Gomez} DID KNOWINGLY AND
INTENTIONALLY POSSESS A QUANTITY OF POWDER COCAINE, WITH A WEIGHT OF IN
EXCESS OF 100 GRAMS. THIS DID OCCUR IN BEAUFORT COUNTY, SOUTH CAROLINA.

Jan 17, 2006
Indictment amended on the record with consent.

Howard Phung
Presiding Judge

to Grand Jury
Presentment of amended indictment waived.

OSIEL N

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

Bartholomew M. Davidson

SOLICITOR

WITNESSES

SGT. ANDRES FLORENCIO

ARREST WARRANT NUMBER

H915578

08/04/2005

ACTION OF GRAND JURY

*June Bell**Patricia Cullerton*

Foreperson of Grand Jury

Date: AUG 11 2005

VERDICT

Foreperson of Petit Jury

Date:

DOCKET NO.

2005-GS-07-01304

THE STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

RANDOLPH MURDAUGH III., Solicitor

COURT OF GENERAL SESSIONS

08/25/2005

TERM

THE STATE
VS.*Narciso*
NARCISO, OSIEL GOMEZ

Indictment for

Drugs/Traf cocaine, 10g/more to 28g-1st

SC Code : 44-53-6170(B) (2) (C)

CDR Code: 0278

Class:

106402 Tuesday, August 14, 2018

CMTI330D SCDC OFFENDER MANAGEMENT SYSTEM 08/14/18
OMCOMITA RELEASE DATE SCREEN C056427
SCDC# > 319935 LOC: RIDGELAND
GOMEZ-NARAISS, OSIEL - SCDC CLASSIFICATION...: VIOLENT
OFFENDER TYPE...: ADULT-STRAIGHT SENTENCE SEXUAL REGISTRY...: N
SEXUAL PREDATOR...: NOT APP
DNA STATUS...: COMPLETED
GPS REQUIREMENT...: N
PREA DECISION...:
PREA PERP...: NONE
PREA VICTIM...: NONE
CURRENT SENTENCE: 025-00-000 CONSECUTIVE SENTENCE ...: N
025-00-000 CURRENT SENT START DATE: 08/03/2005
PROJECTED COMPLETION DATES
MAXOUT DATE ...: 10/27/2026 CURRENT EWC ...: 3 F 5
YOA SIX YEAR DATE: / / CURRENT EEC ...: NOT CURRENTLY EARNING EEC
INITIAL PAROLE DATE: 00/00/0000 NEXT PAROLE HEARING DATE: 00/00/0000

TOTAL GT DAYS EARNED ...: 000000 LABOR CREW/WORK PROG DATE: 99/99/9999
TOTAL EARNED WORK CREDITS ...: 001117 LABOR CREW DISQ REASON:
TOTAL EDUCATION CREDITS ...: 000000 CATEGORY 4 OR 5 OFFENSE
TOTAL EXTRA EARNED CREDITS ...: 000 SUPERVISED REENTRY DATE...: 00/00/00
TOTAL SERVICE TIME EARNED ...: 004691 ISS...:

PFKEYS: 5:HISTORY OF DATE CHANGES

South Carolina Department of Corrections

Classification Summary Reports

Date: Tuesday, August 14, 2018

Classification Summary Reports

Inmate Number

Classification Summary Report for GOMEZ-NARAISO, OSIEL :

CLASSIFICATION SUMMARY REPORT DATED 08/14/2018

SCDC# 00319935

GOMEZ-NARAISO, OSIEL

FBI# 726392EC1

OFFENDER ADULT-STRAIGHT
TYPE: SENTENCE

INSTITUTION: RIDGELAND

SECURITY/CUST: 2 MINIMUM IN

CURR INCARC 25 YRS 0 MOS 0
SENT: DAYS

VICTIM
WITNESS:

MED
CLASS:

INST
RESTRICT: NO RESTRICTION

MENTAL
CLASS:

CURRENT NO CURRENT
PROGRAM: PROGRAM

SEX REGISTRY: N

DNA: C

AGE: 39



RESIDENT
STABILITY: NC

DORMROOMBUNK_CODE: SA 0047 B

PROJ MAXOUT
DATE: 10/27/2026

PROJ PAROLE
DATE: -

EWC
JOB: SENIOR CUSTODIAN

ASSIGNMENT: ADMINISTRATION

EWC
LEVEL: 3F5 EEC LEVEL:

EDUC
PGM: NO CURR EDUC PROGRAM

SECURITY THREAT GROUP DESCRIPTION: NONE SECURITY THREAT GROUP STATUS: NONE

PREVIOUS NUMBERS:

NO PREVIOUS NUMBERS

SENTENCE					SENTENCE			
CURRENT OFFENSES	YRS	MOS	DYS	COUNTY	START	V/NV	CAT	INDICT
TRAFFICKING IN COCAINE	25	0	0	BEAUFORT	08/03/2005	V	4	05GS07-1304
COMPLETED OFFENSES								
NO COMPLETED OFFENSES								
PRIOR COMMITMENTS OVER 90 DAYS:								
INMATE HAS NO PRIORS								
OFFENSES UNDER PREVIOUS NUMBER:								
NO PREVIOUS OFFENSES								
DETAINERS (HOLD,WANTED,NOTIFY):								
WANTED	ICE OFFICIAL				CATEG:			
ESCAPES:								
NO ESCAPE HISTORY								
CRIMINAL CHARGES:								
NO CRIMINAL CHARGES HISTORY								
ASSAULTIVE DISCIPLINARIES:								
NO ASSAULTIVE DISCIPLINARY HISTORY								
PREVIOUS ASSAULTIVE DISCIPLINARIES:								
NO PREVIOUS ASSAULTIVE DISCIPLINARY HISTORY								
NON-ASSAULTIVE DISCIPLINARIES:								
NO NON-ASSAULTIVE DISCIPLINARIES HISTORY								
PREVIOUS NON-ASSAULTIVE DISCIPLINARIES:								
NO PREVIOUS NON-ASSAULTIVE DISCIPLINARIES HISTORY								
HISTORY OF MOVEMENTS:								
03/06/2017	RIDGELAND	INCARCERATED			ADMINISTRATIVE			
12/08/2015	MCCORMICK	INCARCERATED			ADMINISTRATIVE			
12/08/2015	RICHLAND CO	AUTH ABSENCE (AWL)			MEDICAL			
08/17/2015	MCCORMICK	INCARCERATED			ADMINISTRATIVE			
08/17/2015	KIRKLAND	INCARCERATED			MEDICAL			
08/04/2015	MCCORMICK	INCARCERATED			ADMINISTRATIVE			
08/04/2015	PALMETTO RCHLAND	AUTH ABSENCE (AWL)			MEDICAL			
05/19/2015	MCCORMICK	INCARCERATED			ADMINISTRATIVE			
05/18/2015	KIRKLAND	INCARCERATED			MEDICAL			
02/24/2014	MCCORMICK	INCARCERATED			ADMINISTRATIVE			
02/20/2014	KIRKLAND	INCARCERATED			RETURN FROM COURT			
02/19/2014	BEAUFORT CO	AUTH ABSENCE (AWL)			TO COURT			
09/03/2013	MCCORMICK	INCARCERATED			ADMINISTRATIVE			
08/29/2013	KIRKLAND	INCARCERATED			RETURN FROM COURT			
08/28/2013	BEAUFORT CO	AUTH ABSENCE (AWL)			TO COURT			
04/08/2013	MCCORMICK	INCARCERATED			ADMINISTRATIVE			
04/05/2013	KIRKLAND	INCARCERATED			RETURN FROM COURT			
04/04/2013	BEAUFORT CO	AUTH ABSENCE (AWL)			TO COURT			
04/22/2012	MCCORMICK	INCARCERATED			ADMINISTRATIVE			
04/21/2012	SELF MEMRL HOSP	AUTH ABSENCE (AWL)			MEDICAL			
11/03/2011	MCCORMICK	INCARCERATED			ADMINISTRATIVE			

11/03/2011	SELF MEMRL HOSP	AUTH ABSENCE (AWL)	MEDICAL
07/26/2011	MCCORMICK	INCARCERATED	ADMINISTRATIVE
07/25/2011	SELF MEMRL HOSP	AUTH ABSENCE (AWL)	MEDICAL
08/27/2008	MCCORMICK	INCARCERATED	ADMINISTRATIVE
08/26/2008	KIRKLAND	INCARCERATED	RETURN FROM COURT
08/25/2008	BEAUFORT CO	AUTH ABSENCE (AWL)	TO COURT
05/21/2008	MCCORMICK	INCARCERATED	ADMINISTRATIVE
05/21/2008	KIRKLAND	INCARCERATED	MEDICAL
04/02/2007	MCCORMICK	INCARCERATED	ADMINISTRATIVE
02/08/2007	KIRKLAND	INCARCERATED	R&E PROCESSING
02/08/2007	LIEBER	INCARCERATED	NEW ADMISSION

HISTORY OF EARNED WORK CREDIT ASSIGNMENTS:

JOB DESCRIPTION	START DATE	END DATE	TERMINATION REASON	JOB LVL
SENIOR CUSTODIAN	03/31/2017	-		3F5
WARDKEEPER	03/07/2017	03/30/2017	INMATE REQUEST	3F5
TEACHER AIDE	08/15/2016	03/06/2017	INSTIT TRANSFER	3F5
CONSTRUCTION TRAINEE	02/25/2014	08/04/2016	INMATE REQUEST	3F5
CONSTRUCTION TRAINEE	09/04/2013	02/24/2014	INSTIT TRANSFER	3F5
CONSTRUCTION TRAINEE	04/09/2013	09/03/2013	INSTIT TRANSFER	3F5
CONSTRUCTION TRAINEE	02/22/2010	04/04/2013	INSTIT TRANSFER	3F5
FOOD SERVICE AIDE	05/13/2009	01/21/2010	POOR ATTENDANCE	3F5
DESIGN ENGINEER AD CONL	01/05/2009	03/02/2009	INMATE REQUEST	3F5
CARPENTER HELPER	03/27/2008	08/27/2008	INSTIT TRANSFER	3F5
GENERAL WORKER	04/05/2007	03/26/2008	INMATE REQUEST	3F5

HISTORY OF EARNED EDUCATION CREDITS:

EEC DESCRIPTION	START DATE	END DATE	TERMINATION REASON
BONUS 4-7 HRS/WK	02/25/2014	02/20/2015	POOR ATTENDANCE
BONUS 4-7 HRS/WK	09/04/2013	02/24/2014	INSTIT TRANSFER
BONUS 4-7 HRS/WK	04/09/2013	09/03/2013	INSTIT TRANSFER
BONUS 4-7 HRS/WK	09/14/2009	04/04/2013	INSTIT TRANSFER
BONUS 4-7 HRS/WK	04/17/2007	08/27/2008	INSTIT TRANSFER

***** END OF REPORT *****

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Source : SummaryReport.jsp

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[Version: 1.4.16 Built: 06/21/2018 03:28:42 PM Time: 10:06:56 AM]

STATE OF SOUTH CAROLINA

IN THE COURT OF GENERAL SESSIONS

COUNTY OF
STATE

Beaufort

VS. Osiel Narais Gomez

05 GS-07-1304

INDICTMENT/CASE#:

AKA:

Race: H

Sex: M

Age:

DOB: [REDACTED]

SS#: [REDACTED]

Address: [REDACTED]

City, State, Zip: [REDACTED]

DL#

SID#

AW#: H915578

Date of Offense: 8/3/05

S.C. Code §: 44-53-370(E)(2)(c)

CDR Code #: 0 / 2 / 8 / 0

SENTENCE SHEET

In disposition of the said indictment comes now the Defendant who was ☒ CONVICTED OF or ☐ PLEADSTO: Trafficking in Excess of 100 grams Cocainein violation of §44-53-370 S.C. Code of Laws, bearing CDR Code # 0280☐ NON-VIOLENT☒ VIOLENT☒ SERIOUS☐ MOST SERIOUS☐ Mandatory GPS (CSC
w/minor 1st or Lewd Act)☐ §17-25-45The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. (Defendant initial)The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

Kimberly S. [Signature]
SolicitorOsiel [Signature]
Defendant[Signature]
Attorney for DefendantWHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,for a determinate term of 15 days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years

and/or to pay a fine of \$ _____; provided that upon the service of _____ days/months/years and/or payment of \$ _____; plus costs and

assessments as applicable*; the balance is suspended with probation for _____ months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

☐ CONCURRENT or ☐ CONSECUTIVE to sentence on:☒ The Defendant is to be given credit for time served pursuant to S.C. Code §24-13-40 to be calculated and applied by the State Department of Corrections.☐ The Defendant is to be placed on Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Heard, ☐ Waived, ☐ Ordered

Total: \$ _____ plus 20% fee: \$ _____

Payment Terms:

☐ set by SCDPPPS

Recipient:

*Fine:

\$14-1-208 (Assessments 107.5%)

\$14-1-211(A)(1) (Conv. Surcharge)

\$14-1-211(A)(2) (DUI Surcharge)

\$56-5-2995 (DUI Assessment)

\$35.13 (Public Def/Prob)

\$73.3, 1B TP (Law Enforce. Funding)

\$33.7, 1B TP (Drug Court Surcharge)

\$50-21-114(BUI Breath Test Fee)

\$56-5-2942(J) (Vehicle Assessment)

3% to County (if paid in installments)

TOTAL

	\$
\$100	\$
\$100	\$100.00
\$12	\$
\$500	\$
\$25	\$25.00
\$100	\$100.00
\$50	\$
\$40/ea	\$
	\$6.75
TOTAL	\$231.75

PTUP

_____ days/hours Public Service Employment

Obtain GED

Attend Voc. Rehab. or Job Corp.

May serve W/E beginning

Substance Abuse Counseling

Random Drug/Alcohol Testing

Fine may be pd. in equal, consecutive weekly/monthly

pmts. of \$ _____ beginning

\$ _____ paid to Public Defender Fund

Other: _____

☐ Appointed PD or appointed other counsel, \$35.13 TP

Requires \$500 be paid to Clerk during probation.

Joni Fields

Clerk of Court Deputy Clerk

Court Reporter:

Dianne Rutledge

PRESIDING JUDGE

Judge Code:

Sentence Date:

Howard P. King
2110149
Jan 18, 2007

Certified - A True Copy

[Signature]
Elizabeth M. Smith - Clerk of Court
Beaufort County, SC

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF BEAUFORT	)	
	)	
	)	2007-CP-07-2195
	)	
Osiel Gomez Narciso, # 319935,	)	
	)	
Applicant,	)	
	)	
v.	)	RETURN
	)	
State of South Carolina,	)	
	)	
Respondent.	)	
	)	

The Respondent, making its Return to the application for post-conviction relief (PCR) filed August 1, 2007, would respectfully show this Court:

I.

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Beaufort County Clerk of Court. The Applicant was indicted at the August 2005 term of the Beaufort County Grand Jury for trafficking cocaine (in excess of 100 grams) (2005-GS-07-1304). Donald Colongeli, Esquire, represented the Applicant. On January 16-18, 2007, the Applicant proceeded to trial, in which the jury found him guilty as indicted. The Honorable Howard P. King sentenced him to confinement for twenty-five (25) years. The Applicant did not appeal his conviction or sentence.

Attached herewith and incorporated herein are the records of the Beaufort County Clerk of Court regarding the subject conviction, the records of the South Carolina Department of Corrections, and the trial transcript.

II.

In his current application, the Applicant alleges that he is being held in custody unlawfully for the following reasons:

- I. Ineffective assistance of counsel in that trial counsel failed to file a notice of appeal after promising Applicant that he would do so.

III.

In a post-conviction relief action, the Applicant bears the burden of proving the allegations in the application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 286 S.C. 441, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. 668. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of plea counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (citing Strickland). Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a

reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

The allegation of ineffective assistance of counsel probably raises questions of fact that the record does not conclusively refute. Accordingly, the Respondent requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

IV.

The Applicant alleges that he is entitled to a belated direct appeal. The United States Supreme Court has rejected a bright-line rule that counsel must always file an appeal in a criminal case. Roe v. Flores-Ortega, 528 U.S. 470, 120 S.Ct. 1029 (2000). The Court went on to hold that a professionally reasonable attorney should, in most cases, consult with the defendant regarding an appeal. Id.

In determining whether an attorney should consult with the criminal defendant concerning an appeal, the totality of the circumstances must be considered. Id. In examining the totality of the circumstances, courts should consider: (1) whether a rational defendant would want to appeal (for example, because there are non-frivolous grounds for appeal) and (2) whether this particular defendant reasonably demonstrated to counsel that he was interested in appealing. Id. Where the post-conviction relief judge determines that the applicant did not freely and voluntarily waive his appellate rights, the applicant may petition the South Carolina Supreme Court for review of direct appeal issues pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974). See Rule 227(g)(1), SCACR; Davis v. State, 288 S.C. 290, 342 S.E.2d 60 (1986).

Trial counsel is not required to file a notice of appeal without specifically being asked to do so. Roe, 528 U.S. 470. However, in the present case, the allegation of ineffective assistance of counsel for failure to file an appeal raises questions of fact that cannot be conclusively refuted

by the record. The Respondent requests an evidentiary hearing to fully resolve this issue.
Sharper, 279 S.C. 264, 305 S.E.2d 247.

V.

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

VI.

WHEREFORE, having made its Return, the State requests that an evidentiary hearing be held.

Respectfully submitted,

HENRY DARGAN McMASTER
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

MATTHEW J. FRIEDMAN
Assistant Attorney General

By: Matthew J. Friedman
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
(803) 734-3737

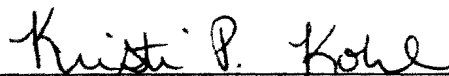
5/15, 2008.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF BEAUFORT	)	
	)	
	)	2007-CP-07-2195
	)	
Osiel Gomez Narciso, #319935,	)	
	)	
Applicant,	)	
	)	
v.	)	AFFIDAVIT OF SERVICE BY MAIL
	)	
State of South Carolina,	)	
	)	
Respondent.	)	

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

**Phillip John Rios, Esquire
 Minor Haight & Arundell, PC
 P.O. Drawer 6067
 Hilton Head Island, SC 29938**

DATED this 15th day of May, 2008.


 Kristi P. Kohl, Legal Assistant
 Office of the Attorney General
 Post Office Box 11549
 Columbia, SC 29211-1549
 (803) 734-3737

2007 CP07 02195

07-2195

14-

FORM 5

STATE OF SOUTH CAROLINA)

COUNTY OF BEAUFORT)

IN THE COURT OF COMMON PLEAS

Osiel Gómez Narciso, #319935)

Full name and prison number (if any) of Applicant)

v.)

State of South Carolina)

APPLICATION FOR

POST CONVICTION RELIEF

INSTRUCTIONS B READ CAREFULLY

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

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

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

1. Place of detention McCormick Correctional Institution
386 Redemption Way, McCormick, SC 29899
2. Name and location of Court which imposed sentence Beaufort County
General Sessions Court
3. Name(s) of co-defendant(s) (if any) Luis García - Cervantes
Eliás Bastida - Díaz
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
(a) 2005-GS-07-1304 Trafficking Cocaine

Certified - A True Copy

- (b) _____
- (c) _____
5. The date upon which sentence was imposed and the terms of the sentence:
- (a) January 16, 2007 25 Years
- (b) _____
- (c) _____
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty _____
- (b) after a plea of not guilty X
- (c) after a plea of nolo contendere _____
7. Did you appeal from the judgment of conviction or the imposition or sentence?
- No.
8. If you answered "Yes" to (7), list:
- (a) the name of each Court to which you appealed:
- i. N/A
- ii. N/A
- iii. N/A
- (b) the result in each such Court to which you appealed:
- i. N/A
- ii. N/A
- iii. N/A
- (c) the date of each such result:
- i. N/A
- ii. N/A
- iii. N/A
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. N/A
- ii. N/A
- iii. N/A
9. If you answered "No" to (7), state your reasons for not so appealing:
- (a) Trial Attorney failed to file timely notice of appeal.

- (b) _____
- (c) _____
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:
- (a) Ineffective Assistance of Counsel
- (b) _____
- (c) _____
11. State concisely and in the same order the facts which support each of the grounds set out in (10):
- (a) Please see attached.
- (b) _____
- (c) _____
12. Prior to this application have you filed with respect to this conviction:
- (a) any petition in a State Court under South Carolina Law? No.
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? No.
- (c) any petition in the United States Supreme Court for certiorari other than petitions if any, already specified in (8)? No.
- (d) any other petitions, motions or applications in this or any other Court? No.
13. If you answered "Yes" to any part of (12), list with respect to each petition, motion or application:
- (a) the specific nature thereof:
- i. N/A
- ii. N/A
- iii. N/A
- iv. N/A
- (b) the name and location of the Court in which each was filed:
- i. N/A
- ii. N/A
- iii. N/A

iv. N/A

(c) the disposition thereof:

i. N/A

ii. N/A

iii. N/A

iv. N/A

(d) the date of each such disposition:

i. N/A

ii. N/A

iii. N/A

iv. N/A

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

i. N/A

ii. N/A

iii. N/A

iv. N/A

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

No.

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

(a) which grounds have been presented:

i. N/A

ii. N/A

iii. N/A

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

i. N/A

ii. N/A

iii. N/A

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:
- (a) This is the only venue in which Petitioner has sought
 - (b) relief. Petitioner was barred from filing appeal due
 - (c) to ineffective assistance of counsel.
17. Were you represented by an attorney at any time during the course of:
- (a) your arraignment and plea? _____
 - (b) your trial, if any? Yes. _____
 - (c) your sentencing? _____
 - (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? _____
 - (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? _____
18. If you answered "yes" to one or more parts of (17), list:
- (a) the name and address of each attorney who represented you:
 - i. Donald C. Colongeli, Esq.
 - P.O. Box 6658; Hilton Head Island, S.C. 29938
 - ii. _____
 - _____
 - iii. _____
 - _____
 - (b) the proceedings at which each such attorney represented you:
 - i. Trial.
 - _____
 - _____
 - ii. _____
 - _____
 - _____
 - iii. _____
 - _____
 - _____

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

Petitioner requests that this court grant him leave to
file a belated appeal.

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

No.

Revised 3/2003

STATE OF SOUTH CAROLINA)

VERIFICATION

County of Beaufort)

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

Osiel Narciso

SWORN to and subscribed before me this 27
 day of July, 2007

John L. Young (L.S.)
 Notary Public

My Commission Expires: 8 28 2011

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

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

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

Osiel Narciso
Applicant

SWORN or affirmed to and subscribed before me this
27 day of July, 2007

Jorge L. Young
Notary Public

My Commission Expires: 8-28-2011

Answer to Question 11, Page 3 of attached Application (State concisely and in the same order the facts which support each of the grounds set out in [10])

Trial attorney failed to file notice of appeal even after promising applicant that he would do so.

My allegation of ineffective assistance of counsel is presently based entirely upon the fact that my attorney did not file a notice of appeal, after stating for the court and upon the record that he would do so. My attorney, through my interpreter, assured me that we had multiple grounds for appeal, and that we would almost certainly be successful in overturning the conviction at the appellate level. Unfortunately, I am unable to obtain the transcript of the proceedings in order to prove this allegation, specifically because I was not afforded a direct appeal.

If my attorney's assurances were based in fact, and I would indeed have had a high probability of overturning my conviction at the appellate level, then his failure to file a notice of appeal constitutes ineffective assistance of counsel. As you are no doubt aware, Strickland v. Washington sets forth a two-prong test by which a claim of ineffective assistance of counsel must be measure:

1. First, counsel's performance must have fallen below an objective standard of reasonableness for a competent defense attorney, and

2. Counsel's error must have caused prejudice to the defendant such that, but for the error, there is a reasonable probability that the result of the proceedings would have been different.

The first prong is easily passed by showing that, after my attorney told me that we would almost certainly prevail on appeal, and then stating on the record that he would appeal the conviction and sentence, his failure to do so is so egregious as to constitute unreasonableness.

The second prong could only be proven by an examination of the transcript, which is not within my possession; however, in support of this application, that there were many things which were brought to my attention through my interpreter that would have made my conviction illegal, not the least of which is my understanding that the jury's verdict was not, in fact, unanimous.

Clearly, counsel's conduct in not filing an appeal in this case does not meet any objective standard of reasonableness. Furthermore, I was clearly prejudiced by this error in that the strongest grounds upon which I might have mounted any attack to my incarceration can no longer be raised in the court of appeal. It is therefore my request that this court order a direct appeal, so that these meritorious issues can be explored and ruled upon.

THE STATE OF SOUTH CAROLINA

In the Supreme Court

APPEAL FROM BEAUFORT COUNTY

Court of Common Pleas

Honorable J. Cordell Maddox, Jr.
Presiding Circuit Court Judge for the
Court of Common Pleas of Beaufort County

Case No. 07-CP-07-2195

OSIEL GOMEZ NARCISO, Inmate #319935, ... Appellant,

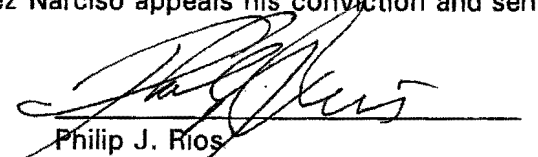
v.

STATE OF SOUTH CAROLINA, ... Respondent.

NOTICE OF APPEAL

Osiel Gomez Narciso appeals the Consent Order Granting Belated Direct Appeal of the Honorable J. Cordell Maddox, Jr., dated August 26, 2008. Appellant received written notice of entry of the Consent Order Granting Belated Direct Appeal on August 26, 2008. This appeal is taken pursuant to the above-stated Consent Order Granting Belated Direct Appeal entered on August 26, 2008 and Osiel Gomez Narciso appeals his conviction and sentence in this case.

September 2, 2008


Philip J. Rios
MINOR, HAIGHT & ARUNDELL, P.C.
P.O. Drawer 6067
Hilton Head Island, SC 29938
(843) 785-8040
Attorney for the Appellant

Other Counsel of Record:
Matthew J. Friedman
OFFICE OF THE ATTORNEY GENERAL
P.O. Box 11549
Columbia, SC 29211
(803) 734-3737
Attorneys for Respondent

THE STATE OF SOUTH CAROLINA

In the Supreme Court

APPEAL FROM BEAUFORT COUNTY

Court of Common Pleas

Honorable J. Cordell Maddox, Jr.
Presiding Circuit Court Judge for the
Court of Common Pleas of Beaufort County

Case No. 2007-CP-07-2195

OSIEL GOMEZ NARCISO, Inmate #319935, ... Appellant,

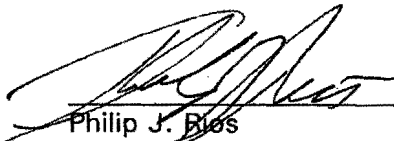
v.

STATE OF SOUTH CAROLINA, ... Respondent.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on Respondent by depositing a copy of it in the United States Mail, postage prepaid, on September 2, 2008, addressed to their attorney of record, Matthew J. Friedman, Esquire, Office of the Attorney General Post Office Box 1549, Columbia, South Carolina 29211-1549.

September 2, 2008


Philip J. Ries
Minor, Haight & Arundell, P.C.
Post Office Drawer 6067
Hilton Head Island,
South Carolina 29938
(843) 785-8040
Attorney for Appellant

STATE OF SOUTH CAROLINA)

COUNTY OF BEAUFORT)

Osiel Gomez Narciso, # 319935,)

Applicant,)

v.)

State of South Carolina,)

Respondent.)

IN THE COURT OF COMMON PLEAS

2007-CP-07-2195

**CONSENT ORDER GRANTING
BELATED DIRECT APPEAL**

This matter comes before this Court by way of an application for post-conviction relief (PCR) filed August 1, 2007. The Respondent made its Return on May 15, 2008.

I.

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Beaufort County Clerk of Court. The Applicant was indicted at the August 2005 term of the Beaufort County Grand Jury for trafficking cocaine (in excess of 100 grams) (2005-GS-07-1304). Donald Colongeli, Esquire, represented the Applicant. On January 16-18, 2007, the Applicant proceeded to trial, in which the jury found him guilty as indicted. The Honorable Howard P. King sentenced him to confinement for twenty-five (25) years. The Applicant did not appeal his conviction or sentence.

II.

In his current application, the Applicant alleges that he is being held in custody unlawfully for the following reason:

1. Ineffective assistance of counsel in that trial counsel failed to file a notice of appeal after promising Applicant that he would do so.

Certified - A True Copy

Reda Stankiewicz
Elizabeth M. Smith - Clerk of Court
Beaufort County, SC

2008 AUG 26 AM 11:19
ELIZABETH M. SMITH
BEAUFORT COUNTY S.C.
CLERK OF COURT

III.

Trial counsel has informed the Respondent and PCR counsel that the Applicant asked him to file an appeal, and trial counsel failed to do so in a timely manner. The Applicant did not knowingly and voluntarily waive his right to a direct appeal. Accordingly, the Respondent consents to granting the Applicant a belated direct appeal pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974).

IV.

The White v. State issue is the Applicant's only allegation in the PCR application. The Applicant understands that he must proceed on all PCR claims at this time and anything not raised now is waived. The Applicant wishes to waive all other PCR claims and proceed with a belated direct appeal.

IT IS THEREFORE ORDERED:

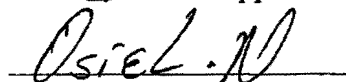
1. That the Applicant be granted a belated direct appeal pursuant to White v. State;
2. That the Applicant has waived his right to raise any other PCR allegations; and
3. The Applicant must be remanded to the custody of the Respondent.

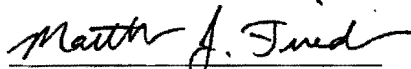
AND IT IS SO ORDERED this 26 day of August, 2008.


J. Cordell Maddox, Jr.
Presiding Judge
14th Judicial Circuit

WE CONSENT:


Philip J. Kios, Esquire
Attorney for the Applicant


Osiel Narciso Gomez
Applicant


Matthew J. Friedman, Esquire
Assistant Attorney General
Attorney for Respondent

STATE OF SOUTH CAROLINA)

COUNTY OF BEAUFORT)

IN THE COURT OF COMMON PLEAS

2007-CP-07-2195

Osiel Gomez Narciso, # 319935,)

Applicant,)

v.)

State of South Carolina,)

Respondent.)

**CONSENT ORDER GRANTING
BELATED DIRECT APPEAL**

This matter comes before this Court by way of an application for post-conviction relief (PCR) filed August 1, 2007. The Respondent made its Return on May 15, 2008.

I.

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II.

In his current application, the Applicant alleges that he is being held in custody unlawfully for the following reason:

1. Ineffective assistance of counsel in that trial counsel failed to file a notice of appeal after promising Applicant that he would do so.

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ELIZABETH A. SMITH
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III.

Trial counsel has informed the Respondent and PCR counsel that the Applicant asked him to file an appeal, and trial counsel failed to do so in a timely manner. The Applicant did not knowingly and voluntarily waive his right to a direct appeal. Accordingly, the Respondent consents to granting the Applicant a belated direct appeal pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974).

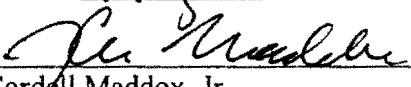
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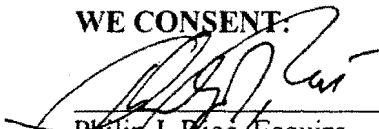
IT IS THEREFORE ORDERED:

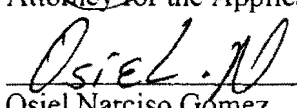
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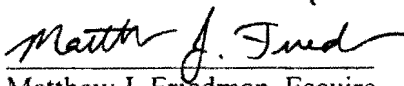
AND IT IS SO ORDERED this 26 day of August, 2008.


 J. Cordell Maddox, Jr.
 Presiding Judge
 14th Judicial Circuit

WE CONSENT:


 Philip J. Rios, Esquire
 Attorney for the Applicant


 Osiel Narciso Gomez
 Applicant


 Matthew J. Friedman, Esquire
 Assistant Attorney General
 Attorney for Respondent

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM BEAUFORT COUNTY
Court of General Sessions

Howard P. King, Circuit Court Judge

Case No. 05-GS-07-1304

State of South Carolina,

Respondent,

v.

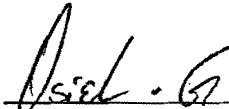
Osiel Gomez Narciso,

Appellant.

BELATED NOTICE OF APPEAL

Osiel Gomez Narciso appeals his conviction and sentence in this case. The sentence was imposed by the Honorable Howard P. King on January 10, 2007. This belated appeal is filed pursuant to White v. State.

September 23, 2008


Osiel Gomez Narciso, #319935
McCormick Correctional Inst.
386 Redemption Way, F-3B #145
McCormick, SC 29899

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM BEAUFORT COUNTY
Court of General Sessions

Howard P. King, Circuit Court Judge

Case No. 05-GS-07-1304

State of South Carolina,

Respondent,

v.

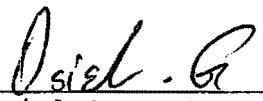
Osiel Gomez Narciso,

Appellant.

PROOF OF SERVICE

The undersigned hereby certifies that a true copy of the Notice of Appeal in the above-referenced case has been served upon the Respondent by placing a copy of said Notice of Appeal in the U.S. Mail, postage pre-paid and addressed to the Respondent's attorney of record at the below address:

Matthew J. Friedman
S.C. Attorney General's Office
Post Office Box 11549
Columbia, SC 29211



Osiel Gomez Narciso

September 23, 2008

The Supreme Court of South Carolina

Osiel Gomez Narciso,

Petitioner,

v.

State of South Carolina,

Respondent.

ORDER

By order dated December 16, 2010, we granted the petition for a writ of certiorari in this matter as to Petitioner's Question I (waiver of right to direct appeal), dispensed with further briefing on that question, and informed the parties we would proceed with further review of the direct appeal issue (validity of stop and search), which has already been briefed by way of the Amended Brief of Appellant Pursuant to White v. State, following oral argument on the issue. We also granted the petition for a writ of certiorari as to Petitioner's Question II (whether the waiver of the right to raise other post-conviction relief allegations was knowingly and voluntarily entered) and directed the parties to serve and file the appendix and briefs as provided by Rule 243(j), SCACR. The parties were notified that both the direct appeal issue and Question II of the petition will be consolidated for oral argument

following *briefing of Question II*.

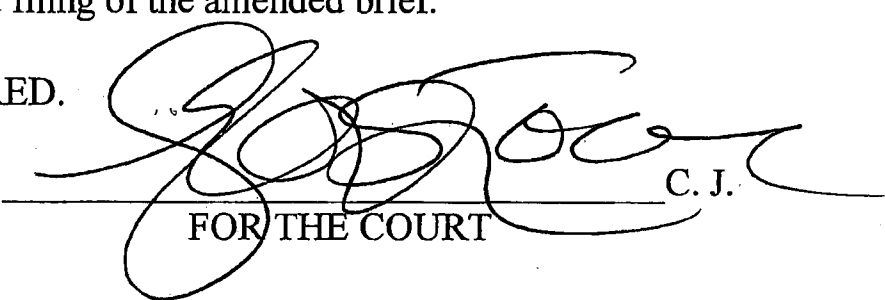
Counsel for petitioner has filed a brief in which she has briefed the direct appeal issue and Petitioner's Question II from the petition for a writ of certiorari. The State moves to strike the argument on the direct appeal issue, as well as a portion of the argument on Petitioner's Question II.

Counsel for petitioner has filed a return to the motion in which she objects to any portion of the argument on Petitioner's Question II being stricken, but admits she erroneously included argument on the direct appeal issue in the brief.

We grant the motion to strike as to the direct appeal issue only.

Within ten days of the date of this order, counsel for petitioner shall serve and file an amended brief which does not contain the "Issue Presented" that is currently in the brief or argument on the direct appeal issue. The amended brief shall only include argument on Petitioner's Question II from the petition for a writ of certiorari. The time for the State to file its brief shall be held in abeyance pending service and filing of the amended brief.

IT IS SO ORDERED.



C. J.
FOR THE COURT

Columbia, South Carolina

August 4, 2011

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Beaufort County

J. Cordell Maddox, Jr., Circuit Court Judge

OSEIL GOMEZ NARCISO,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

BRIEF OF PETITIONER

ELIZABETH A. FRANKLIN-BEST
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S. C. 29211-1589
(803) 734-1343

ATTORNEY FOR PETITIONER.

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ISSUE PRESENTED

Arresting petitioner for a minor traffic violation when police testified they had reasonable suspicion to believe that petitioner was engaged in drug dealing, based on an "on-going investigation," was unreasonable because the facts law enforcement presented to the trial court did not rise to the level of reasonable suspicion, and because their actions were taken solely to circumvent presenting their case to a magistrate. Petitioner was unreasonably seized in this case, and these facts fall beyond the ambit of *New York v. Belton*¹.

¹ 453 U.S. 454, 101 S.Ct. 2860 (1981).

STATEMENT OF THE CASE

Oriel Gomez Narciso was indicted by the Beaufort County grand jury for trafficking cocaine. He was tried before the Honorable Howard P. King, and a jury between January 16-- 18, 2007. He was represented by Donald Colongeli, Esquire. He was convicted, and sentenced to 25 years incarceration.

Petitioner did not appeal his convictions or sentence. He then filed an application for post-conviction relief on August 1, 2007. No hearing was held, but the parties signed a consent order granting belated direct appeal.

On December 16, 2010, this Court granted petitioner's request to review the direct appeal issue raised in his White brief, and also granted the petition for writ of certiorari with respect to Petitioner's Question II: Narciso signed a Consent Order Granting Belated Direct Appeal and "waived his right to raise any other PCR allegations." Narciso respectfully asks this Court to remand his case to determine whether that waiver was entered into knowingly and voluntarily.

ARGUMENT

The Fourth Amendment of the United States Constitution protects citizens from unreasonable searches and seizures. Arresting petitioner for a minor traffic violation when police testified they had reasonable suspicion to believe that petitioner was engaged in drug dealing, based on an "on-going investigation," was unreasonable because the facts law enforcement presented to the trial court did not rise to the level of reasonable suspicion, and because their actions were taken solely to circumvent presenting their case to a magistrate. Petitioner was unreasonably seized in this case, and these facts fall beyond the ambit of *New York v. Belton*².

Petitioner was charged with drugs that were found in his car after police officers pulled him for a minor traffic violation. Admittedly, petitioner was the target in an "on-going investigation" that began earlier in the day. After petitioner was transported to the police station for failing to own a South Carolina driver's license, officers ran a drug dog around petitioner's vehicle. It is unclear whether he was arrested for not having a South Carolina driver's license, which would not be illegal, or because he did not have any license at all. App. 80. The dog alerted, and the car was searched. The drugs were located in the luggage compartment of the car, and in the center console. Based on this find, the police charged petitioner with trafficking cocaine. Officer Florencio testified that the search was conducted incident to arrest for the driver's license violation, and also that the dog alerted on the car after petitioner was already taken into custody. App. 74, 83, 85- 86. Florencio testified that it was not searched pursuant to an inventory search. App. 87.

² 453 U.S. 454, 101 S.Ct. 2860 (1981).

Petitioner's seizure by the officers was unreasonable because the "on-going investigation" was not supported by probable cause, and the officers actions were clearly intended to circumvent a magistrate's finding of probable cause, a concern raised by the trial court judge. This case then falls beyond the ambit of New York v. Belton, which the judge relied upon in upholding the constitutionality of the search, and petitioner's rights under the Fourth Amendment were violated. The search, too, was illegal pursuant to the recent U.S. Supreme Court case, Arizona v. Gant, 556 U.S. ____, 129 S.Ct. 1710 (2009).

Officer Florencio's Investigation of Petitioner

Officer Florencio testified to the investigation the Task Force conducted in this case. The "on- going investigation" started the day of the arrest. App. 198. It was based on some information he received, the substance of which was never revealed either during pre-trial, or during the trial itself. App. 198. Florencio knew that petitioner, along with other Hispanic males were at the Suburban Lodge. App. 199. Petitioner's employer, Savannah Heartscapes, was the actual renter of the room. App. 199. Petitioner was observed by members of the surveillance team traveling to a couple of automotive stores. App. 200. He did not walk out of either of these places carrying anything at all. App. 202, 205- 206. He was then observed working on his car. App. 203. He and other Hispanic males were also working on a truck. App. 203. Florencio admitted that he did not actually view petitioner at these places, but that Lieutenant Woodward, Sergeant Kobel, Officer Haroog, Officer Harold and Officer Light did. App. page 206- 207. These officers did not testify at petitioner's trial.

After petitioner finished working on the car, he was seen taking a phone call. He then went upstairs. Another officer then saw him go into his room. Then, he came out carrying a

white t-shirt "with something in it," place it in the car, and drive away. App. page 208- 209. Florencio did not personally see petitioner place anything into the car. App. page 211. He was not even sure who saw petitioner place the white t-shirt into the car. App. 211. The car did not belong to petitioner. App. 218. Based on petitioner's peregrinations and placement of an unknown item in the car, however, Florencio directed another officer to pull petitioner over. App. 215- 216. Petitioner was placed under arrest for not having a South Carolina driver's license. App. 216. It appears that he did, though, in fact, have a driver's license issued by the State of South Carolina. App. 137-138. He was then transported to a Hilton Head police station. App. 217. This series of events did not amount to probable cause that would have justified a search of the vehicle had the case been presented to a magistrate. State v. Gentile, 373 S.C. 506, 646 S.E.2d 171 (Ct. App. 2007).

After petitioner was removed from the scene, Officer Hiers ran a drug dog around the car. The dog alerted, and the car was searched. In two locations—in the back of the car in the luggage compartment, and in the console-- drugs were found. App. page 149- 152. The drugs were not in plain view. App. 223. Florencio traveled to the Hilton Head station, informed petitioner of what was found in the car, and promptly arrested him for trafficking cocaine. App. 223-224.

The trial court judge was extremely concerned about the search in this case. App. 101- 115. According to him, he only denied defense counsel's motion because he believed he was compelled to by *Belton*. The judge's ruling then was erroneous because this case does not fit within the ambit of *Belton*, violates the ruling in *Arizona v. Gant*, and the search was a violation of petitioner's 4th Amendment rights.

Law Enforcement's Actions Violated petitioner's 4th Amendment Rights

U.S. Const. Amend. IV provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Petitioner's rights were violated by the law enforcement seizure of him, predicated on their "ongoing investigation," because they had not developed facts sufficient to present to a magistrate to secure a warrant for search of the car. Their actions were taken to circumvent their obligation to do so. Therefore the arrest was made in an "extraordinary manner, unusually harmful to [petitioner's] privacy or . . . physical interests." Whren v. United States, 517 U.S. 806, 818, 116 S.Ct. 1769 (1996).

In this case, law enforcement sought to accomplish, by way of pulling petitioner for a minor traffic infraction, what they were otherwise not entitled to do. Law enforcement was quite clear that the purpose of the pull was to search the car for drugs. App. 74, 78. Their actions, then, rendered the subsequent search illegal because the search incident to arrest was then untethered from the exigency justifications that allow for the warrant exception. See Arizona v. Gant, 556 U.S. ___, 129 S.Ct. 1710 (2009). And see Chimel v. California, 395 U.S. 752, 89 S.Ct. 2034 (1969). Additionally, they did not have reasonable suspicion which would have justified a prolonged detention, had petitioner remained at the car and had not been immediately arrested. State v. Tindall, 379 S.C. 304, 665 S.E.2d 188 (Ct. App. 2008). Law enforcement's actions were abusive, and the United States Supreme Court, in Atwater v. City of Lago Vista, 532 U.S. 318, 121 S.Ct. 1536 (2001), suggests in footnote 25 that such actions would be objectionable. Any other conclusion renders the Fourth Amendment a nullity and effectively creates a judicial

review-free zone on the roadways. Further, the police actions in this case ignore the admonition in Terry v. Ohio, 392 U.S. 1, 19, 88 S.Ct. 1868 (1968), that “the scope of [a] search must be ‘strictly tied to and justified by’ the circumstances which rendered its initiation permissible.”

In this case, the police may have had probable cause to believe that a minor traffic violation occurred, but they did not have reasonable suspicion, much less probable cause, to believe that petitioner was engaged in any illegal activity. The officers’ simply used the driver’s license issue to effect an arrest so they could conduct a fishing expedition because they knew they did not have probable cause to secure a warrant. This conduct has been expressly forbidden by the decision in *Arizona v. Gant*: “Police may search a vehicle incident to a recent occupant’s arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest.” *Id.* at 1723. Petitioner was arrested and whisked away to another location. The officers should have taken their case to a magistrate if they wanted to search petitioner’s car. Instead, law enforcement orchestrated a series of events designed to avoid having to do what they were obligated to do by law—present their case to a neutral and detached magistrate to make a determination of probable cause. Respectfully, petitioner asks this Court to reverse his conviction.

II. Petitioner signed a consent order granting belated direct appeal and “waived his right to raise any other PCR allegations.” Petitioner respectfully asks this Court to remand his case to determine whether that waiver was entered into knowingly and voluntarily.

According to the consent order, trial counsel informed the Attorney General’s Office and PCR counsel that petitioner requested that he file a notice of intent to appeal, but that he failed to

do so. This would entitle petitioner to a belated appeal under White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974) and Roe v. Flores-Ortega, 528 U.S. 470, 120 S.Ct. 1029 (2000). Under these facts, petitioner would have been entitled to a belated review of his claim, even without waiving his right to raise other PCR claims.

A review of the record suggests that petitioner does, in fact, have additional post-conviction relief claims that he should be allowed to raise. Specifically, petitioner may be considering raising the issue of accepting a plea offer that was initially extended in this case but which his attorney never formally accepted on his behalf and which would have significantly reduced his legal exposure. Petitioner may also wish to challenge his attorney's failure to object to the extensive hearsay that was allowed into his trial. He may also wish to raise his attorney's failure to object to a *Doyle* violation present in the transcript, and made by the sole officer who testified to his "confession." He may also wish to challenge his attorney's failure to raise a claim under *S.C. Const. art. I, §10* with respect to the search in this case and his heightened privacy protections afforded by this State.

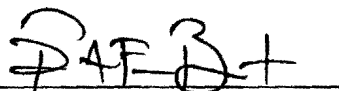
Additionally, the record in this case, aside from his signature on the consent agreement, does not support the conclusion that petitioner entered into the agreement knowingly and voluntarily. Since he was convicted after trial, he received no benefit from entering into the agreement (and that he was entitled to anyway). There was no judicial colloquy between petitioner and the judge to assure that petitioner understood the rights he was waiving. Indeed, petitioner is not a native English speaker and used a translator at his trial—it is unclear that he could read and understand the consent agreement he signed. See Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019 (1936); Gardner v. State, 351 S.C. 407, 570 S.E.2d 184 (2002). In short, none of the procedural safeguards present in Spoone v. State, 379 S.C. 138, 665 S.E.2d 605

(2008) was present here. Respectfully, petitioner asks this Court to find that petitioner did not knowingly and intelligently waive his right to raise additional PCR claims.

CONCLUSION

For the preceding reasons, petitioner respectfully asks this Court, with respect to Issue I, to reverse his conviction, and, with respect to Issue 2, to find that petitioner did not knowingly and intelligently waive his right to raise additional post-conviction relief claims.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read 'EAFB', is written over a horizontal line.

Elizabeth A. Franklin-Best
Appellate Defender

ATTORNEY FOR PETITIONER.

This 21st day of March, 2011

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Beaufort County

J. Cordell Maddox, Jr., Circuit Court Judge

OSEIL GOMEZ NARCISO,

PETITIONER,

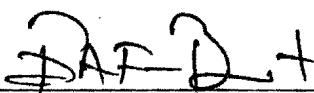
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

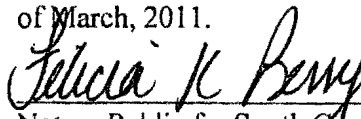
I certify that a true copy of the brief of petitioner, in this case has been served on Matthew J. Friedman, Esquire, this 21st day of March, 2011.



Elizabeth A. Franklin-Best
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 21st day
of March, 2011.

 (L.S.)
Notary Public for South Carolina
My Commission Expires: June 21, 2020

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Beaufort County

J. Cordell Maddox, Jr., Circuit Court Judge

OSEIL GOMEZ NARCISO,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

AMENDED BRIEF OF PETITIONER

ELIZABETH A. FRANKLIN-BEST
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S. C. 29211-1589
(803) 734-1343

ATTORNEY FOR PETITIONER.

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Constitutional Provisions

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ISSUE PRESENTED

Petitioner signed a consent order granting belated direct appeal and “waived his right to raise any other PCR allegations.” Petitioner respectfully asks this Court to remand his case to determine whether that waiver was entered into knowingly and voluntarily.

STATEMENT

Osiel Gomez Narciso was indicted by the Beaufort County grand jury for trafficking cocaine. He was tried before the Honorable Howard P. King, and a jury between January 16-- 18, 2007. He was represented by Donald Colongeli, Esquire. He was convicted, and sentenced to 25 years incarceration.

Petitioner did not appeal his convictions or sentence. He then filed an application for post-conviction relief on August 1, 2007. No hearing was held, but the parties signed a consent order granting belated direct appeal.

On December 16, 2010, this Court granted petitioner's request to review the direct appeal issue raised in his White brief, and also granted the petition for writ of certiorari with respect to Petitioner's Question II: Narciso signed a Consent Order Granting Belated Direct Appeal and "waived his right to raise any other PCR allegations." Narciso respectfully asks this Court to remand his case to determine whether that waiver was entered into knowingly and voluntarily.

By order of this Court, dated August 4, 2011, petitioner now submits this amended brief which includes only the argument on Petitioner's Question II from the petition for a writ of certiorari.

ARGUMENT

Petitioner signed a consent order granting belated direct appeal and “waived his right to raise any other PCR allegations.” Petitioner respectfully asks this Court to remand his case to determine whether that waiver was entered into knowingly and voluntarily.

According to the consent order, trial counsel informed the Attorney General’s Office and PCR counsel that petitioner requested that he file a notice of intent to appeal, but that he failed to do so. This would entitle petitioner to a belated appeal under White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974) and Roe v. Flores-Ortega, 528 U.S. 470, 120 S.Ct. 1029 (2000). Under these facts, petitioner would have been entitled to a belated review of his claim, even without waiving his right to raise other PCR claims.

A review of the record suggests that petitioner does, in fact, have additional post-conviction relief claims that he should be allowed to raise. Specifically, petitioner may considering raising the issue of accepting a plea offer that was initially extended in this case but which his attorney never formally accepted on his behalf and which would have significantly reduced his legal exposure. Petitioner may also wish to challenge his attorney’s failure to object to the extensive hearsay that was allowed into his trial. He may also wish to raise his attorney’s failure to object to a *Doyle* violation present in the transcript, and made by the sole officer who testified to his “confession.” He may also wish to challenge his attorney’s failure to raise a claim under *S.C. Const. art. I, §10* with respect to the search in this case and his heightened privacy protections afforded by this State.

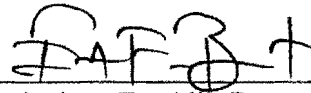
Additionally, the record in this case, aside from his signature on the consent agreement, does not support the conclusion that petitioner entered into the agreement knowingly and voluntarily. Since he was convicted after trial, he received no benefit from entering into the

agreement (and that he was entitled to anyway). There was no judicial colloquy between petitioner and the judge to assure that petitioner understood the rights he was waiving. Indeed, petitioner is not a native English speaker and used a translator at his trial—it is unclear that he could read and understand the consent agreement he signed. See Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019 (1936); Gardner v. State, 351 S.C. 407, 570 S.E.2d 184 (2002). In short, none of the procedural safeguards present in Spoone v. State, 379 S.C. 138, 665 S.E.2d 605 (2008) was present here. Respectfully, petitioner asks this Court to find that petitioner did not knowingly and intelligently waive his right to raise additional PCR claims.

CONCLUSION

For the preceding reasons, Narciso asks this Court to find that petitioner did not knowingly and intelligently waive his right to raise additional post-conviction relief claims.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'EAFBt', written over a horizontal line.

Elizabeth A. Franklin-Best
Appellate Defender

ATTORNEY FOR PETITIONER.

This 11th day of August, 2011

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Beaufort County

J. Cordell Maddox, Jr., Circuit Court Judge

OSEIL GOMEZ NARCISO,

PETITIONER,

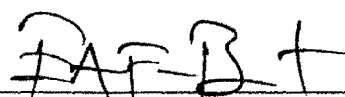
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

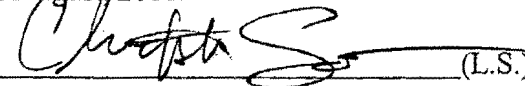
CERTIFICATE OF SERVICE

I certify that a true copy of the amended brief of petitioner, in this case has been served on
Matthew J. Friedman, Esquire, this 11th day of August, 2011.


Elizabeth A. Franklin-Best
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 11th day
of August 2011.

 (L.S.)
Notary Public for South Carolina
My Commission Expires: May 16, 2021

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Beaufort County

J. Cordell Maddox, Jr., Circuit Court Judge

OSEIL GOMEZ NARCISO,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

PETITION FOR WRIT OF CERTIORARI

ELIZABETH A. FRANKLIN-BEST
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South Carolina Commission on Indigent Defense
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ATTORNEY FOR PETITIONER.

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ISSUES PRESENTED

Did the judge properly find that Gomez did not knowingly and intelligently waive his right to appeal, entitling him to a *White v. State*¹ appeal?

¹ 263 S.C. 110, 208 S.E.2d 35 (1974).

STATEMENT

Oriel Gomez Narciso was indicted by the Beaufort County grand jury for Trafficking Cocaine (2005-GS-07-1304). He was tried before the Honorable Howard P. King and a jury between January 16th and 18th, 2007. He was represented by Donald Colongeli, Esquire. He was convicted, and sentenced to 25 years incarceration.

Narciso did not appeal his convictions or sentence. He then filed an application for post-conviction relief on August 1, 2007. No hearing was held, but the parties signed a Consent Order Granting Belated Direct Appeal.

This Petition for Writ of Certiorari timely follows.

ARGUMENT

- I. The judge properly found that Gomez did not knowingly and intelligently waive his right to appeal.

The parties entered into a Consent Order granting Petitioner the right to a belated appeal. According to the Order, "[t]rial counsel [informed] the Respondent and PCR counsel that the Applicant asked him to file an appeal, and trial counsel failed to do so in a timely manner." (App. p. 377, *para.* 1). This supports the PCR judge's grant of relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). Respectfully, Gomez asks this Court to uphold the PCR judge's finding that he is entitled to a belated appeal.

CONCLUSION

Respectfully, Narciso asks this Court to uphold the PCR judge's finding that he is entitled to a belated appeal.

Respectfully submitted,

EA Franklin-Best

Elizabeth A. Franklin-Best
Appellate Defender

ATTORNEY FOR PETITIONER

This 17th day of February, 2009.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Beaufort County
J. Cordell Maddox, Jr., Circuit Court Judge

OSEIL GOMEZ NARCISO,

PETITIONER,

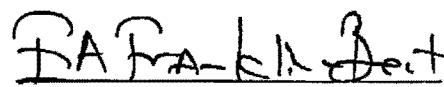
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on Matthew J. Friedman, Esquire, at Rembert Dennis Building, Room 519, 1000 Assembly Street, Columbia, SC 29201; and upon Oseil Gomez Narciso, #319935, McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 17th day of February, 2009.


Elizabeth A. Franklin-Best
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 17th day
of February, 2009.


(L.S.)
Notary Public for South Carolina

My Commission Expires: December 4, 2017.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Beaufort County

J. Cordell Maddox, Jr., Circuit Court Judge

OSEIL GOMEZ NARCISO,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

PETITION FOR WRIT OF CERTIORARI

ELIZABETH A. FRANKLIN-BEST
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ATTORNEY FOR PETITIONER.

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ISSUES PRESENTED

Did the judge properly find that Gomez did not knowingly and intelligently waive his right to appeal, entitling him to a *White v. State*¹ appeal?

¹ 263 S.C. 110, 208 S.E.2d 35 (1974).

STATEMENT

Oriel Gomez Narciso was indicted by the Beaufort County grand jury for Trafficking Cocaine (2005-GS-07-1304). He was tried before the Honorable Howard P. King and a jury between January 16th and 18th, 2007. He was represented by Donald Colongeli, Esquire. He was convicted, and sentenced to 25 years incarceration.

Narciso did not appeal his convictions or sentence. He then filed an application for post-conviction relief on August 1, 2007. No hearing was held, but the parties signed a Consent Order Granting Belated Direct Appeal.

This Petition for Writ of Certiorari timely follows.

ARGUMENT

- I. The judge properly found that Gomez did not knowingly and intelligently waive his right to appeal.

The parties entered into a Consent Order granting Petitioner the right to a belated appeal. According to the Order, "[t]rial counsel [informed] the Respondent and PCR counsel that the Applicant asked him to file an appeal, and trial counsel failed to do so in a timely manner." (App. p. 377, *para.* 1). This supports the PCR judge's grant of relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). Respectfully, Gomez asks this Court to uphold the PCR judge's finding that he is entitled to a belated appeal.

CONCLUSION

Respectfully, Narciso asks this Court to uphold the PCR judge's finding that he is entitled to a belated appeal.

Respectfully submitted,

Elizabeth A. Franklin-Best

Elizabeth A. Franklin-Best
Appellate Defender

ATTORNEY FOR PETITIONER

This 17th day of February, 2009.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Beaufort County
J. Cordell Maddox, Jr., Circuit Court Judge

OSEIL GOMEZ NARCISO,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on Matthew J. Friedman, Esquire, at Rembert Dennis Building, Room 519, 1000 Assembly Street, Columbia, SC 29201; and upon Oseil Gomez Narciso, #319935, McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 17th day of February, 2009.

Elizabeth A. Franklin-Best

Elizabeth A. Franklin-Best
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 17th day
of February, 2009.

[Signature] (L.S.)
Notary Public for South Carolina

My Commission Expires: December 4, 2017.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Beaufort County

J. Cordell Maddox, Jr., Circuit Court Judge

OSEIL GOMEZ NARCISO,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

AMENDED PETITION FOR WRIT OF CERTIORARI

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ISSUES PRESENTED

- I. Did the judge properly find that Narciso did not knowingly and intelligently waive his right to appeal, entitling him to a *White v. State*¹ appeal?

- II. Narciso signed a Consent Order Granting Belated Direct Appeal and "waived his right to raise any other PCR allegations." Narciso respectfully asks this Court to remand his case to determine whether that waiver was entered into knowingly and voluntarily.

¹ 263 S.C. 110, 208 S.E.2d 35 (1974).

STATEMENT

Oriel Gomez Narciso was indicted by the Beaufort County grand jury for Trafficking Cocaine (2005-GS-07-1304). He was tried before the Honorable Howard P. King and a jury between January 16th and 18th, 2007. He was represented by Donald Colongeli, Esquire. He was convicted, and sentenced to 25 years incarceration.

Narciso did not appeal his convictions or sentence. He then filed an application for post-conviction relief on August 1, 2007. No hearing was held, but the parties signed a Consent Order Granting Belated Direct Appeal.

This Petition for Writ of Certiorari timely follows.

ARGUMENT

- I. The judge properly found that Gomez did not knowingly and intelligently waive his right to appeal.

The parties entered into a Consent Order granting Petitioner the right to a belated appeal. According to the Order, “[t]rial counsel [informed] the Respondent and PCR counsel that the Applicant asked him to file an appeal, and trial counsel failed to do so in a timely manner.” (App. p. 377, *para.* 1). This supports the PCR judge’s grant of relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). Respectfully, Gomez asks this Court to uphold the PCR judge’s finding that he is entitled to a belated appeal.

- II. Narciso signed a Consent Order Granting Belated Direct Appeal and “waived his right to raise any other PCR allegations.” Narciso respectfully asks this Court to remand his case to determine whether that waiver was entered into knowingly and voluntarily.

According to the Consent Order, trial counsel informed the Attorney General’s Office and PCR counsel that Narciso requested that he file a notice of intent to appeal, but that he failed to do so. This would entitled Narciso to a belated appeal under White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974) and Roe v. Flores-Ortega, 528 U.S. 470, 120 S.Ct. 1029 (2000). Under these facts, Narciso would have been entitled to a belated review of his claim, even without waiving his right to raise other PCR claims.

A review of the record suggests that Narciso does, in fact, have additional post-conviction relief claims that he should be allowed to raise. Specifically, Narciso may considering raising the issue of accepting a plea offer that was initially extended in this case but

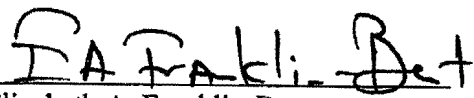
which his attorney never formally accepted on his behalf and which would have significantly reduced his legal exposure. Narciso may also wish to challenge his attorney's failure to object to the extensive hearsay that was allowed into his trial. He may also wish to raise his attorney's failure to object to a *Doyle* violation present in the transcript, and made by the sole officer who testified to his "confession." He may also wish to challenge his attorney's failure to raise a claim under *S.C. Const. art. I, §10* with respect to the search in this case and his heightened privacy protections afforded by this State.

Additionally, the record in this case, aside from his signature on the Consent Agreement, does not support the conclusion that Narciso entered into the agreement knowingly and voluntarily. Since he was convicted after trial, he received no benefit from entering into the agreement (and that he was entitled to anyway). There was no judicial colloquy between Narciso and the judge to assure that Narciso understood the rights he was waiving. Indeed, Narciso is not a native English speaker and used a translator at his trial—it is unclear that he could read and understand the Consent Agreement he signed. In short, none of the procedural safeguards present in *Spoone v. State*, 379 S.C. 138, 665 S.E.2d 605 (2008) was present here. Respectfully, Narciso asks this Court to remand this issue back to the Court of Common Pleas to develop the record on this issue.

CONCLUSION

Respectfully, Narciso asks this Court to uphold the PCR judge's finding that he is entitled to a belated appeal. Also, Narciso respectfully asks this Court to remand his case with respect to Issue II to determine whether he knowingly and intelligently waived his right to raise other PCR allegations.

Respectfully submitted,


Elizabeth A. Franklin-Best
Appellate Defender

ATTORNEY FOR PETITIONER

This 14th day of July, 2009.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Beaufort County
J. Cordell Maddox, Jr., Circuit Court Judge

OSEIL GOMEZ NARCISO,

PETITIONER,

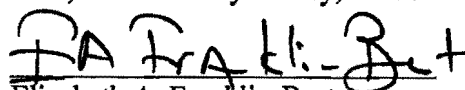
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

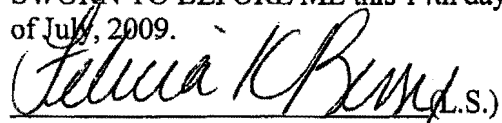
I certify that a true copy of the amended petition for writ of certiorari in this case have been served on Matthew J. Friedman, Esquire, at Rembert Dennis Building, Room 519, 1000 Assembly Street, Columbia, SC 29201; and upon Oseil Gomez Narciso, #319935, McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 14th day of July, 2009.



Elizabeth A. Franklin-Best
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 14th day
of July, 2009.


(L.S.)
Notary Public for South Carolina

My Commission Expires: August 15, 2010.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Beaufort County

Howard P. King, Circuit Court Judge

OSEIL GOMEZ NARCISO,

APPELLANT,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

AMENDED BRIEF OF APPELLANT
PURSUANT TO WHITE V. STATE

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ATTORNEY FOR APPELLANT.

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STATEMENT OF ISSUES ON APPEAL

The Fourth Amendment of the United States Constitution protects citizens from unreasonable searches and seizures. Arresting Narciso for a minor traffic violation when police testified they had reasonable suspicion to believe that Narciso was engaged in drug dealing, based on an "on-going investigation," was unreasonable because the facts law enforcement presented to the trial court did not rise to the level of reasonable suspicion, and because their actions were taken solely to circumvent presenting their case to a magistrate. Narciso was unreasonably seized in this case, and these facts fall beyond the ambit of *New York v. Belton*¹.

¹ 453 U.S. 454, 101 S.Ct. 2860 (1981).

STATEMENT OF THE CASE

Oriel Gomez Narciso was indicted by the Beaufort County grand jury for Trafficking Cocaine (2005-GS-07-1304). He was tried before the Honorable Howard P. King and a jury between January 16th and 18th, 2007. He was represented by Donald Colongeli, Esquire. He was convicted, and sentenced to 25 years incarceration.

Narciso did not appeal his convictions or sentence. He then filed an application for post-conviction relief on August 1, 2007. No hearing was held, but the parties signed a Consent Order Granting Belated Direct Appeal.

This White² appeal timely follows.

² 263 S.C. 110, 208 S.E.2d 35 (1974).

ARGUMENT

The Fourth Amendment of the United States Constitution protects citizens from unreasonable searches and seizures. Arresting Narciso for a minor traffic violation when police testified they had reasonable suspicion to believe that Narciso was engaged in drug dealing, based on an "on-going investigation," was unreasonable because the facts law enforcement presented to the trial court did not rise to the level of reasonable suspicion, and because their actions were taken solely to circumvent presenting their case to a magistrate. Narciso was unreasonably seized in this case, and these facts fall beyond the ambit of *New York v. Belton*³.

Narciso was charged with drugs that were found in his car after police officers pulled him for a minor traffic violation. Admittedly, Narciso was the target in an "on-going investigation" that began earlier in the day. After Narciso was transported to the police station for failing to own a South Carolina driver's license, officers ran a drug dog around Narciso's vehicle. It is unclear whether he was arrested for not having a South Carolina driver's license, which would not be illegal, or because he did not have any license at all. (App. page 80, lines 9-12). The dog alerted, and the car was searched. The drugs were located in the luggage compartment of the car, and in the center console. Based on this find, the police charged Narciso with trafficking cocaine. Officer Florencio testified that the search was conducted incident to arrest for the driver's license violation, and also that the dog alerted on the car after Narciso was already taken into custody. (App. page 74, lines 21-25; App. page 83, lines 6-17; App. page 85, lines 7-10; App.

³ 453 U.S. 454, 101 S.Ct. 2860 (1981).

page 86, lines 1-12). Florencio testified that it was not searched pursuant to an inventory search. (App. page 87, lines 8-11).

Narciso's seizure by the officers was unreasonable because the "on-going investigation" was not supported by probable cause, and the officers actions were clearly intended to circumvent a magistrate's finding of probable cause, a concern raised by the trial court judge. This case then falls beyond the ambit of New York v. Belton, which the judge relied upon in upholding the constitutionality of the search, and Narciso's rights under the Fourth Amendment were violated.

Officer Florencio's Investigation of Narciso

Officer Florencio testified to the investigation the Task Force conducted in this case. The "on- going investigation" started the day of the arrest. (App. page 198, lines 11-19). It was based on some information he received, the substance of which was never revealed either during pre-trial, or during the trial itself. (App. page 198, lines 17-18). Florencio knew that Narciso, along with other Hispanic males were at the Suburban Lodge. (App. page 199, lines 3-7). Narciso's employer, Savannah Heartscapes, was the actual renter of the room. (App. page 199, lines 13-23). Narciso was observed by members of the surveillance team traveling to a couple of automotive stores. (App. page 200, lines 2-14). He did not walk out of either of these places carrying anything at all. (App. page 202, lines 20-25; App. page 205, line 13 to page 206, line 3). He was then seen working on his car. (App. page 203, lines 3-9). He and other Hispanic males were also working on a truck. (App. page 203, lines 3-14). Florencio admitted that he did not actually view Narciso at these places, but that Lieutenant Woodward, Sergeant Kobel,

Officer Haroog, Officer Harold and Officer Light did (App. page 206, line 21 to page 207, line 3). These officers did not testify at Narciso's trial.

After Narciso finished working on the car, he was seen taking a phone call. He then went upstairs. Another officer then saw him go into his room. Then, he came out carrying a white t-shirt "with something in it," place it in the car, and drive away. (App. page 208, line 23 to page 209, line 11). Florencio did not personally see Narciso place anything into the car. (App. page 211, lines 3-7). He was not even sure who saw Narciso place the white t-shirt into the car. (App. page 211, lines 12-19). The car did not belong to Narciso. (App. page 218, lines 1-21). Based on Narciso's peregrinations and placement of an unknown item in the car, however, Florencio directed another officer to pull Narciso over. (App. page 215, lines 15 to page 216, line 25). Narciso was placed under arrest for not having a South Carolina driver's license. (App. page 216, lines 24-25). It appears that he did, though, in fact, have a driver's license issued by the State of South Carolina. (App. page 137, line 8 to page 138, line 9). He was then transported to a Hilton Head police station. (App. page 217, lines 4-6). This series of events did not amount to probable cause that would have justified a search of the vehicle had the case been presented to a magistrate. State v. Gentile, 373 S.C. 506, 646 S.E.2d 171 (Ct. App. 2007).

After Narciso was removed from the scene, Officer Hiers ran a drug dog around the car. The dog alerted, and the car was searched. In two locations—in the back of the car in the luggage compartment, and in the console-- drugs were found. (App. page 149, line 21 to page 152, line 15). The drugs were not in plain view. (App. page 223, line 13). Florencio traveled to the Hilton Head station, informed Narciso of what was found in the

car, and promptly arrested him for trafficking cocaine. (App. page 223, line 13 to page 224, line 8).

The trial court judge was extremely concerned about the search in this case. (App. page 101, line 4 to page 115, line 22). According to him, he only denied defense counsel's motion because he believed he was compelled to by *Belton, supra*. The judge's ruling then was erroneous because this case does not fit within the ambit of *Belton*, and the search was a violation of Narciso's 4th Amendment rights.

Law Enforcement's Actions Violated Narciso's 4th Amendment Rights

U.S. Const. Amend. IV provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Narciso's rights were violated by the law enforcement seizure of him, predicated on their "on-going investigation," because they had not developed facts sufficient to present to a magistrate to secure a warrant for search of the car. Their actions were taken to circumvent their obligation to do so. Therefore the arrest was made in an "extraordinary manner, unusually harmful to [Narciso's] privacy or . . . physical interests." Whren v. United States, 517 U.S. 806, 818, 116 S.Ct. 1769 (1996).

In this case, law enforcement sought to accomplish, by way of pulling Narciso for a minor traffic infraction, what they were otherwise not entitled to do. Law enforcement was quite clear that the purpose of the pull was to search the car for drugs. (App. page 74, lines 9-23; App. page 78, lines 6-22). Their actions, then, rendered the subsequent

search illegal because the search incident to arrest was then untethered from the exigency justifications that allow for the warrant exception. See Chimel v. California, 395 U.S. 752, 89 S.Ct. 2034 (1969). Additionally, they did not have reasonable suspicion which would have justified a prolonged detention, had Narciso remained at the car and had not been immediately arrested. State v. Tindall, 379 S.C. 304, 665 S.E.2d 188 (Ct. App. 2008). Law enforcement's actions were abusive, and the United States Supreme Court, in Atwater v. City of Lago Vista, 532 U.S. 318, 121 S.Ct. 1536 (2001), suggests in footnote 25 that such actions would be objectionable. Any other conclusion renders the Fourth Amendment a nullity and effectively creates a judicial review-free zone on the roadways. Further, the police actions in this case ignore the admonition in Terry v. Ohio, 392 U.S. 1, 19, 88 S.Ct. 1868 (1968), that "the scope of [a] search must be 'strictly tied to and justified by' the circumstances which rendered its initiation permissible."

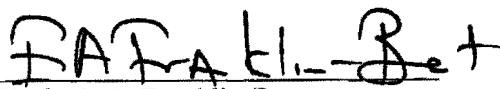
Additionally, the holding in *Belton* does not compel a finding that the search was an appropriate search incident to arrest since, in that case, the police initially pulled the car over for speeding, and then probable cause arose because of the officer's detecting the smell of burnt marijuana. In other words, probable cause existed at the time the police pulled the car, and there was probable cause to believe that criminal activity was afoot because of the smell of marijuana. The exigency of the situation—the possible destruction of evidence—justified a warrantless search of the car compartment area, and it would have been unnecessarily onerous for the officer to have secured a warrant under the facts of *Belton*. That was not the case here, where officers' simply wanted to arrest Narciso on a minor violation so they could conduct a warrantless search without probable cause.

In this case, the police may have had probable cause to believe that a minor traffic violation occurred, but they did not have reasonable suspicion, much less probable cause, to believe that Narciso was engaged in any illegal activity. The officers' simply used the driver's license issue to effect an arrest so they could conduct a fishing expedition because they knew they did not have probable cause to secure a warrant. If the justifications for the exceptions to the 4th Amendment do not exist in a particular case, then their application is improper. Here, no exigencies were present *at all*! Narciso was arrested and whisked away to another location. The officers should have taken their case to a magistrate. Instead, law enforcement orchestrated a series of events designed to avoid having to do what they were obligated to do by law—present their case to a neutral and detached magistrate to make a determination of probable cause. The seizure then of Narciso was conducted in an “extraordinary manner” and Narciso’s rights were violated. Respectfully, Narciso asks this Court to reverse his conviction.

CONCLUSION

For preceding reasons, Narciso respectfully asks this Court to reverse his conviction.

Respectfully submitted,


Elizabeth A. Franklin-Best
Appellate Defender

ATTORNEY FOR APPELLANT.

This 14th day of July, 2009.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Beaufort County

Howard P. King, Circuit Court Judge

OSEIL GOMEZ NARCISO,

APPELLANT,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

**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) App. p. 74
- (3) App. p. 78
- (4) App. p. 80
- (5) App. p. 83
- (6) App. p. 85-87
- (7) App. p. 101-115;
- (8) App. p. 137-138
- (9) App. p. 149-152
- (10) App. 198-200;
- (11) App. p. 202-203
- (12) App. p. 205-209
- (13) App. p. 211
- (14) App. p. 215-217
- (15) App. p. 218
- (16) App. p. 222-224.

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

July 14, 2009

Elizabeth A. Franklin-Best

Elizabeth A. Franklin-Best
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S. C. 29211-1589
(803) 734-1343

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Beaufort County

Howard P. King, Circuit Court Judge

OSEIL GOMEZ NARCISO,

APPELLANT,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

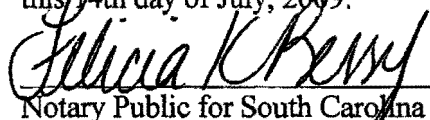
The undersigned attorney hereby certifies that a true copy of the Amended Brief of Appellant Pursuant to White v. State in the above referenced case has been served upon Matthew J. Friedman, Esquire, at Rembert Dennis Building, Room 519, 1000 Assembly Street, Columbia, SC 29201; and upon Oseil Gomez Narciso #319935, McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 14th day of July, 2009.



Elizabeth A. Franklin-Best
Appellate Defender

ATTORNEY FOR APPELLANT.

SUBSCRIBED AND SWORN TO before me
this 14th day of July, 2009.



(L.S.)
Notary Public for South Carolina

My Commission Expires: August 15, 2010

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Beaufort County
Honorable Howard P. King, Circuit Court Judge

THE STATE,

Respondent,

vs.

OSEIL GOMEZ NARCISO,

Petitioner.

**RETURN TO PETITION FOR
WRIT OF CERTIORARI**

HENRY DARGAN McMASTER
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

MICHELLE PARSONS KELLEY
Assistant Attorney General

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ATTORNEYS FOR RESPONDENT

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ISSUES PRESENTED

1. Did the PCR court properly grant the Petitioner a belated direct appeal pursuant White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974)?
2. Did the PCR Court correctly rule the Petitioner waived his right to assert additional PCR allegations?

STATEMENT OF THE CASE

The Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Beaufort County Clerk of Court. The Petitioner was indicted at the August 2005 term of the Beaufort County Grand Jury for trafficking cocaine (in excess of 100 grams) (2005-GS-07-1304). Donald Colongeli, Esquire, represented the Petitioner. On January 16-18, 2007, the Petitioner proceeded to trial, in which the jury found him guilty as indicted. The Honorable Howard P. King sentenced him to confinement for twenty-five (25) years. The Petitioner did not appeal his conviction or sentence.

The Petitioner subsequently filed a post-conviction relief application on August 1, 2007. An evidentiary hearing was held on August 26, 2008. Philip Rios represented the Petitioner, while Matthew Friedman represented the State. Judge J. Cordell Maddox issued an order August 26, 2008, which granted a belated direct appeal with the consent of both parties.

STANDARD OF REVIEW

The proper standard of review of a post conviction relief evidentiary hearing is whether "any evidence of probative value" exists to sustain the post-conviction relief judge's findings. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). If any probative evidence does exist to support the PCR judge's decision, the ruling must be upheld. Jackson v. State, 329 S.C. 345, 348, 495 S.E.2d 768, 769 (1998); Skeen v. State, 325 S.C. 210, 481 S.E.2d 129 (1997). In a post-conviction relief proceeding, the petitioner bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

Where ineffective assistance of counsel is alleged as a ground for relief, the petitioner must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland v. Washington. The petitioner must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. First, the Petitioner must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry v. State, 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland v. Washington. Second, counsel's deficient performance must have prejudiced the Petitioner such that "there is a reasonable probability that, but

for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry v. State, 300 S.C. at 117-18, 386 S.E.2d at 625. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997).

ARGUMENT

I. Did the PCR court properly grant the Petitioner a belated direct appeal pursuant White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974)?

The PCR Court properly granted the Petitioner a belated direct appeal. The State consented to the PCR Court's decision and does not contest the Order of Dismissal on appeal. (App. p. 377).

II. Did the PCR Court correctly rule the Petitioner waived his right to assert additional PCR allegations?

In his brief, the Petitioner claims the PCR should be remanded to the PCR Court to determine whether the Petitioner knowingly and voluntarily waived his right to raise other PCR allegations. This issue is not preserved for appellate review where it was "not raised to and ruled on by the PCR judge." Humbert v. State, 345 S.C. 332, 338, 548 S.E.2d 862, 866 (2001). The Order of Dismissal asserted the Petitioner's only allegation was his desire for a belated direct appeal and the Petitioner waived all other allegations. In addition, the Petitioner signed the Order indicating his consent to its holding. (App. p. 377). The record from the evidentiary hearing indicates the Petitioner failed to put forth any additional allegations at the PCR evidentiary hearing. Moreover, the Petitioner failed to file a 59(e) objecting to the Order's language indicating he waived his remaining PCR allegations. The Petitioner had an opportunity to put forth his PCR allegations at the evidentiary hearing and failed to do so. The Petitioner further failed to object to the Order indicating he waived his allegations. Rather, he signed the Order and indicated his consent. The Petitioner cannot now raise this issue for the first time for appellate review. Moreover, the Petitioner's brief does not even go so far as to assert he did not knowingly and voluntarily waive his other PCR allegations, but mere

speculates that may be the case. For all of these reasons, the PCR Court's ruling should be affirmed and this allegation should be denied.

CONCLUSION

For the reasons stated above, this Court should affirm the PCR Court's Order and deny the Petition for Writ of Certiorari. However, should this Court grant certiorari, the Respondent asks permission under the rules to fully brief the issues discussed above.

Respectfully submitted,

HENRY DARGAN McMASTER
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

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By: Michelle Parsons Kelley
ATTORNEYS FOR THE RESPONDENT

Columbia, South Carolina
November 30, 2009.

STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO BEAUFORT COUNTY
Court of Common Pleas

The Honorable Howard P. King, Circuit Court Judge

Case No. 2007-CP-07-2195

OSIEL GOMEZ NARCISO,

Petitioner,

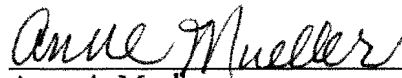
v.

STATE OF SOUTH CAROLINA,

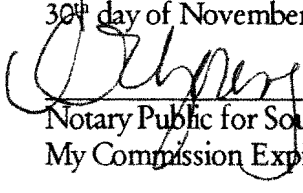
Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Return to the Petition for Writ of Certiorari has been served upon opposing counsel, Elizabeth A. Franklin-Best, this 30th day of November, 2009.


Anne A. Mueller
Legal Assistant for Respondent

SWORN to before me this
30th day of November, 2009.


Notary Public for South Carolina,

My Commission Expires: 10/28/2014

(L.S.)

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Beaufort CountyJ. Cordell Maddox, Jr., Circuit Court Judge

OSEIL GOMEZ NARCISO,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

SUPPLEMENTAL
APPENDIX

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Chief Deputy Attorney GeneralSALLEY W. ELLIOTT
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ATTORNEYS FOR RESPONDENT

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INDICTMENT 1

WITNESSES

SGT. ANDRES FLORENCIO

ARREST WARRANT NUMBER

H915578

08/04/2005

ACTION OF GRAND JURY

*John Bell**Patty Culbertson*

Foreperson of Grand Jury

Date: AUG 25 2005

VERDICT

Foreperson of Petit Jury

Date:

DOCKET NO.

2005-GS-07-01304

THE STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

RANDOLPH MURDAUGH III. , Solicitor

COURT OF GENERAL SESSIONS

08/25/2005

TERM

THE STATE
VS.*Narciso*
NARCISO, OSIEL GOMEZ

Indictment for

Drugs/Traf cocaine, 10g/more to 28g-1st

SC Code : 44-53-0370(B) (2) (C)

CDR Code: 0278

Class:

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

INDICTMENT
2005-GS-07-01304

At a Court of General Sessions, convened on 08/25/2005 the
Grand Jurors of BEAUFORT COUNTY present upon their oath:

Drugs/Traf cocaine, 10g/more to 28g-1st

44-53-0370 (E) (2) (C)

THAT ON OR ABOUT 08/03/05, THE DEFENDANT, OSIEL NARCISO ^{Gomez}, DID KNOWINGLY AND
INTENTIONALLY POSSESS A QUANTITY OF POWDER COCAINE, WITH A WEIGHT OF IN
EXCESS OF 100 GRAMS. THIS DID OCCUR IN BEAUFORT COUNTY, SOUTH CAROLINA.

Jan 19, 2006
Indictment amended on the record with consent.

Howard P. King
Presiding Judge

to Grand Jury
Presentment of amended indictment waived.

Osiel N

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

Randolph M. Mendenhall

SOLICITOR

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

THE STATE OF SOUTH CAROLINA, by and through the Attorney General, vs. JAMES H. HANCOCK, Defendant.

FILED FOR RECORD IN THE CLERK'S OFFICE OF THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA, AT COLUMBIA, SOUTH CAROLINA, THIS 10TH DAY OF MAY, 1906.

1906

106

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ISSUE PRESENTED

1. Did the Petitioner freely and voluntarily waive his right to raise any PCR allegations except the White v. State appeal issue when he signed a Consent Order Granting Belated Direct Appeal and the White v. State appeal issue was his only allegation in his original PCR application?

STATEMENT OF THE CASE

For purposes of this brief, Respondent adopts Petitioner's Statement.

STANDARD OF REVIEW

The proper standard of review of a post conviction relief evidentiary hearing is whether "any evidence of probative value" exists to sustain the post-conviction relief judge's findings. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). If any probative evidence exists to support the PCR judge's decision, the ruling must be upheld. Jackson v. State, 329 S.C. 345, 348, 495 S.E.2d 768, 769 (1998); Skeen v. State, 325 S.C. 210, 481 S.E.2d 129 (1997).

ARGUMENT

- I. **The Petitioner freely and voluntarily waived his right to raise any PCR allegations except the White v. State appeal issue when he signed a Consent Order Granting Belated Direct Appeal and the White v. State appeal issue was his only allegation in his original PCR application.**

Petitioner signed a Consent Order Granting Belated Direct Appeal, in which he was granted review of direct appeal issues pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974) and waived the right to raise any other PCR allegations. Petitioner contends that he did not knowingly and intelligently waive his right to raise additional PCR claims. He asserts that none of the procedural safeguards present in Spoone v. State, 379 S.C. 138, 665 S.E.2d 605 (2008) was present here. Respondent submits that this case can be distinguished from Spoone. In Spoone, the issue was whether the right to appellate review and post-conviction review may be waived by a written plea agreement. Spoone, 379 S.C. 138, 665 S.E.2d 605. Here, the Petitioner proceeded to trial and was convicted. Petitioner waived his right to raise any other PCR allegations by consent order rather than written plea agreement.

The Consent Order Granting Belated Direct Appeal states as follows:

The White v. State issue is the Applicant's only allegation in the PCR application. The Applicant understands that he must proceed on all PCR claims at this time and anything not raised now is waived. The Applicant wishes to waive all other PCR claims and proceed with a belated direct appeal.

(App. p. 377). Petitioner signed the consent order, and he never indicated to his attorney or the presiding judge that he did not understand the rights that he was waiving. In the Amended Brief of Petitioner, Petitioner notes that he is not a native English speaker and it is unclear that he could read and understand the consent order he signed. Respondent submits that Philip J. Rios, Esquire, represented Petitioner on his PCR application. Mr. Rios is fluent in Spanish, and he did not indicate

any problems communicating with the Petitioner.

Petitioner asserts that a review of the record suggests that he does, in fact, have additional PCR claims that he should be allowed to raise. Respondent contends that the Court should not consider potential PCR allegations that were not raised in the original PCR application. Petitioner's only original allegation was that trial counsel failed to file a notice of appeal after promising to do so, an allegation that was addressed and ruled upon in the consent order. Respondent respectfully submits that Petitioner freely and voluntarily waived his right to raise any PCR issues other than the White v. State issue.

CONCLUSION

For the foregoing reasons, the State respectfully submits that the Court should find that Petitioner freely and voluntarily waived his right to raise additional PCR claims.

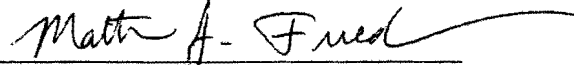
Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

MATTHEW J. FRIEDMAN
Assistant Attorney General


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September 12, 2011.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Osiel Gomez Narciso, Petitioner,

v.

State of South Carolina, Respondent.

ON WRIT OF CERTIORARI

Appeal From Beaufort County
J. Cordell Maddox, Jr., Circuit Court Judge

Opinion No. 27104
Heard January 25, 2012 – Filed March 14, 2012

AFFIRMED IN PART, REMANDED IN PART

Appellate Defender Elizabeth A. Franklin-Best, of Columbia, for
Petitioner.

Attorney General Alan Wilson, Chief Deputy Attorney General John
W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott,
and Assistant Attorney General Matthew J. Friedman, all of
Columbia, for Respondent.

CHIEF JUSTICE TOAL: Oseil Gomez Narciso (Petitioner) appeals his conviction for trafficking cocaine, and asserts that the circuit court erred in denying his motion to suppress drug evidence seized by police during a routine traffic stop. Following his conviction, Petitioner signed a Consent Order Granting Belated Direct Appeal (Consent Order) and waived his right to raise any other post-conviction relief (PCR) allegations. Petitioner requests this Court remand his case to determine whether that waiver was entered into knowingly and voluntarily. We affirm the circuit court's order denying Petitioner's motion to suppress, and remand the case for a determination as to whether Petitioner's waiver was entered into knowingly and voluntarily.

FACTUAL/PROCEDURAL BACKGROUND

On August 3, 2005, the Beaufort County Sherriff's Office (BCSO) conducted a drug investigation focusing on Petitioner. Police believed that Petitioner may have been involved in the sale and distribution of cocaine in the Hilton Head/Bluffton area of Beaufort County. A sheriff's deputy received information that Petitioner might be operating a vehicle in the area with expired license plates and possibly no driver's license. The deputy conducted a traffic stop of Petitioner after confirming that his license plates were indeed expired and suspended. A "back-up officer," arrived on scene shortly thereafter. Police placed Petitioner under arrest for operating the vehicle without a driver's license and removed him from the vehicle. Police then conducted a "K-9" search of the vehicle. The narcotics-detection dog used in the search alerted on drug residue on the vehicle, and police conducted a search of the cargo compartment. Police seized powdered cocaine from the vehicle, and charged Petitioner with knowingly and intentionally possessing a quantity of powder cocaine with a weight in excess of one hundred grams.

The Beaufort County Grand Jury indicted Petitioner for trafficking cocaine in excess of one hundred grams, and Petitioner proceeded to trial. The jury found Petitioner guilty as indicted. The circuit court sentenced Petitioner to twenty-five years imprisonment. Petitioner did not appeal his conviction or sentence, but subsequently filed a PCR application.

Petitioner claimed in his PCR application that his trial attorney failed to file a timely notice of appeal even after assuring Petitioner that he "had multiple grounds for appeal," and that he "would almost certainly be successful in overturning the convictions at the appellate level." According to the Consent Order, Petitioner's trial counsel admitted that he failed to file an appeal even though Petitioner requested one be filed. Thus, the State consented to granting Petitioner a belated direct appeal pursuant to *White v. State*, 263 S.C. 110, 208 S.E.2d 35 (1974)¹. In the same Consent Order, Petitioner "waived his right to raise any other PCR allegations."

In a petition for writ of certiorari to this Court, Petitioner asserted that the PCR judge properly found that he did not waive his right to a direct appeal, and requested this Court remand his case to determine whether his waiver of any other PCR allegations was entered into knowingly or

¹ In *White v. State*, 263 S.C. 110, 113, 208 S.E.2d 35, 36 (1974), the defendant was convicted of burglary and sentenced to twenty years imprisonment. The defendant did not appeal his conviction or sentence, but subsequently filed a petition for PCR and a circuit court denied that relief in a full evidentiary hearing. *Id.* The defendant argued on appeal that the PCR judge should have ordered a new trial because the defendant did not knowingly and intelligently waive the right to appeal from his conviction and sentence. *Id.* at 117, 208 S.E.2d at 39. The defendant's trial counsel testified at the PCR hearing that he did not advise the defendant of his right to appeal because he was certain the defendant knew of his rights due to his prior criminal record. *Id.* The PCR judge found that the defendant did not knowingly and intelligently waive his right to appeal, and directed defendant's new counsel to secure a belated appeal to this Court from his conviction and sentence. *Id.* at 118, 208 S.E.2d at 39. This Court found that with regard to this belated appeal, no notice of appeal had been filed, and thus the Court had no jurisdiction over such an appeal. *Id.* at 119, 208 S.E.2d at 39. However, the Court reviewed the record in connection with the properly presented PCR appeal and ruled that "there was no reversible error in the trial and that there was not an arguably meritorious ground of appeal, even if notice of intention to appeal had been timely served" *White*, 263 S.C. at 119, 208 S.E.2d at 40.

voluntarily. This Court granted the petition for writ of certiorari as to whether Petitioner knowingly and voluntarily waived his right to direct appeal, dispensed with further briefing on that question, and elected to proceed with further review of the direct appeal issue—the validity of the stop and search. Additionally, this Court granted review of whether Petitioner's waiver of any other PCR allegations was entered into knowingly and voluntarily.

ISSUES PRESENTED

- I. Whether the circuit court erred in admitting evidence obtained as a result of Petitioner's traffic stop.
- II. Whether Petitioner's waiver of PCR allegations, other than the belated direct appeal issue, was entered into knowingly and voluntarily.

STANDARD OF REVIEW

On appeal from a motion to suppress on Fourth Amendment grounds, this Court applies a deferential standard of review and will reverse only if there is clear error. *State v. Tindall*, 388 S.C. 518, 520, 698 S.E.2d 203, 205 (2010) (citation omitted). However, this Court is not barred from conducting its own review of the record to determine whether the trial judge's decision is supported by the evidence. *Id.*

On certiorari in a PCR action, the Court applies the "any evidence" standard. Accordingly, this Court will affirm if any evidence of probative value in the record exists to support the findings of the PCR court. *Terry v. State*, 394 S.C. 62, 66, 714 S.E.2d 326, 328 (2011) (citation omitted).

LAW/ANALYSIS

- I. Whether the circuit court erred in admitting evidence obtained as a result of Petitioner's traffic stop.

Petitioner argues that the facts presented by police to the circuit court did not rise to the level of "reasonable suspicion," and that he was

"unreasonably seized." Thus, according to Petitioner, his Fourth Amendment rights were violated, and this Court should reverse his conviction. We agree with Petitioner that the search incident to arrest in this case violated his Fourth Amendment rights. However, for reasons explained below, the exclusion remedy is unavailable to Petitioner, and thus his conviction will stand.

In *New York v. Belton*, 453 U.S. 454 (1981), the United States Supreme Court initially explained the constitutionally permissible scope of a search incident to arrest. In that case, police ordered the driver of a speeding vehicle to pull over to the side of the road and stop. *Id.* at 455. The policeman asked to see the driver's license and automobile registration and simultaneously smelled burnt marijuana. *Id.* at 455-56. The officer directed the occupants out of the car and conducted a pat down of the four men. *Id.* at 456. The officer then conducted a search of the passenger compartment of the car, including a black leather jacket belonging to Belton. *Id.* He unzipped one of the pockets of the jacket and discovered cocaine. *Id.*

Belton argued that the cocaine had been seized in violation of the Fourth and Fourteenth Amendments. *Belton*, 453 U.S. at 456-57. The Court stressed the need to provide a "workable rule," and held that when a policeman has made a lawful custodial arrest of the occupant of an automobile, "he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile." *Id.* at 459-60. The Court reasoned that the police should also be allowed to examine the contents of any containers found within the passenger compartment, "for if the passenger compartment is within reach of the arrestee, so also will containers in it be within his reach." *Id.* at 460-61 (citations omitted).

In the instant case, the police stopped Petitioner as part of an ongoing drug investigation, but primarily because the license tags on his automobile were expired. The police officer asked Petitioner for his driver's license, and verified that Petitioner did not possess a valid driver's license. Thus, he arrested Petitioner, and police searched Petitioner's vehicle incident to that arrest.

Petitioner challenged the search at trial. The circuit court judge initially expressed concern at the vehicle search following a mere traffic stop, but denied Petitioner's motion to suppress:

It concerns me that the law enforcement in this case would risk this investigation by making a search under these circumstances without obtaining a search warrant. It would have been a very easy thing to do. There was just no reason that it needed to be done the way that they did it But after looking especially at the case of *New York v. Belton*, 433 U.S. 454, is [sic] the only thing that tips the scales in the State's favor in this case; and that is that a search may be made incident to an arrest of the passenger compartment of the vehicle, including containers located in the passenger compartment where the search incident to arrest even if the detainee has been arrested and removed from the vehicle.

Petitioner's trial took place in 2007, two years prior to the United States Supreme Court's holding in *Arizona v. Gant*, 556 U.S. 332 (2009). In *Gant*, the United States Supreme Court limited the expansive searches allowed by *Belton*. The Court noted that *Belton* had been widely understood to "allow a vehicle search incident to arrest of a recent occupant even if there is no possibility the arrestee could gain access to the vehicle at the time of the search." *Id.* at 1718. The Court found this reading incompatible with its previous decisions regarding the basic scope of searches incident to lawful custodial arrests. *Id.* at 1719 (citation omitted). Therefore the Court held that police may search a vehicle incident to a recent occupant's arrest only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search or when it is reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle. *Id.* (citing *Thornton v. United States*, 541 U.S. 615, 624–25 (2004)).

Newly announced rules of constitutional criminal procedure must apply retroactively to all cases, "pending on direct review or not yet final, with no exception for cases in which a new rule constitutes a 'clear break' with the past." *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987). Petitioner's conviction has not yet become final on direct review. Thus, *Gant* applies retroactively to

this case, and Petitioner may invoke its rule of substantive Fourth Amendment law as a basis for seeking relief. However, our analysis of the instant case is further controlled by the United States Supreme Court's decision in *Davis v. United States*, 131 S.Ct. 2419 (2011).

In *Davis*, the defendant was charged and convicted of unlawful possession of a firearm based on discovery of a revolver in a stopped automobile in which he was the only passenger. *Id.* at 2425–26. During the pendency of Davis's appeal, the United States Supreme Court decided *Gant*. The Eleventh Circuit applied *Gant*'s new rule and held that the vehicle search incident to arrest violated Davis's Fourth Amendment rights. *Id.* at 2426 (citation omitted). However, the court concluded that penalizing the arresting officer for following binding appellate court precedent would do nothing to deter Fourth Amendment violations. *Id.* (citing *United States v. Davis*, 598 F.3d 1259, 1265–66 (2010)).

The United States Supreme Court agreed, and reasoned that the acknowledged absence of police culpability doomed Davis's claim. *Id.* at 2428. "Police practices trigger the harsh sanction of exclusion only when they are deliberate enough to yield 'meaningful deterrence' and culpable enough to be 'worth the price paid by the justice system.'" *Id.* (citing *Herring v. United States*, 555 U.S. 135, 144 (2009)). Excluding evidence in cases where the "constable" has scrupulously adhered to governing law deters no police conduct and imposes substantial social costs. *Davis*, 131 S.Ct. at 2434. Thus, the Court held that when the police conduct a search in objectively reasonable reliance on binding appellate precedent, the exclusionary rule does not apply. *Id.*

In the instant case, the search incident to arrest violated Petitioner's Fourth Amendment rights pursuant to *Gant*. However, excluding the evidence against Petitioner would not deter police misconduct because the police in this instance conducted a search incident to arrest pursuant to binding appellate precedent. *See id.* at 2426–28. Moreover, exclusion of the evidence in this case would result in severe social costs, including the articulation of an inexplicable and undecipherable message to law enforcement regarding how to conduct a legal search. The protection of the Fourth Amendment can only be realized if the police are acting under a set of

rules which make it possible to reach a correct determination beforehand as to whether an invasion of privacy is justified in the interest of law enforcement. Wayne R. LaFave, "*Case-By-Case Adjudication*" Versus "*Standardized Procedures*": *The Robinson Dilemma*, 1974 Sup. Ct. Rev. 127, 142 (1974).

This Court will only reverse the circuit court's decision on a motion to suppress when there is clear error. *State v. Tindall*, 388 S.C. 518, 520, 698 S.E.2d 203, 205 (2010). The circuit court in this case applied the established law to a search executed pursuant to binding precedent. Thus, *Davis v. United States*, and our own standard of review, commands that the circuit court's decision be affirmed.²

II. Whether the Petitioner's waiver of PCR allegations, other than the belated direct appeal issue, was entered into knowingly and voluntarily.

Petitioner signed a consent order granting belated direct appeal and waived his right to raise any other PCR allegations. He now asks this court to remand his case for a determination as to whether he knowingly and voluntarily waived his right to raise additional PCR claims.

In order to determine whether a waiver is effective, the court examines the particular facts and circumstances surrounding the case, including the background, experience, and conduct of the accused. *Spoone v. State*, 379 S.C. 138, 143, 665 S.E.2d 605, 607 (2008) (citing *United States v. Broughton-Jones*, 71 F.3d 1143, 1146 (4th Cir. 1995)). Numerous jurisdictions have upheld waivers of post-conviction relief, provided they were knowing and voluntary. *Id.* at 143, 665 S.E.2d at 607. A defendant's

² Respondent argues that due to *Gant*, the "search-incident-to-arrest logic is no longer appropriate grounds for denying the suppression motion," and urged this Court to find the search was justified under the automobile exception. However, the decision in *Davis* being dispositive, this Court need not reach the automobile exception, or any other grounds, for upholding the search. See *Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1998) (holding that appellate courts need not discuss remaining issues when determination of a prior issue is dispositive).

knowing and voluntary waiver of statutory or constitutional rights must be established by a complete record, and may be accomplished by a colloquy between the court and defendant, between the court and defendant's counsel, or both. *Brannon v. State*, 345 S.C. 437, 439, 548 S.E.2d 866, 867 (2001).

In *Spoone v. State*, 379 S.C. 138, 665 S.E.2d 605 (2008), this Court addressed whether a PCR court erred in enforcing a written plea agreement wherein the petitioner waived his right to direct appeal, PCR, and habeas corpus relief. The petitioner argued that his waiver was not knowing and intelligent because there was no discussion at the plea proceeding about the extent of his understanding of the waiver. *Id.* at 141, 665 S.E.2d at 607.

The Court took into account that although petitioner had only a ninth grade education, the text of the written plea agreement was straightforward. *Id.* at 143–44, 665 S.E.2d at 608. In addition, the plea colloquy showed that the PCR court specifically asked petitioner about the waiver both in the language of the plea agreement, and in "plain language." *Id.* Two attorneys accompanied petitioner to the plea hearing and both signed the written plea agreement along with petitioner. *Id.* Thus, this Court held that the PCR court correctly enforced the waiver and dismissed petitioner's PCR application. *Id.*

In this case, according to the Consent Order, Petitioner appeared before the PCR court on August 26, 2008. The Consent Order states that Petitioner waived his right to raise any other PCR allegations, but was "granted a belated direct appeal pursuant to *White v. State*." The record before this Court of the colloquy between the parties consists of the following:

The court: What's the—what we got this morning?

Mr. Friedman: Your Honor, the first one is Osiel Gomez Narcisco [sic].

The court: All right.

Mr. Friedman: May we approach on this one?

The court: Yeah

(Bench conference)

Mr. Friedman: Thank you, Your Honor.

The court: Okay. Appreciate it. Thank you.

The Consent Order signed by Petitioner is straightforward. However, Petitioner used an English-speaking interpreter throughout his original trial, and apparently has, at best, a limited command of the English language. The colloquy provided to this Court does not show that the PCR court specifically asked Petitioner about the waiver, either in the language of the Consent Order, or in "plain language."

The State argues that Petitioner's case is distinguishable from *Spoone* because in that case the issue was "whether the right to appellate review and post-conviction review may be waived by a written plea agreement . . .," and that "[Petitioner] proceeded to trial and was convicted." This is a distinction without a difference. The key issue in *Spoone* and in Petitioner's case is the circumstances surrounding the waiver of the right to appeal PCR allegations. Aside from the consent agreement, the record in this case does not support the conclusion that Petitioner entered into the agreement knowingly and voluntarily. Additionally, the colloquy between the court and the defendant in this case does not clearly establish that Petitioner knowingly and voluntarily waived his right to raise any other PCR allegations. This Court will affirm the PCR court's findings if any evidence of probative value exists in the record. *Terry v. State*, 394 S.C. 62, 66, 714 S.E.2d 326, 328 (2011). However, finding that no such evidence exists in the instant case, we must remand for a determination as to whether Petitioner's waiver was entered into knowingly and voluntarily.

CONCLUSION

We affirm the circuit court's denial of Petitioner's motion to suppress. However, the record does not adequately demonstrate whether Petitioner's waiver was in accordance with this Court's waiver jurisprudence. Thus, we remand the case for a determination on that issue.

AFFIRMED IN PART, REMANDED IN PART.

PLEICONES, BEATTY, KITTREDGE and HEARN, JJ., concur.



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

March 30, 2012

REMITTITUR

The Honorable Jerri Roseneau
102 Ribaut Road, Rm 208
PO Box 1128
Beaufort, SC 29901

Re: Narciso, Osiel Gomez v. The State -- 2007-CP-07-02195

Dear Mrs. Roseneau:

The above referenced matter is hereby remitted to the lower court. A copy of the judgment of this Court is attached.

Very truly yours,

CLERK

DES/jj

cc: Appellate Defender Elizabeth A. Franklin-Best
Assistant Attorney General Matthew J. Friedman

STATE OF SOUTH CAROLINA))
COUNTY OF BEAUFORT))

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT
2007-CP-07-2195

OSEIL GOMEZ NARCISO))

PLAINTIFF,))

VS.))

TRANSCRIPT OF RECORD

THE STATE OF))
SOUTH CAROLINA))
DEFENDANT.))

AUGUST 26, 2008
BEAUFORT, SOUTH CAROLINA

B E F O R E:

THE HONORABLE J. CORDELL MADDOX, JUDGE

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

PHILIP JOHN RIOS, ESQUIRE
ATTORNEY FOR THE PLAINTIFF

MATTHEW J. FRIEDMAN, ESQUIRE
ATTORNEY FOR DEFENDANT

BONNIE H. KELLY
CIRCUIT COURT REPORTER

EXHIBITS

NO.

DESCRIPTION

ID/EVIDENCE

NO EXHIBITS WERE MARKED DURING THIS PROCEDURE

1 THE COURT: What's -- what we got this morning?

2 MR. FRIEDMAN: Your Honor, the first one is Osiel
3 Gomez Narcisco.

4 THE COURT: All right.

5 MR. FRIEDMAN: May we approach on this one?

6 THE COURT: Yeah.

7 (Bench conference.)

8 MR. FRIEDMAN: Thank you, Your Honor.

9 THE COURT: Okay. Appreciate it. Thank you.

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11 --- END OF TRANSCRIPT OF RECORD ---

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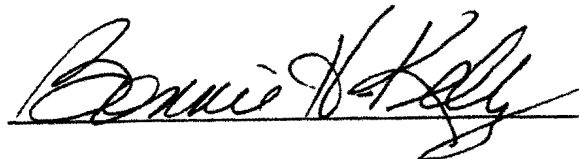
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CERTIFICATE

I, THE UNDERSIGNED BONNIE H. KELLY, OFFICIAL COURT REPORTER FOR THE ELEVENTH JUDICIAL CIRCUIT OF THE STATE OF SOUTH CAROLINA, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE, ACCURATE AND COMPLETE TRANSCRIPT OF RECORD OF ALL THE PROCEEDINGS HAD AND EVIDENCE INTRODUCED IN THE HEARING OF THE CAPTIONED CAUSE, RELATIVE TO APPEAL, IN THE CIRCUIT COURT FOR BEAUFORT COUNTY, SOUTH CAROLINA, ON THE 26TH DAY OF AUGUST, 2008.

I DO FURTHER CERTIFY THAT I AM NEITHER OF KIN, COUNSEL, NOR INTEREST IN ANY PARTY HERETO.



BONNIE H. KELLY

COLUMBIA, SOUTH CAROLINA

SEPTEMBER 26, 2008

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	CASE NO.: 2007CP0702195
OSEIL GOMEZ NARCISO,	)	
PETITIONER	)	
V.	)	ORDER
THE STATE OF SOUTH CAROLINA,	)	
RESPONDENT	)	

This matter came before the Court on February 20, 2014. In its decision of March 14, 2012, the South Carolina Supreme Court held that the record of the PCA hearing in this case did not "adequately demonstrate whether Petitioner's waiver was in accordance with [the Court's] waiver jurisprudence." *Narciso v. State*, 397 S.C. 24, 33, 723 S.2d 369, 374 (S.C. 2012). The case was remanded to this Court for a determination of this issue remand from the South Carolina Supreme Court.

An evidentiary hearing was held on February 20, 2014. Present at the hearing were: Petitioner; Petitioner's attorney Carol C. Ruff; and Assistant Attorney General Ashleigh Wilson, Esq. Rebecca McCann, Donald Colongeli, and Phillip Rios were called as witnesses by the Applicant to testify during the evidentiary hearing. The State submitted as State's Exhibit 1 a handwritten checklist drafted by Phillip Rios, Esq. and reviewed with Petitioner.

Upon due and careful consideration of the testimony and exhibits admitted in evidence at the hearing, the arguments of counsel, and applicable law, the following are this Court's Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. Petitioner was tried and convicted of trafficking cocaine on January 18, 2007, and sentenced to 25 years in prison.
2. Petitioner's trial lawyer, Donald Colongeli, failed to appeal Petitioner's conviction, despite Petitioner's request that he do so.

3. Petitioner later filed a PCR application, and Phillip Rios was appointed as his PCR lawyer.

4. At a PCR hearing held on August 26, 2008, the Attorney General offered Petitioner the opportunity to appeal his conviction, but only if Petitioner waived his right to PCR. Mr. Rios recommended Petitioner sign a Consent Order memorializing this bargain. There was no colloquy or other court record of Petitioner's waiver other than the following:

THE COURT: What's - what we got this morning?

MR. FRIEDMAN: Your Honor, the first one is Oseil Gomez Narciso

THE COURT: All right.

MR. FRIEDMAN: May we approach on this one?

THE COURT: Yeah. (Bench conference.)

MR. FRIEDMAN: Thank you, Your Honor.

THE COURT: Okay. Appreciate it. Thank you.

--- END OF TRANSCRIPT OF RECORD ---

(See Exhibit 1)

5. Mr. Rios also did not pursue an appeal of Petitioner's conviction, but instead made the aforementioned bargain with the Attorney General's office.

6. Petitioner is a native of Mexico. Spanish is his native language. He moved to the United States when he was 19 years old. Petitioner does not speak or read English adequately enough to understand legal proceedings or his statutory and constitutional rights.

7. Specifically, Petitioner could not read or understand the Consent Order presented to him by Mr. Rios, which was written in English. No one read the Consent Order to Petitioner in Spanish either on or off the record. No one translated the Consent Order into Spanish for Petitioner. There was no translating equipment used in the PCR hearing that allowed Petitioner to hear and understand anything said about his case.

CONCLUSIONS OF LAW

1. A defendant's knowing and voluntary waiver or statutory or constitutional rights must be established by a complete record, and may be accomplished by colloquy between court and defendant, between court and defendant's counsel, or both. *Brannon v. State*, 345 S.C. 437, 548 S.E. 2d 866 (2001).

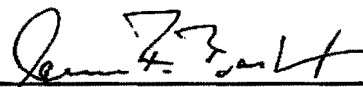
2. A valid waiver of the right to PCR must be knowing, intelligent and voluntary; and in making this determination, a court must examine the particular facts and circumstance surrounding the case, including the background, experience and the conduct of the accused. *Spoone v. State*, 370 S.C. 138, 665 S.E.2d 605 (2008).

3. Based on the facts that (1) Petitioner is a non-English speaker who could not read the Consent Order, (2) there was no colloquy whatsoever with the judge at the PCR hearing to establish that Petitioner understood the Consent Order and/or his waiver of PCR rights, and (3) Petitioner may have been entitled to an appeal anyway without having to waive his PCR rights under the case of *White v. State*, 263 S.C. 110, 208 S.E.2d 35 (1974), the record does not adequately demonstrate that Petitioner's waiver was knowing, intelligent and voluntary, and accordingly the PCR waiver fails the tests outlined in *Brannon* and *Spoone*.

IT IS THEREFORE ORDERED that:

1. The Petitioner's purported waiver of his PCR rights in the Consent Order is hereby declared null, void and of no effect;
2. The Petitioner's request to bring a PCR application is hereby granted; and
3. Counsel may seek reimbursement from the Office of Indigent Defense for their time and expenses pursuant to standard policy.

AND IT IS SO ORDERED.



The Honorable James R. Barber, III
Presiding Judge
Court of Common Pleas
Fourteenth Judicial Circuit

Beaufort, South Carolina

~~JUNE~~
~~April~~ 5, 2014

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2007CP0702195

Osiel Gomez Narciso

South Carolina State Of

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

Attorney for: ☐ Plaintiff ☐ Defendant
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit);
☐ Rule 43(k), SCRCP (Settled); ☐ Other: _____
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j) SCRCP; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other:

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order; (formal order to follow) ☐ Statement of Judgment by the Court:

Order

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.

Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

s/ J. R. Barber, III
Circuit Court Judge

6/5/2014

Judge Code

Date

For Clerk of Court Office Use Only

This judgment was entered on **June 27, 2014**, and a copy mailed first class or placed in the appropriate attorney's box on **July 8, 2014**, to attorneys of record or to parties (when appearing pro se) as follows:

Osiel Gomez Narciso #319935 McCormick Corr. Inst. F3A-
192 386 Redemption Way McCormick, SC 29899
Harley Delleney Ruff 17 Professional Village Cir. Beaufort,
SC 29907

Ashleigh Rayanna Wilson PO Box 11549 Columbia, SC
29211

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Melissa Kilby

Court Reporter

Jerri Ann Roseneau - Clerk of Court

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

The Honorable James R. Barber, Circuit Court Judge

Case No. 2007-CP-07-2195

Osiel Narciso.....Respondent.

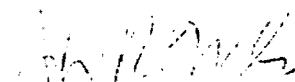
v.

State of South Carolina.....Petitioner.

NOTICE OF APPEAL

The State of South Carolina appeals the order of the Honorable James R. Barber dated June 5, 2014. Petitioner received written notice of entry of this order on June 9, 2014. Enclosed is a copy of the above referenced order.

June 18, 2014



Ashleigh R. Wilson
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211-1549
(803) 734-4037
SC Bar #100269
Attorney for the Petitioner

Other Counsel of Record:
Carol Ruff, Esquire
Harley Ruff, Esquire
Ruff & Ruff, LLC
17 Professional Village Circle
Beaufort, SC 29907
Attorneys for Respondent

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Beaufort County
Court of Common Pleas
The Honorable James R. Barber, III, Circuit Court Judge

Appellate Case No. 2014-001327

OSIEL NARCISO,

Respondent,

v.

STATE OF SOUTH CAROLINA,

Petitioner.

PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

ASHLEIGH R. WILSON
Assistant Attorney General
S.C. Bar # 100269

Post Office Box 11549
Columbia, SC, 29211
(803) 734-3737

ATTORNEYS FOR PETITIONER

INDEX

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ISSUE PRESENTED

I. Did the lower court err by finding the Respondent's waiver of all other post-conviction relief claims was not entered knowingly and voluntarily when post-conviction relief counsel fully advised the Respondent of the rights he was waiving, the Respondent signed and initialed a written waiver of rights form drafted by counsel, and at the time of the waiver the Respondent had no other post-conviction relief claims he wished to pursue?

STATEMENT OF THE CASE

On January 16-18, 2007, the Respondent proceeded to trial before a jury and was convicted of trafficking cocaine in excess of 100 grams (2005-GS-07-1304). The Honorable Howard P. King sentenced the Respondent to confinement for twenty-five years.

On August 1, 2007, the Respondent filed an application for post-conviction relief. In the application, the Respondent alleged "ineffective assistance of counsel" (App. 3) and asked the court for "leave to file a belated appeal". (App.6). In a document attached to the application, the Respondent alleged "my allegation of ineffective assistance of counsel is presently based entirely upon the fact that my attorney did not file a notice of appeal, after stating for the court and upon the record that he would do so". (App. 8). The Petitioner filed a Return on May 15, 2008.

An evidentiary hearing was held on August 26, 2008. At the hearing, counsel for the Respondent called the case and the parties approached the bench briefly to speak to the Honorable J. Cordell Maddox who was presiding. The contents of the bench conference were not put on the record. (App. 25). Shortly thereafter, Judge Maddox, the Respondent, and counsel for both parties signed a consent order granting the Respondent a direct appeal pursuant to White v. State. The consent order stated "[t]he White v. State issue is the Applicant's only allegation in the PCR application. The Applicant understands that he must proceed on all PCR claims at this time and anything not raised now is waived. The Applicant wishes to waive all other PCR claims and proceed with a belated direct appeal." (App. 28).

The Respondent filed a Notice of Appeal to this Court to effectuate an appeal pursuant to White v. State. On appeal, the Respondent asked this Court to review the waiver of the Respondent's other post-conviction relief allegations. In its opinion, this Court affirmed the Respondent's conviction and remanded his case to the post-conviction relief court for a

determination as to whether or not the Respondent knowingly and voluntarily waived his right to raise additional PCR claims. (App. 54-56). The Remittitur was issued on March 30, 2012.

On February 20, 2014, after the Court's remand, a second evidentiary hearing was held in the Respondent's post-conviction relief matter. The Respondent was represented by Carol Ruff, Esquire, and Harley Ruff, Esquire. Present and testifying at the hearing were Philip Rios, Esquire, Rebecca McCann, Donald Colongeli, Esquire, and the Respondent. An interpreter was also present to assist the Respondent at the hearing. By Order dated June 5, 2014, the lower court found "the PCR waiver fails the test outlined in Brannon and Spooner", "the Petitioner's purported waiver of his PCR rights in the Consent Order is hereby declared null, void, and of no effect", and "the Petitioner's request to bring a PCR application is hereby granted". (App. 140). This Appeal by the State follows.

ARGUMENT

The lower court erred by finding the Respondent's waiver of all other post-conviction claims was not entered freely and voluntarily when the record reflects post-conviction relief counsel fully advised the Respondent that he could amend his application to raise additional claims and that by signing the consent order granting him an appeal pursuant to White v. State he would be waiving his ability to raise any additional claims.

While the transcript of the Respondent's first post-conviction relief hearing does not reflect the circumstances surrounding the waiver of the Respondent's right to raise any other PCR allegations, the record now established in this matter on remand supports the conclusion that the Respondent knowingly and voluntarily waived his right to raise any other PCR allegations. This Court should reverse the post-conviction relief court's finding that the Respondent is now entitled to bring his remaining post-conviction relief claims. The Petitioner submits there is no evidence in the record to support the lower court's findings.

The waiver of a constitutional or statutory right requires a showing on the record that the defendant made the waiver knowingly and intelligently. State v. Reed, 332 S.C. 35, 45, 503 S.E.2d 747, 752 (1998). The waiver inquiry "has two distinct dimensions": waiver must be "voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception," and "made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." Berghuis v. Thompkins, 560 U.S. 370, 382-83, 130 S. Ct. 2250, 2260, 176 L. Ed. 2d 1098 (2010).

When addressing the waiver of collateral-attack rights, the Court must examine "the particular facts and circumstances surrounding the case." Spoone v. State, 379 S.C. 138, 143, 665 S.E.2d 605, 607 (2008) (citing United States v. Broughton-Jones, 71 F.3d 1143, 1146 (4th Cir.1995)). In Spoone, this Court looked at background, experience, and conduct of the accused, the text of the agreement, and the transcript of the proceeding. Id. at 143-144. On appeal, this

Court must reverse the circuit court's grant of relief when there is no probative evidence to support the findings of the circuit court. Wolfe v. State, 326 S.C. 158, 485 S.E.2d 369 (1997); Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

The record established on remand reflects the Respondent's waiver of his right to raise any other post-conviction relief claims was knowingly and voluntarily entered. The Petitioner submits a formal colloquy between the Court and the defendant is not the only way to establish a valid waiver of rights. The record reflects prior to the signing of the consent order a colloquy took place between the Respondent and his initial post-conviction relief counsel during which counsel, with the assistance of an Spanish speaking interpreter, fully advised the Respondent of his right to pursue additional post-conviction relief claims and the consequences of waiving such right. The record also reflects counsel's colloquy with the Respondent was memorialized in a signed waiver of rights form drafted by post-conviction relief counsel and signed and initialed by the Respondent.

Counsel provided credible testimony that prior to the Respondent signing the consent order granting him an appeal pursuant to White v. State, he spoke with the Respondent about the consent order and advised him that "he would be waiving his right forever" and "that he's only given one application for PCR". (App. 112-113). Counsel also testified that with the assistance of the interpreter, he reviewed with the Respondent the written consent order and a handwritten checklist that he created which outlined the rights the Respondent would be waiving by signing the consent order. Counsel testified further he was able to effectively communicate with the Respondent with the assistance of the interpreter. (App. 155).

The checklist drafted by counsel was signed by the Respondent and clearly reflects counsel's full advisement of the Respondent's rights and the consequences of the Respondent's

waiver. Counsel reviewed the handwritten waiver form with the Respondent with the assistance of a Spanish speaking interpreter. The form reads as follows:

"I understand that although Mr. Rios has offered to amend the application and raise other allegations, I am unwilling to raise new allegations.

I understand that I am forever waiving my right to raise any other allegations of ineffective assistance of counsel against Mr. Colongeli and am raising my right and agreeing to a belated appeal only.

My attorney, Phillip J. Rios, has reviewed with me the terms of the consent order and the legal consequences of those terms (through the assistance of translator Rocio-Maria-Riley) and I understand the terms and am in agreement with them.

Mr. Rios advised me that my appeal may or may not be successful and has not promised a successful appeal or a new trial.

My attorney Philip J. Rios has answered all my questions to my satisfaction and has communicated to me often and throughout the period of his representation of me.

I have been informed and advised by my attorney, Philip J. Rios, about my PCR application, the legal meaning of its substantive content, the standard of relief in PCR cases, and the waiver of issues and all other matters arising out of my PCR application.

I am not under the influence of any alcohol, and drugs and nothing today would impair my ability to make decisions concerning the PCR application and hearing today.

My attorney Philip J. Rios has not promised or guaranteed me anything to induce me into making decisions today.

I have not been coerced or threatened into entering into the Consent Order agreeing to its limited relief and am entering into the agreement in the Consent Order freely, intelligently, and voluntarily.

It is not my desire to amend the PCR application and raise new allegations against Mr. Colongeli although Mr. Rios has provided me the opportunity and has offered to amend the application.

I am satisfied with my attorney, Philip J. Rios, and the representation that he has provided me." (App. 89-91).

The form reflects the Respondent signed his name and initialed under the word "Yes" after the advisement of each right listed on the waiver form.¹

While the record does not reflect an oral waiver of rights before the court, this checklist drafted by post-conviction relief counsel and signed by the Respondent reflects a clear explanation by post-conviction relief counsel and a written waiver of rights by Respondent. The waiver form reflects the Respondent was made aware that he was "forever waiving [his] right to raise any other allegations of ineffective assistance of counsel against Mr. Colongeli and [was] raising [his] right and agreeing to a belated appeal only." (App. 89).

The plain language in the consent order signed by the Respondent is also evidence of the knowing and voluntary waiver of the Respondent's right to raise any other post-conviction relief claims. As this Court correctly noted in the Respondent's direct appeal opinion, the consent order signed by the Petitioner is straightforward. (App. 56). The record established on remand reflects that the plain language of the order was explained to the Respondent by counsel with the assistance of a Spanish speaking interpreter. (App. 112-113). Counsel's use of an interpreter when during his discussions with the Respondent should quiet any of this Court's concerns about the Respondent's limited command of the English language. All of counsel's communications with the Respondent including his written correspondence to the Respondent took place in the Respondent's native language of Spanish.

Lastly, the fact that the Respondent has no interest in pursuing any other claims during his initial post-conviction relief proceeding is further evidence of the voluntariness of his waiver of all other post-conviction relief claims. The Respondent's PCR application, counsel's testimony, and the written waiver of rights form signed by the Respondent reflect the sole issue

¹ The record reflects the Respondent identified his signature on the written waiver form drafted by post-conviction relief counsel. (App. 127).

the Respondent wanted to pursue in his post-conviction relief proceeding was counsel's failure to file an appeal.

In the Respondent's application for post-conviction relief he states "my allegation of ineffective assistance of counsel is presently based entirely upon the fact that my attorney did not file a notice of appeal, after stating for the court and upon the record that he would do so". (App. 8). Counsel testified he spoke with the Respondent multiple times about amending his application to raise additional claims, but that the Respondent was interested solely in pursuing a belated appeal. (App. 110, 113, 119).

The written waiver form signed by the Respondent reflects "I understand that although Mr. Rios has offered to amend the application and raise other allegations, I am unwilling to raise new allegations. I understand that I am forever waiving my right to raise any other allegations of ineffective assistance of counsel against Mr. Colongeli and am raising my right and agreeing to a belated appeal only." (App. 89).

Because the Respondent had no interest in pursuing any claims other than counsel's failure to file an appeal, the waiver of his right to pursue any other PCR claims (which the record reflects did not exist) in the consent order aligns with his desire to solely obtain a belated appeal. The Respondent was entitled to a direct appeal and the Petitioner did not consent to an appeal pursuant to White v. State in exchange for the waiver of all other post-conviction relief claims as Respondent's second post-conviction relief counsel asserts. Had the Respondent been interested in pursuing claims other than trial counsel's failure to file an appeal, an evidentiary hearing would have been held on the Respondent's remaining claims.

Based on the evidence and testimony presented to the lower court on remand, the record now demonstrates the Respondent's waiver of his right to raise any additional post-conviction

relief claims in the consent order granting him a belated appeal was knowingly and voluntarily entered. The Petitioner submits there is no probative evidence to support the lower court's claim that the waiver of the Respondent's rights to raise any other PCR claims was invalid. The Respondent's waiver was made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. The Petitioner asks this Court to grant this Petition, proceed with further briefing, and reverse the lower court's finding that the Respondent is entitled to bring a new post-conviction relief application.

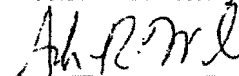
CONCLUSION

Based on the foregoing, Petitioner respectfully submits that the Petition for Writ of Certiorari be granted.

Respectfully submitted,

ALAN WILSON
Attorney General

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December 22, 2014

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal From Beaufort County
The Honorable James R. Barber, III Circuit Court Judge

OSIEL NARCISO

Respondent,

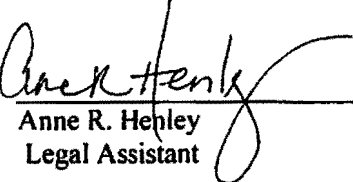
v.

STATE OF SOUTH CAROLINA,

Petitioner.

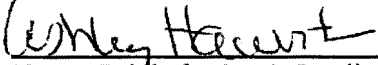
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari and the Appendix To The SC Supreme Court has been served upon the respondent's attorney Carmen Ganjehansi, this 22nd day of December 2014.



Anne R. Henley
Legal Assistant

SWORN to before me this
22nd day of December, 2014.

 (L.S.)
Notary Public for South Carolina.
My Commission Expires: 3-18-23

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Beaufort County

James R. Barber, III, Circuit Court Judge

OSIEL NARCISO,

RESPONDENT,

V.

STATE OF SOUTH CAROLINA,

PETITIONER

APPELLATE CASE NO. 2014-001327

RETURN TO PETITION FOR WRIT OF CERTIORARI

LAURA R. BAER
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
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ATTORNEY FOR RESPONDENT

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STATEMENT OF QUESTION PRESENTED

Did the lower court err by finding the Respondent's waiver of all other post-conviction relief claims was not entered knowingly and voluntarily when post-conviction relief counsel fully advised the Respondent of the rights he was waiving, the Respondent signed and initialed a written waiver of rights form drafted by counsel, and at the time of the waiver the Respondent had no other post-conviction relief claims he wished to pursue?

COUNTER-STATEMENT OF QUESTION PRESENTED

Whether the remand court's findings that Narciso's waiver of all other post-conviction relief claims was not knowing, intelligent, voluntary and fails the tests outlined in Brannon v. State, 345 S.C. 437, 548 S.E.2d 866 (2001) and Spoone v. State, 370 S.C. 138, 665 S.E.2d 605 (2008) were supported by "any evidence" presented at the remand hearing?

COUNTER-STATEMENT OF THE CASE

Respondent Oriel Narciso was indicted by the Beaufort County grand jury for trafficking cocaine. On January 16-18, 2007, he was tried before the Honorable Howard P. King and a jury. Narciso was represented by Donald Colongeli, Esquire. He was convicted and sentenced to 25 years incarceration.

PCR Application, PCR Hearing, and Consent Order

On August 1, 2007, Narciso filed an Application for Post-Conviction Relief alleging ineffective assistance of counsel for failing to file a timely appeal. App. 1. On May 15, 2008, the State filed its Return. App. 10. On August 26, 2008, the parties appeared before the Honorable J. Cordell Maddox. Narciso was represented by Philip John Rios and the State was represented by Assistant Attorney General Matthew J. Friedman. No testimony or colloquy took place on the record; the transcript only reflects that an off-the-record bench conference took place. App. 22. The parties executed a Consent Order Granting Belated Direct Appeal, which was approved by the court and filed August 26, 2008. App. 27. The Consent Order contained the following: "The Applicant understands that he must proceed on all PCR claims at this time and anything not raised now is waived. The Applicant wishes to waive all other PCR claims and proceed with a belated direct appeal." Thus, the Order directed that "Applicant waived his right to raise any other PCR allegations." App. 28.

Petition for Certiorari

On July 14, 2009, appellate defender Elizabeth Franklin-Best filed a Petition for Certiorari and Brief of Appellant pursuant to White v. State¹ on behalf of Narciso. On December 16, 2010,

¹ 263 S.C. 110, 208 S.E.2d 35 (1974).

this Court granted the petition for writ of certiorari and ordered further briefing with respect to Petitioner's Question II: "Narciso signed a Consent Order Granting Belated Direct Appeal and 'waived his right to raise any other PCR allegations.' Narciso respectfully asks this Court to remand his case to determine whether that waiver was entered into knowingly and voluntarily." Ms. Franklin-Best filed the Brief of Petitioner on March 21, 2011, followed by an Amended Brief of Petitioner on August 11, 2011. App. 29. The State, represented by Assistant Attorney General Matthew Friedman, filed its Brief of Respondent on September 12, 2011. App. 38. On March 14, 2012, this Court issued its opinion affirming the circuit court's denial of Narciso's motion to suppress but remanding the case for a determination as to whether Petitioner's waiver of his PCR allegations was in accordance with the Court's waiver jurisprudence. App. 47; Narciso v. State, 397 S.C. 24, 723 S.E.2d 369 (2012).

Remand Hearing and Order Granting Relief

An evidentiary hearing on the remanded issue was held before the Honorable James R. Barber, III on February 20, 2014. Narciso was represented by Carol C. Ruff and Harley D. Ruff, and the State was represented by Assistant Attorney General Ashleigh R. Wilson. App. 92. Narciso's counsel filed a Petitioner's Brief in Support of Finding PCR Waiver Invalid, along with exhibits. App. 59 – 88. The witnesses included Rebecca McCann, the Spanish interpreter at Narciso's PCR hearing; Donald Colongeli, original trial counsel; Phillip Rios, PCR counsel; and Narciso.

On June 27, 2014, Judge Barber issued an Order granting Petitioner's request to bring a PCR application. App. 138. In support of this decision, Judge Barber stated:

Based on the facts that (1) Petitioner is a non-English speaker who could not read the Consent Order, (2) there was no colloquy whatsoever with the judge at the PCR hearing to establish that

Petitioner understood the Consent Order and/or his waiver of PCR rights, and (3) Petitioner may have been entitled to an appeal anyway without having to waive his PCR rights under the case of White v. State, 263 S.C. 110, 208 S.E.2d 35 (1975), the record does not adequately demonstrate that Petitioner's waiver was knowing, intelligent and voluntary, and accordingly the PCR wavier fails the tests outlined in Brannon and Spoone.

App. 143.

The State filed its Petition for Writ of Certiorari on December 22, 2014. This Return follows.

ARGUMENT

The remand court's findings that Narciso's waiver of all other post-conviction relief claims was not knowing, intelligent, and voluntary and fails the tests outlined in Brannon v. State, 345 S.C. 437, 548 S.E.2d 866 (2001) and Spoone v. State, 379 S.C. 138, 665 S.E.2d 605 (2008) were supported by "any evidence" presented at the remand hearing.

- A. There was ample evidence to support the remand court's findings that Narciso's waiver of his other PCR claims was not knowing, intelligent, and voluntary where the Consent Order signed by Narciso was not read or translated into Narciso's native language of Spanish, there was no colloquy on the record at the PCR hearing regarding Narciso's understanding of the Consent Order and/or his waiver of PCR rights, and the granting of his belated direct appeal pursuant to *White v. State* was not incumbent upon the waiver of any other PCR claims.

There was no incentive for Narciso to waive any other PCR allegations because he was entitled to file a belated White v. State appeal even without the State's consent. This case illustrates how the State can take advantage of an unknowing defendant and PCR attorney, resulting in a serious deprivation of rights. The sole issue on remand was whether Narciso's waiver of his PCR allegations was in accordance with this Court's waiver jurisprudence. App. 56. The remand court² applied the correct law to the facts of the case and determined that the waiver was not knowing, intelligent and voluntary and not in compliance with the requirements of Brannon and Spoone. In support of this determination, the court cited the facts that Narciso is a non-English speaker who could not read the Consent Order and the original PCR hearing contained "no colloquy whatsoever with the judge" regarding Narciso's waiver of his PCR rights. The court also found that Narciso may have been entitled to a belated direct appeal even without having to waive his PCR rights. App. 140. Narciso should not be in any worse position because his trial attorney fumbled the filing of the notice of intent to file a direct appeal.

² For ease of reference, when referring to the August 26, 2008 proceedings, Respondent uses "PCR hearing" and "PCR court" and when referring to the February 20, 2014 proceedings, Respondent uses "remand hearing" and "remand court."

Upon appellate review, this Court gives great deference to the PCR court's findings of fact and conclusions of law. Dempsey v. State, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005). This court also "gives great deference to a PCR court's findings where matters of credibility are involved." Simuel v. State, 390 S.C. 267, 270, 701 S.E.2d 738, 739 (2010). It is well settled that "[i]n reviewing the PCR court's decision, an appellate court is concerned only with whether any evidence of probative value exists to support that decision." Jamison v. State, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014); Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013); Davie v. State, 381 S.C. 601, 675 S.E.2d 416 (2009); Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989). Accordingly, the Court will affirm if *any evidence* of probative value in the record exists to support the finding of the PCR court. Cherry, 300 S.C. at 119, 386 S.E.2d at 626. In the present case, there was far more evidence supporting the remand court's findings than the minimal amount required for this Court to affirm. The State's contention that there is "no evidence" to support the Court's finding is baseless. Pet. for Cert., 6.

1. Failure to Translate Consent Order into Spanish

The remand court found that Narciso's native language is Spanish and that he "does not speak or read English adequately enough to understand legal proceedings or his statutory and constitutional rights." App. 139. This finding was supported by Narciso's testimony that he is a native of Mexico and does not understand written or spoken English. App. 125, l. 7 – 126, l. 2. Nonetheless, his attorney allowed him to sign a Consent Order written in English, whereby he waived his rights to pursue any other PCR claims beyond the failure of trial counsel to file a timely notice of direct appeal. Additionally, contrary to the State's contention in its prior Return to the Petition for Certiorari, Narciso's PCR attorney, Rios, is not fluent in Spanish and could not communicate with Narciso in his native language without aid of a court interpreter or a translator at

his office. Compare App. 44 – 45 (State’s Return to Cert., Sept. 12, 2011) with App. 107, ll. 15-16; App. 108, ll. 1-6; App. 109, ll. 9-12; App. 114, ll. 20-24.

The court found that the Consent Order was never translated into Spanish and that its contents were not read to Narciso in Spanish on or off the record. App. 139. Additionally, because neither the Consent Order nor its terms were read into the record, the Spanish interpreter present at the PCR hearing gave no interpretation of the document or its terms on the record. These findings are supported by interpreter McCann’s inability to confirm that she ever translated the Consent Order for Narciso and Narciso’s testimony that the document was never read to or translated for him. App. 102, ll. 16-21; App. 126, l. 8 – 127, l. 2.

In response to the court’s question regarding whether PCR counsel had any document that indicated that he advised his client that he would be waiving his rights forever, that he’s only given one application for PCR, and that it could affect his rights in the future on any habeas matter, PCR counsel pointed to a handwritten document contained in his case file. App. 112, l. 23 – 113, l. 12. While PCR counsel initially called the document “the consent order” he then described the document as being handwritten, indicating that he was not referring to the Consent Order actually executed by the parties and approved by the Court but rather a document only signed by Narciso. App. 113, 8-10; App. 89 – 91 (State’s Ex. 1). However, he later stated that both the Consent Order and handwritten list were presented to Narciso together. App. 118, ll. 20-24. The interpreter testified that she believed that she was set to arrive at the courthouse on the morning of the hearing at 8:45 a.m. and does not recall translating the Consent Order for Narciso. App. 104, l. 1-3; App. 124, ll. 1-20. Thus, her testimony does not corroborate PCR counsel’s testimony that the translator met him at the detention center between 7:30 and 8:30 a.m. and assisted in his communication with Narciso regarding the Consent Order and handwritten checklist. App. 116, l. 17 – 117, l. 4. It was

the duty of the remand court to weigh the evidence, such that it could believe or disbelieve all or a part of any of the witness testimony. Thus, the evidence presented at the remand hearing supported the court's finding that the Consent Order signed by Narciso was not read or translated into Narciso's native language of Spanish. This meets the low threshold of "any evidence" required for affirmance of the remand court.

2. Failure to Conduct Any "On the Record" Colloquy

In addition to the failure to translate the Consent Order or even read the Consent Order to Narciso, the remand court cited the fact that there was no colloquy between the judge and Narciso or his attorney of a waiver of Narciso's PCR rights. App. 145 – 146. Though the State provides no authority to support its position, it contends that "a formal colloquy between the Court and the defendant is not the only way to establish a valid waiver of rights." Pet. for Cert., 7. However, the State makes no attempt to reconcile this with the mandate of Brannon v. State, that "[a] defendant's knowing and voluntary waiver of statutory or constitutional rights *must* be established by a complete record, and may be accomplished by colloquy between court and defendant, between court and defendant's counsel, or both." 345 S.C. 437, 439, 548 S.E.2d 866, 867 (2001) (emphasis added). Further, even if the lack of colloquy alone is not sufficient to render the waiver invalid, the other evidence before the remand court supported its finding that Narciso's waiver was not knowing, intelligent, and voluntary.

Though Spoone dealt with the waiver of collateral review subject to a plea agreement, it is instructive regarding how to evaluate the circumstances surrounding a waiver of the right to pursue allegations in PCR. See Narciso v. State, 397 S.C. 24, 723 S.E.2d 369 (2012) ("The State argues that Petitioner's case is distinguishable from Spoone because in that case the issue was 'whether the right to appellate review and post-conviction review may be waived by a written plea

agreement ...,’ and that ‘[Petitioner] proceeded to trial and was convicted.’ This is a distinction without a difference. The key issue in Spoone and in Petitioner’s case is the circumstances surrounding the waiver of the right to appeal PCR allegations.”). However, Narciso’s conviction after a trial is important to the extent that this Court distinguishes between the advisement of rights regarding appeal required after a trial versus after a guilty plea. See Turner v. State, 384 S.C. 451, 456, 682 S.E.2d 792, 794-95 (2009)). This distinction is at least in part to the far greater potential for viable issues on direct appeal following a trial rather than a guilty plea. Roe v. Flores-Ortega, 528 U.S. 470, 120 S.Ct. 1029 (2000) (“Although not determinative, a highly relevant factor in this inquiry will be whether the conviction follows a trial or a guilty plea, both because a guilty plea reduces the scope of potentially appealable issues and because such a plea may indicate that the defendant seeks an end to judicial proceedings.”). There is likewise a greater potential for viable issues in post-conviction relief proceedings following a trial.

In Spoone, the Court noted that the waiver of a right to collateral review is much the same as the waiver of any other constitutional or statutory rights. 379 S.C. at 142, 665 S.E.2d at 607. “[S]uch a waiver will be held effective only if it is knowing and voluntary.” Id. The Court recognized that in determining the effectiveness of a waiver in the Fourth Circuit, “the court examines the particular facts and circumstances surrounding the case, including the background, experience and conduct of the accused.” Id. at 143, 665 S.E.2d at 607. Applying that principle in Spoone’s case, the Court determined that it must evaluate “(1) the background, experience and conduct of the accused, (2) the text of the plea agreement, and (3) the transcript of the plea hearing.” Id. at 143, 665 S.E.2d at 608. Though noting that Spoone had only a ninth grade education, in finding that Spoone’s wavier was effective, the Court cited the straightforwardness of the written plea agreement and the plea colloquy in which the trial court specifically asked

Spoone about the waiver both in the language of the plea agreement and in plain language. Id. at 143-44, 665 S.E.2d at 608. Spooone was also represented by two attorneys who signed the plea agreement, which Spooone also signed.

In United States v. Wessells, 936 F.2d 165 (4th Cir. 1991), the defendant challenged the waiver of his right to direct appeal of his sentence, which was included in his written plea agreement. 936 F.2d at 167. The Fourth Circuit found the waiver unenforceable, however, because the plea court did not question the defendant “specifically concerning the waiver provision of the plea agreement” and the defendant “himself gave no indication of the degree to which he understood the waiver's import.” Id. at 168. In distinguishing Spoone from Wessells, this Court found that in Spoone “the trial court did specifically question petitioner about the waiver provision more than one time and in more than one manner.” 379 S.C. at 144 n. 5, 665 S.E.2d at 608 n. 5.

Like the Fourth Circuit, this Court requires that the record establish a knowing and voluntary waiver of statutory right, stating that such can be accomplished by a colloquy between the court and either the defendant, defense counsel, or both. Brannon, 345 S.C. at 439, 548 S.E.2d at 867. In Brannon, the PCR court informed Brannon at the evidentiary hearing that he wanted a reduction in sentence, which the court advised it did not have the authority to order. Id. at 438, 548 S.E.2d at 867. PCR counsel then indicated that Brannon wished to withdraw his PCR application, and the motion was granted without further discussion. Id. Though the written order stated that Brannon was questioned to ensure that the withdrawal of his PCR application was free and voluntary, the record did not reflect that any such questioning took place. Id. This Court found that there was nothing in the record to support the PCR court's finding that the withdrawal of the PCR application was knowing and voluntary. Id. at 439, 548 S.E.2d at 867.

The case was remanded for an evidentiary hearing on whether Brannon's withdrawal was knowing and voluntary, with instructions that if the court found in the negative that Brannon may proceed with his PCR application. Id.

In applying the factors announced in Spoone to the present case, the court correctly evaluated the background and experience of Narciso as a Spanish speaking defendant without the benefit of translation or interpretation. It also noted the failure of the Consent Order itself or the PCR transcript to indicate that the waiver was knowing and voluntary. Unlike Spoone, the content of the Consent Order was not straightforward, as it gives no explanation as to why Narciso was being made to bring any and all other PCR claims at that time when he was entitled to a belated direct appeal regardless of the waiver. It also fails to address how the waiver would apply to any PCR issues not apparent until after the direct appeal, such as error preservation issues. Moreover, Narciso testified that no one explained to him why he had to give up his PCR rights in order to get a direct appeal or the fact that he was giving up his chance to raise any other claims by signing the Consent Order. App. 128, ll. 10-14; App. 130, ll. 21-23. He further testified that he was told that the only way to go back to court was by signing the Consent Order. App. 128, ll. 15-19; App. 130, ll. 9-20.

Additionally, unlike Spoone, neither the record of the PCR hearing nor the testimony at the remand hearing reflected any colloquy with the court regarding Narciso's waiver. Rather, like Brannon and Wessells, there was nothing on the record in the present case to support any finding that Narciso's waiver of his PCR rights was knowing and voluntary. The record of the PCR hearing itself reflected only that an off-the-record bench conference was held, with no indication that Narciso was present at the bench or had any sworn interpreter assisting him. App. 371. There was *no evidence* presented at the remand hearing that Narciso was present at the off the

record bench conference and questioned by the court as to his understanding of the nature and consequences of the waiver or that the court questioned PCR counsel about his discussions and advisements to Narciso regarding the waiver.

Therefore, the evidence at the remand hearing supported the court's finding that there was no colloquy whatsoever with the judge at the PCR hearing to establish that Petitioner understood the Consent Order and/or his waiver of PCR rights. The Court also considered the other relevant circumstances and determined that they did not point to a knowing and voluntary waiver either. This meets the low threshold of "any evidence" required for affirmance of the remand court.

3. Lack of Any Benefit of the Bargain to Narciso

Lastly, the Court found that Petitioner may have been entitled to an appeal anyway without having to waive his PCR rights under the case of White v. State, 263 S.C. 110, 208 S.E.2d 35 (1975). App. 146. In Spoone, the court noted that with respect to plea bargains generally, South Carolina has recognized and followed federal precedent. 379 S.C. at 142, 665 S.E.2d at 607. This includes the fact that a plea bargain rests on contractual principles such that "each party should receive the benefit of the bargain." Id. In the present case, there was no benefit to Narciso from the waiver of all other PCR claims such that he gained ***nothing*** from signing the Consent Order other than the belated appeal to which he was ***already entitled***.

Trial counsel testified the he filed an appeal on Narciso's behalf. However, the appeal was not filed timely. App. 105, ll. 14-15. He took responsibility for the error and did everything that he could to try to correct his error. App. 105, ll. 16-20. Trial counsel believed that had he filed the appeal timely, then Narciso would have retained his PCR rights as well as his appellate rights. App. 106, ll. 13-15.

While there is currently no avenue for Narciso to allege ineffective assistance of PCR counsel, it is difficult to fathom under what circumstance PCR counsel would affirmatively advise his client to dismiss all other PCR allegations with prejudice. This is especially true in light of the fact that the direct appeal itself may reveal problems with trial counsel's representation, such as a ruling that a direct appeal issue was not properly preserved. There was no need to have the State's consent to the belated to direct appeal if they were unwilling to give it without a waiver of any other PCR allegations. Rather than entering into sort of consent agreement, PCR counsel could have insisted on a brief PCR hearing, at which trial counsel's testimony would undoubtedly have resulted in the granting of Narico's belated appeal. If the Attorney General convinced the PCR court that all PCR allegations should have to be raised at the hearing, PCR counsel had have, at the very least, requested a continuance to prepare to go forward on other PCR claims.

While PCR counsel confirmed that it was not necessary for Narciso to give up any and all other PCR claims, his testimony as a whole reflects his belief that if Narciso did not amend his application to include other allegations that day he could not pursue them later. App. 110, ll. 14-23. The Consent Order itself, signed by both the Attorney General and PCR counsel, also stated "[t]he Applicant understands that he *must* proceed on all PCR claims at this time and anything not raised now is waived." App. 28 (emphasis added). Further, PCR counsel could not recall whether he had any conversation with Narciso advising that he should preserve his PCR rights. App. 121, ll. 17-20. This is likely because PCR counsel seemed to be under the misapprehension that if the PCR issues were not addressed at the PCR hearing they could not be dismissed without prejudice.

Moreover, the PCR court did not believe PCR counsel's testimony that the State's consent to the belated appeal was not contingent upon the waiver of any other PCR allegations. It instead found that "the Attorney General offered Petitioner the opportunity to appeal his conviction, but

only if Petitioner waived his right to PCR.” App. 139 (emphasis added). If PCR counsel’s averment that the State’s consent to the belated appeal was not contingent upon the waiver were true, then dismissal without prejudice should have been a viable option. A waiver made without proper counsel from his attorney regarding all of his options can certainly not be found to be knowing.

Thus, the language of the Consent Order itself, along with Narciso’s testimony that he thought he had to sign the Consent Order to go back to court and common sense, are enough to support the court’s findings that the Attorney General’s consent to the belated appeal was offered “only if Petitioner waived his right to PCR” and that Narciso may not have had to make such a waiver in order to pursue the belated appeal. This especially true where trial counsel admits that he mishandled the appeal, making a belated direct appeal pursuant to White v. State inevitable. This meets the low threshold of “any evidence” required for affirmance of the remand court.

Based on the foregoing, there was more than the minimal required evidence at the remand hearing to support the court’s findings that Narciso’s waiver was not knowing, intelligent, and voluntary and was not in compliance with this Court’s jurisprudence. Therefore, the State’s Petition for a Writ of Certiorari should be denied.

B. Neither PCR counsel’s testimony and admission of the executed handwritten checklist nor the executed Consent Order are sufficient to reflect that Narciso was fully advised of the nature of the rights being abandoned by his waiver.

Despite the ample evidence to support the remand court’s findings, see discussion supra Part A, the State points to PCR counsel’s alleged advisement accompanied by the execution of a handwritten checklist, along with the “plain language” of the Consent Order signed by Narciso, as evidence that the waiver was knowing, intelligent, and voluntary. The Attorney General goes so

far as to state that “a *colloquy* took place between the Respondent and his initial post-conviction relief counsel.” Pet. for Cert. 7 (emphasis added). The State further contends that PCR counsel’s use of a Spanish translator or interpreter in his communications with Narciso “should quiet any of this Court’s concerns about the Respondent’s limited command of the English language.” Pet. for Cert. 9.

Importantly, “the validity of a defendant’s waiver does not turn on his communication with counsel, but rather on the presence of a record supporting the validity of that waiver.” Moore v. State, 399 S.C. 641, 732 S.E.2d 871 (2012). In Moore, this Court found that both the trial and PCR courts conducted a deficient analysis of the petitioner’s waiver of his right to jury trial and observed the State’s “fundamental misunderstanding of what this Court’s waiver jurisprudence commands.” Id. at 641, 732 S.E.2d at 874. The Moore majority found that trial counsel’s testimony did not necessitate affirmance because it “illustrates a trial strategy, and decision-making process, incompatible with the demands of this Court’s waiver jurisprudence.”³ Id. at 641 n.2, 732 S.E.2d at 875 n.2. Thus, this Court stated that “[t]he bare fact that this testimony exists, does not mean that this testimony constitutes evidence of a valid waiver, even under a deferential standard of review.” Id. This Court further noted in Moore that “[a] ‘colloquy’ is defined as ‘any formal discussion, such as an oral exchange between a judge, the

³ In Moore, the majority found that the record was “devoid of any evidence to support the PCR court’s finding that trial counsel’s discussions regarding the waiver were at ‘length’ or ‘detailed.’” 399 S.C. at 641, 732 S.E.2d at 874. Trial counsel could not testify that he definitely explained to Moore the differences between a jury trial and a bench trial or whether he had any questions regarding that distinction. Id. However, he was “inexplicably able to testify that Petitioner definitely wanted to move forward with a bench trial.” Id. Further, there was *no* colloquy between the court and trial counsel or Moore regarding the waiver. Id. The Court also considered that Moore completed only the seventh grade, cannot read or write, and testified that he did not know ahead of time that he was going to have a bench trial and not a jury trial but wanted a jury trial. Id. at 641, 732 S.E.2d at 874-75.

prosecutor, the defense counsel, and a criminal defendant in which the judge ascertains the defendant's understanding of the proceedings and of the defendant's rights.” Id. at 641 n.1, 732 S.E.2d at 874 n.1. It found that the exchange in Moore did not meet “even a banal definition of colloquy, and falls far short of the ‘high-level serious discussion’ necessary to support the waiver of a defendant’s constitutional right to a jury of his peers.” Id.

Thus, contrary to the State’s assertions, PCR counsel’s testimony and admission of the handwritten checklist are not the dispositive. See App. 113, ll. 8-16; App. 116, l. 11 – 117, l. 4. The checklist does not reflect a “colloquy,” which requires formality and the court’s determination that the waiver is knowing, intelligent, and voluntary. See Moore, 399 S.C. at 641 n.1, 732 S.E.2d at 874 n.1. Further, though Narciso confirmed that his initials and signature appear on the document, he further testified that he thought by signing the document that he was “going to go to court.” App. 127, ll. 9 – 128, l. 4; App. 130, ll. 6-16. Thus, his initials next to each line fail to demonstrate the content of what actual discussion, if any, was held. Notably, the document does not indicate that PCR counsel had any discussion with Narciso about preserving his PCR rights, but rather indicates that Narciso understands that he is “forever waiving my right to raise any other allegations of ineffective assistance of counsel against Mr. Colangeli and am raising my right and agreeing to a belated appeal only.” App. 89. As more fully discussed supra in Part A.3, PCR counsel’s testimony and the checklist establish that PCR counsel failed to advise Narciso of the importance of preserving his PCR rights because PCR counsel was under the misapprehension that his client had to pursue any and all PCR allegations other than the belated appeal that day.

The State further contends that the plain language of the Consent Order signed by Narciso is evidence of the knowing and voluntary waiver. However, as discussed more fully supra in Part A.1, the remand court properly found that the Consent Order was not translated for Narciso or read to

him in Spanish. Moreover, while the failure to communicate to Narciso in Spanish is important, the paramount concern is the content of what was communicated to Narciso, which was never confirmed on the record and did not include any advice to preserve any other PCR claims.

The Consent Order itself is no more a reflection of a knowing and voluntary waiver than the signing of any other document. Otherwise, Narciso's signature alone would have been sufficient such that no remand would have been necessary to determine if his waiver was knowing, intelligent, and voluntary. The Consent Order did not even contain a statement that Narciso was questioned to ensure that the withdrawal of his PCR application was free and voluntary. See Brannon, 345 S.C. at 439, 548 S.E.2d at 867 (finding that the PCR court erred in failing to ascertain the voluntariness of Brannon's withdrawal prior to dismissing his application with prejudice where the order stated that such questioning took place but the record revealed that "there was no inquiry conducted to ascertain the voluntariness of the withdrawal, nor was Brannon advised his withdrawal would result in a dismissal with prejudice"). Rather, the content of the Consent Order only indicates that Narciso understands that all PCR claims must be brought "at this time" and wishes to waive all other PCR claims and proceed with a belated direct appeal. Thus, it misrepresents that Narciso had no option to preserve any other PCR allegations.

Therefore, the PCR court properly weighed the evidence and focused on that which is probative of whether Narciso's waiver was in accordance with South Carolina's waiver jurisprudence. Moore makes clear that off-the-record discussions between an attorney and his client do not constitute a "colloquy" such that neither PCR counsel's testimony regarding such discussion nor the handwritten checklist never introduced at the PCR hearing can overcome the absence of any formal colloquy with the PCR court. The Consent Order likewise is not a sufficient

substitute for the required “on the record” colloquy. Thus, the State’s contentions fail to overcome the low threshold for affirmance required in this matter and its Petition for a Writ of Certiorari should be denied.

C. Neither Narciso’s assertion of only the belated direct appeal allegation in his PCR application nor his failure to amend his application to include any additional allegations bear on the validity of his waiver, and judicial economy does not favor a requirement that an applicant immediately waive or pursue any other PCR claims where the State consents to the belated appeal.

The State suggests that Narciso’s failure to include any PCR allegations in his application beyond the failure to timely file a notice of appeal is further evidence that his waiver was voluntary. Pet. for Cert. 10. However, Narciso’s inclusion of only the belated appeal allegation in his PCR application and failure to amend is of little consequence in this case, especially in light of his inability to read or speak English and PCR counsel’s failure to effectively advise him. Moreover, the existence and legitimacy of any other PCR allegations is a matter to be considered by a subsequent PCR court, as the remand court had only the matter of whether Narciso’s waiver was in accordance with this Court’s waiver jurisprudence to decide. The Attorney General also contends that Narciso was not required to bargain away his PCR rights in exchange for the State’s consent to the belated direct appeal. Pet. for Cert. 10. If that were truly its position, it is unclear why the State filed its Petition for Writ of Certiorari rather than allowing Narciso to proceed with his PCR application pursuant to the remand court’s Order. It is because the State maintains that, though its consent was *not dependent* on the waiver, any other PCR claims *must* be heard at the 2008 PCR hearing. Pet. for Cert. 10. This is the same misapprehension under which PCR counsel operated at the PCR hearing. The language of the Uniform Post-Conviction Relief Act allows an applicant to retain his or her rights to raise any further PCR allegations in the future and just proceed with the

belated direct appeal, a procedure supported by the interests of judicial economy. See S.C. Code Ann. § 17-27-90.

Though PCR counsel testified that he wrote to Narciso and asked him if he wished to amend his application, there is no indication that PCR counsel advised him of what types of allegations could be raised or that Narciso understood the content of the letters. App. 111, ll. 3-10; App. 113, ll. 17-25; App. 118, ll. 13-16. Despite PCR counsel's testimony that he did not see any additional allegations to raise, appellate counsel noted several potential PCR allegations in her brief including ineffective assistance of counsel related to an initial plea offer, failure to object to extensive hearsay, failure to object to a *Doyle*⁴ violation, and failure to raise a claim under S.C. Const. Art. 1, § 10 with respect to the search and South Carolina's "right to privacy." See App. 111, ll. 11-14; App. 121, ll. 23-25; App. 34 (Amended Brief of Petitioner Aug. 11, 2011). Such allegations can be difficult to ascertain by any defendant, much less one like Narciso with limited legal experience and no understanding on the English language. That is why a PCR applicant is appointed an attorney, whose responsibility it is to review the transcript and assist the applicant in identifying any other PCR allegations. Additionally, some PCR allegations may not be apparent from review of a transcript, as they often relate to deficiencies such as a failure to investigate, failure to request or review discovery, failure to call a particular witness, failure to fully advise the defendant regarding his constitutional rights, or even affirmative coercion by counsel toward the defendant. These matters can only be discovered through a thorough discussion of the client's case, not by simply asking a defendant if there is anything else he would like to amend his application to raise any additional allegations. Despite this, PCR counsel testified that his discussions with Narciso did not

⁴ Doyle v. Ohio, 426 U.S. 610, 96 S.Ct. 2240 (1976).

focus on other potential PCR allegations. App. 111, ll. 14-16. Narciso should not be prejudiced by PCR counsel's unskilled representation.

While PCR counsel testified that the waiver of Narciso's PCR rights was not done in "exchange" for the State's consent to the belated appeal, this testimony was obviously not believed by the remand court which found that "the Attorney General offered Petitioner the opportunity to appeal his conviction, but only if Petitioner waived his right to PCR." App. 108, ll. 9-19; App. 139. The PCR Court's finding was supported by an overall view of the facts and and Narciso's testimony that he thought he had to sign those documents in order to go back to court. App. 128, ll. 15-19. Additionally, the Consent Order itself said "[t]he Applicant understands that he *must* proceed on all PCR claims at this time and anything not raised now is waived" App. 28 (emphasis added). As discussed supra in Part A.3, if PCR counsel's averment that the State's consent to the belated appeal was not contingent upon the waiver were true, then dismissal without prejudice should have been a viable option and would have been the best option due to the potential that a PCR allegation may not be evident until after the Court's ruling on direct appeal. Depending on the result of the direct appeal a hearing on the other PCR allegations may not even be necessary, for instance if a new trial were granted. Moreover, whether the consent and waiver were contingent does not affect the reality that per the terms of the Consent Order Narciso waived his right to raise any other PCR allegations and such a waiver must be knowing, intelligent, and voluntary.

Further, both PCR counsel and the State seem to be under the misapprehension that Narciso had to pursue any other PCR claims on the day of the hearing. This is not what South Carolina law requires. See S.C. Code Ann. § 17-27-90 ("All grounds for relief available to an applicant under this chapter must be raised in his original, supplemental or amended application. Any ground finally adjudicated or not so raised, or knowingly, voluntarily and intelligently waived in the

proceeding that resulted in the conviction or sentence or in any other proceeding the applicant has taken to secure relief, may not be the basis for a subsequent application, *unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental or amended application.*") (emphasis added). Though Rule 243(i)(1), SCACR, provides for review of a PCR court's finding that the right to direct appeal was not knowingly and intelligently waived along with all other post-conviction relief issues petitioner seeks to have reviewed, this is not an affirmative requirement that all potential PCR issues be reviewed by the PCR court at the same time as the White v. State issue. Rather, as S.C. Code Ann. § 17-27-90 indicates, there may be sufficient reason to delay consideration of the remaining PCR allegations. Rule 243(i)(1) simply requires that all allegations that were considered by the PCR court and that petitioner wishes to have reviewed be raised in the petition for writ of certiorari along with the White v. State issue.

Beyond the factual inaccuracy of the Consent Order that Narciso was required to "proceed on all PCR claims at this time and that anything not raised now is waived," such a requirement where the State consents to the filing of a belated appeal is inefficient. Under the State's suggested procedure, even where the State consents to the filing of a belated appeal, a PCR applicant is required to raise any other allegations against trial counsel in his PCR application or an amendment thereto and proceed to a hearing on those allegations immediately. Consequently, if the applicant is unsuccessful on any of his other PCR allegations, then the subsequent Petition for Certiorari would have to include both the issue of whether the applicant was entitled to a belated direct appeal and any other denied PCR issues. See Rule 243(i)(1), SCACR ("When the post-conviction relief judge has affirmatively found that the right to a direct appeal was not knowingly and intelligently waived, the petition shall contain a question raising this issue along with all other post-

conviction relief issues petitioner seeks to have reviewed.”). Appellate counsel would also file a White v. State brief on the direct appeal issue along with the Petition for Certiorari. Id. (“At the same time the petition is served, petitioner shall serve and file a brief addressing the direct appeal issues.”).

This procedure results in the pendency of the belated direct appeal and review of the other PCR allegations simultaneously. If the PCR court were to grant relief on one of the other PCR issues, such could potentially result in the granting of a resentencing hearing or new trial, this would further muddy the waters as to when the new trial should occur vis-a-vis resolution of a belated direct appeal issue that may result in acquittal, i.e. a directed verdict issue. Additionally, the applicant should undoubtedly be permitted to file a subsequent PCR application alleging either ineffective assistance of trial counsel based on failure to preserve an issue for appellate review were such revealed in the direct appeal decision or ineffective assistance of appellate counsel, at which point another PCR hearing would be held followed by another potential Petition for Certiorari. In a circumstance where the State contests the granting of a belated direct appeal, this may be the best alternative, but such is not the case where the State consents, leading to the almost inevitable grant of certiorari and review of the direct appeal.

Conversely, if only the belated appeal issue were addressed at the PCR hearing, appellate counsel would need only file the Petition for Certiorari on the issue of whether the applicant was entitled to a belated direct appeal and the White v. State brief on the direct appeal issue. If certiorari were granted, which it likely would be if the State consents, the Court would then address the direct appeal issue. Upon final resolution of the direct appeal and any subsequent proceedings necessitated as a result of the decision, an applicant could then file a PCR application alleging claims regarding his original trial, any subsequent new trial, plea, or re-sentencing, and his appeals,

all as a part of one application to be addressed at one evidentiary hearing. This is a much more efficient procedure and decreases the likelihood of successive PCR applications which are disfavored.

There could be a fear that the State would be less inclined to consent to a belated appeal if the PCR applicant preserves his or her PCR rights, but professional judgment will likely be unaffected in those cases where the State would be willing to consent based on trial counsel's admission that the failure to timely file for an appeal was his own and not the fault of the applicant. Any delay in the resolution of any other PCR allegations is minimal considering that the Uniform Post-Conviction Relief Act requires:

An application for relief filed pursuant to this chapter must be filed within one year after the entry of a judgment of conviction or within one year after the sending of the remittitur to the lower court from an appeal or the filing of the final decision upon an appeal, whichever is later.

S.C. Code Ann. § 17-27-45(A). The delay would be only the time it takes to file the PCR application based on White v. State and execute the consent order granting belated appeal, a process which effective PCR counsel can help accelerate.

Thus, the content of Narciso's original PCR application and failure to amend his application are not relevant to the question of whether his waiver of any other allegations was in accordance with this State's waiver jurisprudence. Further, a PCR applicant should not be forced to go forward on his or her other PCR claims where the State consents to the filing of a belated appeal because judicial economy supports preservation of any remaining PCR issues until completion of the direct appeal process.

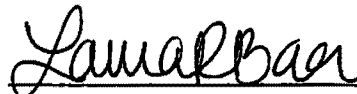
The waiver required of Narciso at the PCR hearing was the result of the Attorney General taking advantage of a foreign defendant and inexperienced PCR attorney. Had Narciso understood

that he gained no benefit by waiving any additional PCR allegations, there is no question that he would have chosen to preserve them. Unfortunately, he was a Spanish speaking applicant with no meaningful legal representation, resulting in his signature on a document that he did not understand. Beyond the obvious injustice of allowing Narciso to be put into a worse position merely because his trial attorney admittedly failed to timely file his direct appeal, is the more the basic fact that the remand court's findings are supported by far beyond the "any evidence" required for affirmance. Therefore, the State's Petition for a Writ of Certiorari should be denied.

CONCLUSION

For the reasons set forth herein, Respondent Osiel Narciso requests this Court to deny the State's Petition for a Writ of Certiorari.

Respectfully submitted,



Laura R. Baer
Appellate Defender

ATTORNEY FOR RESPONDENT.

This 6th day of April, 2015.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Beaufort County

James R. Barber, III, Circuit Court Judge

OSIEL NARCISO,

RESPONDENT,

V.

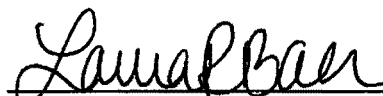
STATE OF SOUTH CAROLINA,

PETITIONER

APPELLATE CASE NO. 2014-001327

CERTIFICATE OF SERVICE

I certify that a true copy of the return to petition for writ of certiorari in this case have been served on Ashleigh R Wilson, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 and Osiel Narciso at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 6th day of April, 2015.



Laura R. Baer
Appellate Defender

ATTORNEY FOR RESPONDENT

SWORN TO BEFORE ME this 6th day
of April, 2015.

 (L.S.)
Notary Public for South Carolina
My Commission Expires: October 24, 2021

The Supreme Court of South Carolina

Osiel Narciso, Respondent,

v.

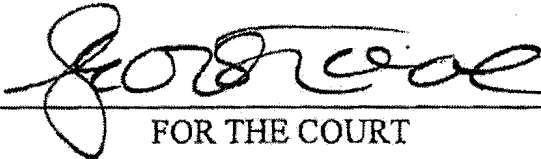
State of South Carolina, Petitioner.

Appellate Case No. 2014-001327

Lower Court Case No. 2007-CP-07-02195

ORDER

This matter is before the Court on a petition for a writ of certiorari. The petition is denied.


C.J.
FOR THE COURT

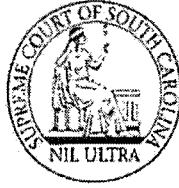
June 17, 2015

Columbia, South Carolina

cc:

Ashleigh Rayanna Wilson, Esquire

Laura Ruth Baer, Esquire



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA
29211
1231 GERVAIS STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1080
FAX: (803) 734-1499
www.sccourts.org

July 06, 2015

The Honorable Jerri Ann Roseneau
PO Box 1128
Beaufort SC 29901-1128

REMITTITUR

Re: Osiel Narciso v. State
Lower Court Case No. 2007CP0702195
Appellate Case No. 2014-001327

Dear Clerk of Court:

The above referenced matter is hereby remitted to the lower court or tribunal. A copy of the judgment of this Court is enclosed.

Very truly yours,

Daniel E. Shearouse
ES

CLERK

cc:

Ashleigh Rayanna Wilson, Esquire
Laura Ruth Baer, Esquire

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Beaufort County

J. Cordell Maddox, Jr., Circuit Court Judge

OSEIL GOMEZ NARCISO,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPENDIX

ELIZABETH A. FRANKLIN-BEST
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South Carolina Commission on Indigent
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Division of Appellate Defense
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Columbia, S. C. 29211-1589

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SALLEY W. ELLIOTT
Assistant Deputy Attorney General

MATTHEW J. FRIEDMAN
Assistant Attorney General
P. O. Box 11549
Columbia, S. C. 29211

ATTORNEYS FOR RESPONDENT

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STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

COURT OF GENERAL SESSIONS
05-GS-07-1304

STATE OF SOUTH CAROLINA :

-vs- :

OSIEL NARCISO GOMEZ :

TRANSCRIPT OF RECORD

JANUARY 16, 17, AND 18, 2007
BEAUFORT, SOUTH CAROLINA

B E F O R E:

HONORABLE HOWARD P. KING, JUDGE, AND A JURY.

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

ANGELA TANNER, DEPUTY SOLICITOR
KIMBERLY SMITH, ASSISTANT SOLICITOR
ATTORNEYS FOR THE STATE

DONALD COLONGELI, ESQUIRE
ATTORNEY FOR THE DEFENDANT

DIANNE A. RUTLEDGE
CIRCUIT COURT REPORTER

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STATE OF SOUTH CAROLINA)
COUNTY OF BEAUFORT)
))
))
OSIEL NARCISO GOMEZ, #319935)
))
Applicant,)
))
vs)
))
STATE OF SOUTH CAROLINA,)
))
Respondent.)
_____)

IN THE COURT OF COMMON PLEAS

2015-CP-07-2196

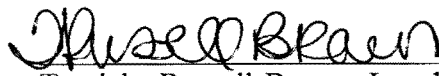
AFFIDAVIT OF SERVICE BY MAIL

2018 SEP 28 PM 1:11
CLERK OF COURT
SOUTH CAROLINA

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

James K. Falk, Esquire
Falk Law Firm, LLC
Post Office Box 1058
Charleston, South Carolina 29402

DATED this 21st day of September, 2018.


Tamieka Russell-Brown, Legal Assistant



ALAN WILSON
ATTORNEY GENERAL

September 21, 2018

The Honorable Jerri Ann Roseneau
Clerk of Court-Beaufort County
PO Box 1128
Beaufort, SC 29901-1128

2018 SEP 28 PM 1:11
RECEIVED
CLERK OF COURT
BEAUFORT COUNTY
SOUTH CAROLINA

Re: Osiel Narciso Gomez, #319935 v. State of South Carolina
2015-CP-07-2196

Dear Ms. Roseneau:

Enclosed please find the original **Return and Partial Motion to Dismiss** in the above-captioned case for filing in your office.

Sincerely,

Christian Saville
Assistant Attorney General

CS/trb
Enclosure

cc: James K. Falk, Esquire

STATE OF SOUTH CAROLINA	)	COURT OF COMMON PLEAS
	)	
COUNTY OF BEAUFORT	)	FOR THE 14th JUDICIAL CIRCUIT
	)	
Osiel Narciso Gomez 319935	)	
Applicant	)	2015-CP-07-2196
Vs.	)	
State of South Carolina	)	AMENDED PCR APPLICATION
Respondent,	)	
_____	)	

Applicant by and through undersigned counsel amends his PCR application to add the following grounds in support of his claim of ineffective assistance of counsel.

1. Applicant was a non-English speaker from a Latin American country facing charges of trafficking in cocaine. Applicant is informed and believes that because of his client's nationality and the nature of the offense, trial counsel provided ineffective of counsel by failing to submit proposed voir dire questions that could have helped ensure that the veniremen did not harbor any unfair prejudices against Applicant. The record shows that the Court asked trial counsel if he had any additional voir dire to which trial counsel responded that he had none. (Transcript Page 8 lines 14-16). Additionally after the jury was selected, but prior to being sworn, trial counsel moved to excuse Juror 43 for cause. Trial counsel provided ineffective assistance of counsel by failing to make a timely motion to excuse Juror 43. (Transcript page 17 lines 14-17).

2. Trial counsel provided ineffective assistance of counsel by failing make a contemporaneous objection and thus failing to preserve for appellate review the lawfulness of the search and seizure of the vehicle that Applicant was driving. (Officer Jody Hiers' testimony regarding the K-9 search of the vehicle. Transcript page 150 line 20 through 153 line 6); (Officer Heir's testimony that drugs were found in the vehicle. Transcript page 151 line 24 – 152 line 15); (Sergeant Florencio's testimony regarding State's Exhibit S-1-A; S-2-A. Transcript pages 183 and

188); (Staff Sergeant Berry's entire testimony regarding the results of her forensic analysis of the cocaine seized from the car that Applicant was driving).

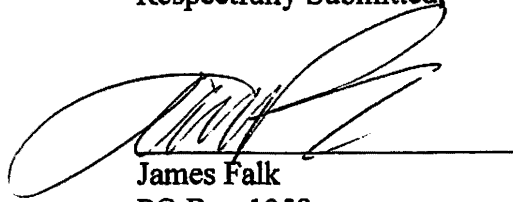
3. Trial counsel failed to provide effective assistance of counsel by failing to move to have the Incident Report In Case No. 20050803-474 made a Court's exhibit. (Transcript Page 248 lines 8-11). At the close of the case trial counsel renewed his motions under both Rule 5 SCRCrM and Brady v Maryland and then moved for a mistrial. Trial counsel believed that the State failed to abide by its obligation to disclose the names of all witnesses with knowledge of the case. In denying trial counsel's motion the Court relied upon the disclosures set forth in the above-described incident report. By failing to move to have the report made a Court's exhibit, trial counsel failed to fully preserve the issue for appellate review.

4. Trial counsel provided ineffective assistance of counsel by not requesting a charge on a lesser included offense. When agents searched the car Defendant was driving a small bag of cocaine was found between the driver's seat and center console. The bulk of the cocaine was seized from the storage compartment in the rear of the vehicle. The defendant made a statement that he purchased 4 ounces of cocaine. (Transcript page 291 lines 21 through page 292 line 12). Therefore the jury could have believed that Applicant was only in constructive possession of the small bag found next to the driver's seat and returned a verdict on the lesser included offense.

5. Trial counsel provided ineffective assistance of counsel by not preserving for appellate review his objection to Defendant's statement. The Court conducted a pre-trial Jackson v Denno hearing. The trial court found that the statement was made knowingly and voluntarily. Trial counsel failed to make a contemporaneous objection when Sergeant Florencio testified about Applicant's statement. (Transcript page 194 lines 14- 25).

6. Trial Counsel failed to object when Sergeant Florencio testified in violation of Applicant's Due Process rights under the 14th Amendment and as recognized in Doyle v Ohio, 426 U.S. 610 (1976). Sergeant Florencio testified that Applicant stated: *at that time he stated that he did not want to answer any more questions and requested a lawyer.* (Transcript 194 lines 20- 23)

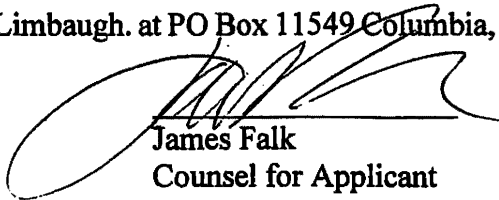
Respectfully Submitted,



James Falk
PO Box 1058
Charleston, SC 29402
(843) 606 6007
jfalklaw@gmail.com

CERTIFICATE OF SERVICE

Undersigned certifies that on March 31, 2019, 2019 a copy of the above was both mailed and emailed to Benjamin Limbaugh. at PO Box 11549 Columbia, SC 29211; blimbaugh@scag.gov



James Falk
Counsel for Applicant

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
)
 COUNTY OF BEAUFORT) CASE NO.: 2015-CP-07-2196

OSIEL NARCISO GOMEZ,)
)
 APPLICANT)
)
 v.) TRANSCRIPT OF RECORD
)
 THE STATE OF SOUTH CAROLINA)
)
 RESPONDENT.)
)

WEDNESDAY, AUGUST 28TH, 2019
 COMMENCING AT
 BEAUFORT COUNTY COURTHOUSE
 BEAUFORT, SOUTH CAROLINA
 BEFORE THE HONORABLE JENNIFER MCCOY

APPEARANCES:

MR. JAMES FALK, ESQUIRE
 Attorney for the Applicant

MR. BENJAMIN LIMBAUGH, ESQUIRE
 SOUTH CAROLINA ATTORNEY GENERAL'S OFFICE
 Attorney for the Respondent

MR. DONALD COLONGELI, ESQUIRE
 Attorney for Applicant at time of trial

Rebecca H. Hill
 Official Court Reporter

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WITNESS: MR. OSIEL NARCISO GOMEZ

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CROSS EXAMINATION BY MR. LIMBAUGH 43

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COURT EXHIBITS

<u>NO.</u>	<u>DESCRIPTION</u>	
1	PLEA AGREEMENT DATED 9.29.05	16
2	PLEA AGREEMENT DATED 6.28.06	16

1 THE COURT: All right. Next up, we have Mr. Narciso.
2 I'm going to swear the translator in first. If you would
3 raise your right hand, please, ma'am. And tell me your
4 name?

5 MS. NEIDERHISER: Beverly Neiderhiser.

6 THE COURT: And how do you spell your last name?

7 MS. NEIDERHISER: N-E-I-D-E-R-H-I-S-E-R.

8 THE COURT: Ms. Neiderhiser, what language will you be
9 translating for us today?

10 MS. NEIDERISER: English to Spanish.

11 (Whereupon, the translator is duly sworn.)

12 THE COURT: All right. Mr. Narciso, please have a seat
13 by your attorney. Mr. Limbaugh, what would you like to
14 tell me about this case?

15 ATTY. GEN. LIMBAUGH: May it please the Court, Your
16 Honor? This is Mr. Osiel Narciso Gomez. Case number 2015-
17 CP-07-2196. Applicant is currently confined to the South
18 Carolina Department of Corrections and pursuant to the
19 orders of commitment from the Berkeley County Clerk of
20 Court.

21 In August of 2005, the Beaufort County Grand Jury
22 indicted him for trafficking cocaine, 10 grams to 28 grams,
23 first offense. That indictment was amended on the record on
24 January 17th, 2006, to trafficking cocaine in excess of 100
25 grams. Mr. Donald Colongeli represented the Applicant.

1 Asst. Solicitor Kimberly Smith prosecuted the case.

2 On January 16th, 2006, Applicant proceeded to trial
3 before the Honorable Howard P. King. The jury found
4 Applicant guilty as indicted. On January 18th, 2007, Judge
5 King sentenced Applicant to imprisonment for 25 years for
6 trafficking cocaine in excess of 100 grams. Applicant did
7 not appeal his conviction for this sentence at this time.

8 Your Honor, there is some unique PCR procedural history
9 in this case, so I would like to inform the Court of that as
10 well.

11 THE COURT: Okay.

12 ATTY. GEN. LIMBAUGH: On August 1st, 2007, Applicant
13 filed an application for post-conviction relief and attached
14 to the application, the applicant wrote my allegation of
15 ineffective assistance of counsel is presently based upon
16 the fact that my attorney did not file an appeal after
17 stating to the Court and upon the record that he would do
18 so,

19 An evidentiary hearing is a matter convened on August
20 26th, 2008, before the Honorable J. Cordell Maddox. At the
21 hearing, both parties signed a consent order Applicant
22 direct appeal to White v. State.

23 The consent order stated that White v. State issue is
24 Applicant's only allegation in the PCR application.
25 Applicant understands that he must proceed on all PCR claims

1 at this time and anything not raised now is waived.

2 Applicant wishes to waive all other PCR claims and proceed
3 with the appeal.

4 Applicant subsequently filed an appeal in which he
5 asked the Court to review the waiver of his other PCR
6 applications. The South Carolina Court of Appeals confirmed
7 the convictions and remanded the case to PCR Court for a
8 determination of whether he knowingly and voluntarily waived
9 his rights to raise additional PCR claims. The remittitur
10 was issued on March 30th, 2012.

11 On February 20th, 2014, after the Court's remand, the
12 second evidentiary hearing was held in the PCR matter. The
13 Applicant was represented by Carol.

14 Present to testify at the hearing were Philip Rios,
15 Rebecca McCann, Donald Colongeli, and the Applicant. An
16 interpreter was present to assist the Applicant at the
17 hearing. By Order dated June 5th, 2014, the Court found the
18 PCR waiver failed to outline the Applicant's waiver PCR of
19 his rights in the consent order to be null and void and
20 granted the Applicant's request to bring a PCR application.

21 The State subsequently filed a petition for writ of
22 certiorari on December 22nd, 2014. The South Carolina
23 Supreme Court denied the petition on June 17th of 2015. A
24 remittitur was issued on July 6th of 2015. Applicant
25 subsequently filed his current PCR Application on September

1 9th, 2015. Applicant did have some initial allegations, but
2 I believe Mr. Falk has amended since then as to what we are
3 going to be moving forward on here today. I will hand it
4 over to him at this time.

5 THE COURT: Okay. And just so I have a clear
6 understanding, he is currently serving a 25-year sentence
7 for trafficking in cocaine in excess of 100 grams; is that
8 correct?

9 ATTY. GEN. LIMBAUGH: That's correct, Your Honor.

10 THE COURT: And that sentence was handed down on
11 January 18th, 2007.

12 ATTY. GEN. LIMBAUGH: That's correct, Your Honor.

13 THE COURT: About twelve and a half years ago.

14 ATTY. GEN. LIMBAUGH: Yes, Your Honor.

15 THE COURT: All right. And that charge carries ---

16 ATTY. GEN. LIMBAUGH: Actually, I'm not entirely sure,
17 Your Honor.

18 MR. FALK: Beg your pardon?

19 THE COURT: What is trafficking in excess of 100 grams?

20 MR. FALK: Twenty-five to life I believe.

21 THE COURT: Okay. Mr. Falk, I'm happy to hear from
22 you.

23 MR. FALK: Your Honor, the reason why we're back here
24 today is because there was no appeal filed and so we never
25 had an opportunity to hear some of the PCR issues. You have

1 to send it all up, PCR issues and direct appeal issues. I
2 may be raising some issues and I will detail further, but
3 there may be some issues on preservation of the record and
4 our position would be either trial counsel was ineffective
5 for failing to preserve the record.

6 THE COURT: Okay.

7 MR. FALK: I can appreciate -- I mean, normally, when
8 we have issues like that, you can raise the issue on direct
9 appeal, and frequently, the Courts will find that this may
10 be a meritorious issue but it wasn't properly preserved, so
11 I think that's why we're not going to have that opportunity
12 to go up and have the Court look at the issues and then come
13 back for preservation issues. So I just want to protect his
14 right to, you know, if there were evidentiary questions that
15 were ruled incorrectly by the Court, I just want to make
16 sure those will still be able to be addressed when he gets
17 his relief for his direct appeal; does that make sense?

18 THE COURT: It does. I don't think that anything you
19 are doing today will waive that.

20 MR. FALK: Okay. Because I may say I don't think this
21 issue is properly preserved and you may say, "Yes, it is."
22 And I have to ---

23 THE COURT: I understand.

24 MR. FALK: And so I have filed an amended PCR
25 application and so we are going forward. We have some

1 concerns about the way trial counsel handled the voir dire.
2 We think that trial counsel failed to preserve the record on
3 whether or not there was a lawful search and seizure in this
4 case. The issue was vigorously argued at a pretrial
5 hearing, but I don't believe there was a contemporaneous
6 objection when the information was introduced.

7 Also, this is an interesting case, Mr. Colongeli was
8 suddenly very concerned, and probably rightfully so, that he
9 did not feel that the State had provided all of the
10 materials required under a Brady or Rule 5, and a lot of it
11 dealt with names of potential witnesses.

12 At one point in the trial, the Court was certainly
13 concerned about this issue. And the Court looked at a piece
14 of possibly the discovery; it was identified on page 248 of
15 the transcript as an incident report, case number 20050803-
16 474. And based on the Court's reading of that report, the
17 Court felt that although the State could have done a lot
18 better job; he did have adequate notice of potential
19 witnesses. The problem is that that document should have
20 been made a Court's exhibit because there was going to be no
21 basis for the Appellate Court to understand what the judge
22 was looking at. And I will get into this in more detail
23 when we get there.

24 THE COURT: Okay.

25 MR. FALK: And I'm just sort of summarizing it. I'm

1 going to move forward, but I'm waiting on the translator.
2 Also, we believe there was potentially grounds to at least
3 ask for a requested charge on a lesser included offense in
4 this case, which I'll set forth those facts.

5 THE COURT: Okay.

6 MR. FALK: And we said that trial counsel was
7 ineffective for failing to renew his objection to the
8 statement made after the Jackson v. Denno hearing, and
9 finally, we would believe that there was a Doyle violation,
10 Ohio v. Doyle violation. There was some testimony that was
11 heard. I'm not sure if there is a remedy for this, but we
12 want to address also whether trial counsel provided
13 ineffective assistance for not accepting the plea offer.

14 THE COURT: Whether the trial counsel was ineffective
15 for not accepting the plea offer versus the client who
16 ultimately accepts a plea offer; so we say if we're not
17 accepting it, do you mean for not urging it or?

18 MR. FALK: I think his testimony was and I'll let Mr.
19 Colongeli address this, but I think the testimony is that he
20 knew -- or the family thought it was a good idea to take
21 it, but all of a sudden he was sort of surprised that the
22 case shows up on the docket two weeks later and he never had
23 a ---

24 THE COURT: When you say "he", do you mean Mr.
25 Colongeli?

1 MR. FALK: Yes, Mr. Colongeli.

2 THE COURT: Okay. Well, we will ---

3 MR. FALK: I just, yeah.

4 THE COURT: Okay. Whenever you're ready, you can call
5 your first witness.

6 MR. FALK: Your Honor, we call Mr. Donald Colongeli.

7 MR. COLONGELI: My apologies for running late, Your
8 Honor. I'm also still extremely hot from a car with no
9 air conditioning, so I beg the Court's indulgence as far as
10 that goes.

11 THE COURT: Do you need any water?

12 MR. COLONGELI: I'm fine.

13 THE COURT: If you do, just let us know.

14 MR. COLONGELI: Thank you very much.

15 (Whereupon, the witness, Mr. Colongeli, is duly sworn.)

16 THE COURT: Okay.

17 DIRECT EXAMINATION

18 BY MR. FALK:

19 Q Good morning, Mr. Colongeli.

20 A Good morning, sir.

21 Q Forgive me if I was mischaracterizing some of what I
22 thought the facts were in this case.

23 A Totally.

24 Q When the case started, you made a motion to enforce a
25 plea offer; do you recall that?

1 A I do.

2 Q Okay. And can you just sort of tell me what the
3 history of this case was and the plea offers? How we got to
4 that point?

5 A To the extent I can, sir, it's quite difficult to
6 remember back as to the specifics of that plea offer and
7 what it ---

8 MR. FALK: Your Honor, may I interrupt?

9 THE COURT: Yes.

10 MR. FALK: Would it be possible to move him to that
11 table? I can't hear with the interpreter ---

12 THE COURT: I don't if your client doesn't.

13 (The interpreter and the Applicant move towards the
14 defense table.)

15 A As far as your impression goes, counsel, I remember the
16 motion specifically. Do I remember the details of it or the
17 specific numbers? I don't.

18 Q If I could approach, I'm going to show you two things.

19 A Thank you.

20 Q I would like to mark these as Applicant Exhibits One
21 and Two. Applicant's Exhibit One will be the plea agreement
22 that was dated 9-29-05 and Exhibit Two will be the plea
23 agreement that was dated 6-28-06.

24 THE COURT: Let's let the court reporter mark them.
25 Any objection as to them being admitted, from the State?

1 ATTY. GEN. LIMBAUGH: If I could get a little more from
2 Mr. Colongeli as to per identification and him actually
3 recognizing these documents.

4 THE COURT: Sure. Can you confirm that you recognize
5 them?

6 A It might have been back in 2007, being as honest as I
7 can be, do I specifically remember these? No. Do I
8 remember them based on my recollection? Yes, if that makes
9 sense. I do recall these documents. I don't recall the
10 fact that it was in the Judge's -- it really wasn't at all
11 in the judge's discretion the event carries seven to twenty-
12 five years; original charge carries mandatory twenty-five
13 years, which I was aware of. I wasn't anything more. The
14 absolute worth that he could get was the twenty-five. So it
15 was really no specific offer other than a recommendation by
16 the State to a straight-up plea. That's how I read this
17 now.

18 Q But that would be to a lesser offense, because he was
19 charged with trafficking over a 100 grams?

20 A Correct. Correct.

21 Q So this would be a plea to a lesser offense, which
22 carries seven to twenty-five, correct?

23 A That's correct, absolutely; yes, sir.

24 Q So there's a difference in the two separate ranges?

25 A Yes, I apologize; you are correct. As far as the

1 weight goes, yes, they were allowing him to plead to the
2 lesser weight, which was the seven to twenty-five, as
3 opposed to the original indictment which carried a mandatory
4 of twenty-five. But at the end of the day when you looked
5 at it, the original indictment carried up to a mandatory of
6 twenty-five and I'm not sure what the mandatory minimum was
7 but it was very little difference between the two, as far as
8 my professional judgment at the end of the day after looking
9 at it.

10 Q It's my understanding after reading this, the
11 transcript, that the offer that I'm describing is offer
12 number one, Exhibit Number One, that came before you made an
13 initial appearance in this case?

14 A I believe that's correct.

15 Q Okay. So did you have some conversations with the
16 Solicitor's Office about trying to renew the offer?

17 A Obviously, yes. And I remember this was -- I believe
18 the newly, Ms. Tanner, Angela McCall when she first got
19 here. I knew her quite well, and obviously, she is the wife
20 of the sheriff, and she was the solicitor on this case,
21 along with Kimberly Smith, I believe. And I did have many
22 discussions with the both of them as far as trying to get a
23 better deal for Mr. Gomez.

24 Q So you had -- you started the trial on page 32 of the
25 transcript. It talks about you asking to enforce, you know,

1 the plea offer.

2 A Correct.

3 Q So at that time, you must have had conversations with
4 your client and he advised that he was willing to accept the
5 offer?

6 A That's correct.

7 Q Okay. And do you recall what happened as to why you
8 didn't advise the solicitor's office that you were willing
9 to accept the offer?

10 A I'm not sure -- I'm not sure that I understand the
11 question.

12 Q Okay. When you were in court that day, you were saying
13 you wanted to put this offer back on the table; is that
14 correct?

15 A Correct.

16 Q So you obviously had some conversations prior to that
17 day with your client that he wanted to accept the offer, the
18 seven to twenty-five offer; the offer to the lesser offense;
19 is that correct?

20 A I believe that makes sense.

21 Q Okay. And then on the day of the trial -- on the first
22 day of the trial, you moved to enforce the plea offer?

23 A That's correct.

24 Q And why had you not contacted the Solicitor's Office
25 prior to the first day of trial that you wanted to accept

1 the offer?

2 A I'm not certain that I did not.

3 Q Okay.

4 A I don't recall that I didn't. I don't recall that I
5 specifically did. My notes don't reflect that. I'm sure
6 that I must have had probably more than one conversation
7 with Ms. Tanner or her second chair as far as advising Mr.
8 Gomez of the original offer. And then I had intended that
9 if they did not agree to that, then obviously, the pre-trial
10 motion as to the enforceability of the plea agreement, the
11 prior plea offer.

12 Q Did you ever ---

13 A It was the first time I brought that.

14 Q Do you have a copy of the transcript?

15 A I do not.

16 (Whereupon, Court's Exhibit Number One

17 Q I'm going to hand you a copy of the record on appeal.

18 A Thank you.

19 THE COURT: Let me see a copy of that for a second.

20 MR. LIMBAUGH: Just for the record, the State is
21 satisfied with the foundation that has been laid and does
22 not object to these two exhibits being admitted.

23 THE COURT: All right. Thank you for clarifying that.
24 These will be admitted. Have you had a chance to review
25 these?

1 MR. LIMBAUGH: I have, Your Honor.

2 (Whereupon, Court Exhibit Number One and Court Exhibit
3 Number Two are received into evidence.)

4 A I'm sorry, what page?

5 Q If you could look at page 71, lines 13 through 19.

6 A Okay.

7 Q So the issue was that it had been timely accepted?

8 A Correct. And therefore, there was no quid pro quo. No
9 consideration, therefore, no contract.

10 Q Okay. And the decision to sort of hold that in your
11 back pocket until the day of the trial and then try to
12 accept, that was a trial strategy decision, wasn't it?

13 A No.

14 Q Okay. Let me move on to -- now this is a case where we
15 have somebody who is Latin-American, non-English speaking,
16 accused of a drug offense; is that a fair summary of your
17 client?

18 A Yes, sir.

19 Q What was your -- was your trial strategy decision you
20 had not putting any individualized voir dire?

21 A I believe that the judge sufficiently voir dired the
22 jury. But the questions he put forth were the standard ones
23 and the chief resident judge at the time I believe I would
24 have had a discussion with him regarding the same and I
25 didn't feel the need that any additional questions were

1 necessary.

2 Q Okay. Because that was -- on page 15, the judge asked
3 you if you had any additional voir dire?

4 A I'm sure I probably said no.

5 Q Page eight, lines 14 through 16.

6 A Yes, sir.

7 Q Okay. So you did not seek any additional voir dire?

8 A Correct. Now,

9 Q Do you think it would have been helpful to know whether
10 or not there were members of the jury panel who had been
11 affected by drugs in their personal life or perhaps who had
12 a friend or family member that was addicted to drugs,
13 arrested for drugs, or in recovery?

14 A In retrospect, I believe you're right, probably.

15 Q Okay.

16 A I would also say that might be a downhill -- could be a
17 possible downhill question, but anyway, that wouldn't be
18 possibly something I would have asked.

19 Q And I'm not sure exactly what question I would have
20 used if I had some concerns about somebody who isn't a non-
21 native speaker living in the United States, but you could
22 possibly have framed a question about whether or not there
23 were members of the jury concerned about somebody living
24 here but is not speaking the language.

25 A Correct.

1 Q And so a juror could have had a possible negative
2 prejudice floating around in the back of her head about a
3 Latino coming up here trafficking in cocaine.

4 A That's a valid point. I agree.

5 Q All right. Now, because then there was a little bit of
6 a problem. I'm going to let you, maybe, why don't you read
7 this. I thought you had the transcript, I apologize. If
8 you could look on page 15 of the transcript, lines four
9 through sixteen. Just read that and try to get your
10 recollection.

11 A Yes, sir.

12 Q So juror number 43 was actually already seated, right?

13 A I don't recall. I don't recall. I don't believe it
14 indicates that in those paragraphs. I don't believe he
15 would have been seated if I had brought that up to them if
16 he had been seated. But actually on the previous page it
17 looks like he was excused; I may be wrong.

18 Q If you could look at the judge's ruling on your request
19 to remove him, lines 14 through 17.

20 A Yes, sir.

21 Q So you agree that that juror had already been seated?

22 A Fourteen through seventeen, I apologize.

23 Q Page 17.

24 A I'm sorry; I don't see it within those lines whether he
25 was seated or not.

1 Q The transcript doesn't show it. Let me find it. Well,
2 if you look at page 11, lines 14 through 19.

3 A Yes, sir.

4 Q It would appear that the judge was excusing the panel.

5 A It does.

6 Q Because there were going to be some pretrial matters.
7 And then if you look at page 12, lines 10 through 14, the
8 judge is directing how they are going to be picking a
9 foreperson of the jury.

10 A Correct.

11 Q All right. So does that help to refresh your memory?

12 A It does, but I'm wondering, without being able to look
13 at it closer, and I apologize, I should have been better
14 prepared to answer this. I would imagine it was something I
15 probably renewed for purposes of housekeeping because of the
16 strong basis for the objection for cause on that particular
17 individual. Because I do recall making the motion when he
18 was called, because he was suited in his firefighting
19 uniform.

20 Q Okay. And I don't have, obviously, there is a hole in
21 the beginning of the transcript here.

22 A My memory if it serves correctly would have been that I
23 had objected when he was called and probably would have
24 renewed that objection when we came back the next morning.
25 As far as renewing any objections I had the prior day.

1 Q Okay. I'll move on. But you knew he was a first --
2 you had a concern about a first responder?

3 A Yes, sir.

4 Q You had a concern about his being a first responder
5 because of how much time they spent with law enforcement?

6 A Absolutely. Well, just the fact that they work hand in
7 hand with law enforcement and on a daily basis and that fact
8 alone, even though they didn't have the power to arrest, I
9 argued that that would be enough in my opinion at least
10 arguably for cause to strike.

11 Q And you recognized that he was a first responder, but
12 he was wearing his uniform.

13 A Not only was he wearing his uniform, but he stated such
14 during voir dire.

15 Q Were there any other first responders in the voir dire?

16 A I seem to want to think there may have been other fire
17 fighters or other sort of law enforcement people, but I
18 don't remember.

19 Q And you didn't ask a specific question about it?

20 A Absolutely.

21 Q You did not ask that question?

22 A No. No. No. I believe that was a part of the judge's
23 general voir dire. "Does any member of the jury pool have a
24 family member or a relative who is retired or otherwise in
25 law enforcement?"

1 Q They always ask the law enforcement question, but this
2 is a step removed from that. Your concern is the first
3 responder, so a fireman or a volunteer fireman or an EMS
4 agent, that's not necessarily a part of law enforcement, but
5 you still have that same concern?

6 A Yes, correct. I didn't ask for that question to be
7 asked. I raised it as an issue as far as an objection, or a
8 request to strike for cause based on my argument.

9 Q But that would have potentially been another question
10 you could have asked during voir dire?

11 A Correct.

12 Q Now, do you kind of recall the facts of the stop?

13 A I do. I do.

14 Q And you certainly -- certainly made a vigorous
15 objection as to how my client was treated on the side of the
16 road.

17 A Absolutely.

18 Q And what I'm going through here is because I'm not sure
19 if your objections from the judge's agreement to let in, you
20 know, you objected to the search and seizure ---

21 A Absolutely.

22 Q --- and to the introduction of the products of the
23 search and seizure into the case; you objected?

24 A Yes.

25 Q The Court denied your motion.

1 A They did. After a great of consideration.

2 Q Absolutely. And I'm only going through this for
3 whether or not so if the Court of Appeals -- I don't want to
4 get into a situation where the Court of Appeals is going to
5 say Mr. Colongeli did the right job but it wasn't preserved.
6 I just want to make sure we talk about this situation here,
7 so that's why I'm going to go through this.

8 MR. FALK: Your Honor, this is sort of a complicated
9 one and I don't know if you want to get all of the facts
10 here, but the best way to sort of get a taste of this is to
11 read page 101, the State is summarizing their argument for
12 the admission of the evidence and then starting on page 108,
13 counsel is summarizing his argument.

14 Q And what we have here is a roadside stop, I guess,
15 maybe a registration out of -- invalid registration and they
16 said he didn't have a valid driver's license and they put
17 him under arrest at that time; is that right?

18 A That's correct.

19 Q And then they tried to bootstrap that into an entire
20 search of the car.

21 A Absolutely. That's correct.

22 Q And not only that, while they had him under arrest,
23 then they call the K-9 dog to come and sniff the car for
24 somebody who was driving on an expired driver's license --
25 or no driver's license; is that correct?

1 A As far as I recall, I believe that is correct. And I
2 believe a great deal of time transpired during such and the
3 same, and also, I want to say if I remember correctly, he
4 did have a Mexican driver's license or something, unless I'm
5 mistaking that for another case; but I'm fairly certain that
6 he had some form of document -- government documentation as
7 far as the validity of the driver's license, just not a
8 South Carolina driver's license.

9 Q And so then you got to a situation where you could do a
10 search incident to arrest, maybe just immediate area and
11 then they searched the rear compartment of the car.

12 A That is where they went past it.

13 Q So then they're going past the line there. That's what
14 you argued.

15 A Adamantly argued. And I remember to this day that my
16 predecessor, the former Chief Public Defender, rest his
17 soul, love the man, Gene Hood. I believe he was second
18 chair to me, if I'm not mistaken, but he was always close by
19 when any of us former public defenders tried a case, let
20 alone if we were in the public defender's office, but we had
21 a great, lengthy discussion as to that specific issue.
22 That's why I recall it so well.

23 Q And you might recall further the issue that you raised
24 if they were going to tow the car, they could have then got
25 a warrant to search the entire car.

1 A As a matter of fact, Judge King came to that conclusion
2 himself at one point.

3 Q Because there was really no exigent circumstance.

4 A Correct.

5 Q He was in handcuffs, arrested.

6 A That's correct.

7 Q Then they called the dog.

8 A Yes, sir.

9 Q The dogs alerted and then they searched the rest of the
10 car?

11 A Yes, sir. And I believe the testimony prior to that
12 also made it quite obvious that this had been an ongoing
13 drug investigation. And the ongoing drug investigation took
14 all of one day, and I read it to mean that it was ongoing
15 for days when it was just, in fact, hours. It was clearly
16 obvious in my opinion that it was a form of a pretextual
17 stop in that the DTF officers witnessed what they thought
18 was an individual exiting a hotel with a laundry basket in
19 which they assumed there was some illegal contraband, and
20 then -- this is conjecture on my part, but arguably notified
21 a -- which is something we have come to know that they do
22 routinely is notify a squad car at that point to make a stop
23 based on a moving violation, whether it was valid or not at
24 the time, that was how that came about. And then the Fourth
25 Amendment issue that I raised.

1 Q Whether or not the judge made the right decision, that
2 will be something that will be addressed on appeal.

3 A Sure. That's correct. That was my argument. That was
4 my position. And at one point, the judge actually did come
5 up with the fact -- or at least if my recollection serves me
6 correctly, he in fact did say that the back luggage
7 compartment was outside of the scope of their ability to
8 search; and a search warrant should have been issued for
9 that search to be conducted. Meaning that as far as the
10 Sheriff's Department procedure goes, that they follow
11 procedure, that car would have been impounded and
12 inventoried at that point if they had done it properly.

13 Q Now, we get to the trial and the judge has issued his
14 ruling; I'm not sure if it's page 109 or 113.

15 A Page 113.

16 Q Okay. So the judge issues his ruling and they are
17 going to admit the testimony. We come around to the trial
18 and Jody Hiers, who is the K-9 officer testified.

19 A Yes, sir.

20 Q And he testified that the K-9 alerted on the car. Did
21 you consider whether or not you should have objected to that
22 testimony, because the K-9 hit would certainly be fruit of
23 the poisonous tree from the bad stop at the get-go.

24 A If my recollection serves me correctly, I believe I
25 did; unless the record indicates otherwise.

1 Q From what I saw, the record indicates that you objected
2 to once they tried to put the drug evidence in, you renewed
3 your objection. But I did not see an objection to Jody
4 Hiers' testimony.

5 A Understood. The record speaks for itself. I obviously
6 may not have, but I should have. I seem to remember
7 specifically in trial preparations that I did a great deal
8 of research as far as the K-9 issue and I remember Jody
9 Hiers specifically, actually I knew him, and I remember
10 quite the cross-examination as far as he goes, but I thought
11 I had made an objection, but I may not have.

12 Q And then Sgt. Berry, the forensic expert, testified who
13 had done the analysis of the drugs.

14 A Correct.

15 Q And I did not find an objection that you objected or
16 renewed your objection to her testimony regarding the drugs.

17 A I don't believe I did.

18 Q Do you remember this, when I was talking before, about
19 the deal with your objection about whether or not you were
20 fully made aware from the Rule 5, because I know several
21 times you renewed the Rule 5, the Brady motion, the whole
22 she-bang, about whether or not you were given the names of
23 all the people involved in this case?

24 A Yes, sir.

25 Q And they were planning on fast and loose, but the

1 names.

2 A Crystal clear.

3 Q And it is what it is, but so on page 248, if you will
4 look there.

5 A Okay.

6 Q Look at lines 8 through 12.

7 A Okay.

8 Q So you would agree that the judge was really giving the
9 solicitor kind of a hard time up to that point about whether
10 or not they had made adequate disclosure; is that a fair
11 reflection?

12 A I wouldn't want to say what the judge was -- what the
13 judge's position was on that, but I can remember there was
14 quite the fuss over that. Trust me. I'm not sure if this
15 was the first case, I don't believe it was, but I have made
16 that objection more than most criminal defense lawyers have
17 and let's say I'm quite known for doing that. I have a
18 reputation for that and I've gotten paid -- in my opinion,
19 I've paid the price quite dearly for that, but that's
20 regardless of this trial. I do know that that was quite the
21 issue here and they became extremely offended and upset that
22 I would make that motion and allegation when I was
23 attempting to do my job.

24 Q What did that report say? So the judge was looking at
25 a report, the incident report, case number 20050803474, on

1 line 11 of that page.

2 A Right. It did show that a patrolman, Herald, was also
3 in the interview room, or that's what I'm assuming if my
4 memory serves me correctly, that testified as to the drugs
5 being wrapped in a shirt in the laundry basket. I can only
6 assume that between that patrolman and also a Cobb, C-O-B-B,
7 who I'm assuming was also a deputy at the time, was
8 identified. Both of which I did not know about prior to
9 receiving that report, which I believe was the same day.

10 Q So prior to that, there was vigorous argument between
11 you and the solicitor about whether or not they had made
12 adequate disclosure?

13 A Correct.

14 Q And the solicitor said, "Well, we think this report
15 constitutes adequate disclosure." And they handed it up to
16 the judge?

17 A Correct. If I remember correctly, that is right.

18 Q In the record it says it's a five-page report.

19 A Yes, sir.

20 Q Did you consider whether or not you should have made
21 that a Court's exhibit?

22 A I may have overlooked that. I know I obviously brought
23 it to the attention of the Court and was extremely concerned
24 about the same; however, do I specifically recall going to
25 the extent of preserving it? I may not have. In the

1 commotion of what was going on at the time, as much
2 commotion as it caused, I may have gotten caught up in the
3 moment and forgotten the obvious. I don't recall whether I
4 did or did not request that that be made a court's exhibit.

5 Q You would agree that for purpose of direct appellate
6 review, the Court of Appeals is not going to be able to know
7 what the judge based his decision on?

8 A In 2007, I can't say that I was brand new at the job,
9 but I was much younger than I am now.

10 Q Yeah.

11 A And I may have thought that if the judge identified it
12 in the record, that there was no need for me to therefore
13 request that it be marked as an exhibit. Seeing that the
14 Court actually took my motion into consideration to the
15 extent of obtaining the document and actually publishing it
16 to the Court is a guess.

17 Q Yes. And I know, and all I'm trying to do is that it
18 needs to be done. I don't want the ---

19 A I'm fine.

20 Q Yeah. And so you would agree that based on your
21 reading of the transcript, it would appear that the judge
22 relied on that for Court in reaching his decision to say
23 there was no Brady violation?

24 A I'm sorry?

25 Q You would agree that the Judge's review of that report

1 was critical in his decision to determine that there was no
2 Brady violation?

3 A Yes, sir.

4 Q Okay. Thank you.

5 A Yes, sir.

6 Q Okay. Now, this one I kind of thought up and whenever
7 I do these PCR's, I always love to see if there is an
8 argument for a lesser included offense, but as I recall, and
9 we're going to talk about his statement in a little bit; the
10 police stopped his car and there was a small amount of
11 controlled substance -- I don't know if it was crack or
12 cocaine, whatever it was. But there was a small amount of
13 something up in the front, like in between the seat and the
14 center console; is that correct?

15 A Allegedly.

16 Q Yeah. There was a small amount. And actually, after
17 the Denno hearing, your client admitted he contacted this
18 person to buy four ounces.

19 A There was some discussion about that, correct. I just
20 read that.

21 Q Okay. Now, this would be a construction possession
22 case; would it not? Because it's not his vehicle.

23 A Yes. Absolutely.

24 Q And he could have just been driving some vehicle and
25 somebody else had bad stuff in the car; is that right?

1 A Yes.

2 Q So under those facts, a jury could have determined that
3 he was responsible for those four ounces. He admitted to
4 buying four ounces, and not necessarily responsible for the
5 100-plus that are in the other part of the car.

6 A Absolutely. Yes, sir.

7 Q So that would potentially have been a lesser included
8 that you could have requested?

9 A Four ounces is how many grams?

10 Q Less than a hundred?

11 A Possibly, yes. I'm trying to figure out the weight,
12 but I guess the possibility is there. It was under the
13 threshold.

14 Q Because most of the stuff is found in the back.

15 A All of it.

16 Q Yes.

17 A The majority of it.

18 THE COURT: For the record, four ounces is 113 grams.

19 MR. COLONGELI: Thank you. That's what I thought.

20 MR. FALK: Thank you. I apologize. I will withdraw
21 that.

22 THE COURT: Okay.

23 Q So there was a Jackson v. Denno hearing about his
24 statement; is that correct?

25 A Yes, sir.

1 Q And as part of the statement, he said, "Sgt. Florencio
2 stated, this is a quote from page 194, lines 20 through 23:
3 "At that time, he" -- "he" meaning your client, "stated that
4 he did not want to answer any more questions and requested a
5 lawyer."

6 A Yes, sir.

7 Q Okay. And prior to that, he also said as part of the
8 statement about buying the four ounces; is that correct?

9 A According to Florencio.

10 Q Yeah, okay. And there was a Jackson v. Denno hearing?

11 A Yes, sir.

12 Q And that statement was ultimately admitted into the
13 record.

14 A As far as my memory serves me, that is correct.

15 Q And if we look at page 194, lines 18 through 19. "He
16 made a statement that referenced to he only bought four
17 ounces."

18 A That's correct.

19 Q So the jury heard that statement?

20 A Yes.

21 Q And that was part of direct testimony?

22 A If it came out, it would have been during direct.

23 Q And you did not preserve the objection that you made at
24 the Denno hearing about whether or not that statement was
25 voluntary?

1 A If the record reflects that, that's correct, yes.

2 Q Okay.

3 MR. FALK: Your Honor, this is really our last point.

4 THE COURT: Okay.

5 Q On page 194, lines 20 through 23.

6 A I'm sorry, what page?

7 Q Page 194, lines 20 through 23.

8 A Okay.

9 Q This is Sgt. Florencio. He made a statement in
10 reference to he only bought the four ounces. When I began
11 to question him about where he bought this from and who he
12 bought it from, at that time he stated that he did not want
13 to answer any more questions and requested a lawyer. Did
14 you consider whether or not you should have objected to Sgt.
15 Florencio's statement about him wanting to exercise his
16 right to counsel and to exercise his Miranda rights?

17 A I believe if the record doesn't reflect this, I stand
18 to be corrected, but I can swear that I made quite an issue
19 of this being one of the issues as far as discovery goes,
20 because I don't think I was prepared for that going into
21 trial, as far as the statement that was made according to
22 Florencio. But if the record reflects that I did not make
23 any issue as to that, I stand to be corrected.

24 Q I mean, because that's essentially his same testimony
25 that he made during the Denno hearing where you knew he was

1 going to say about the four ounces, and then he wanted
2 his lawyer.

3 A Unfortunately, in all honesty, my memory is fairly
4 foggy as to the four ounce statement that was made. I'm
5 having a problem remembering the specifics of that.

6 Q Sure. But as far as that portion of the statement that
7 he didn't want to answer any more questions and requested a
8 lawyer, that part of his Miranda rights, that was also
9 repeated in the Denno hearing?

10 A Yes.

11 Q So I'm just saying that wasn't where the police officer
12 slipped it in; you knew it was coming?

13 A No, I don't believe so.

14 Q Okay.

15 MR. FALK: Your Honor, I have no further questions.

16 THE COURT: Okay. Any cross-examination of this
17 witness?

18 ATTY. GEN. LIMBAUGH: Thank you, Your Honor. May it
19 please the Court?

20 THE COURT: Yes.

21 CROSS-EXAMINATION

22 BY ATTY. GEN. LIMBAUGH:

23 Q Good morning, Mr. Colongeli.

24 A Good morning.

25 Q So is -- what is your standard practice in terms of

1 voir dire?

2 A I'll be honest with you, typically, when I was much
3 younger, I would go out of my way to try and come up with
4 more questions that the judge typically would give, but the
5 judges are very well versed in South Carolina and
6 particularly here, which is where the bulk of my practice
7 is, in the Fourteenth Circuit, I've never had to really ask
8 any additional questions unless the case required it.
9 That's why I've usually been able to go along with what the
10 judge's standard voir dire is.

11 Q Have you ever had someone removed from a jury panel for
12 being EMS or First Responder?

13 A Specifically, I couldn't tell you yes or no, but I
14 would guess yes.

15 Q And you can't recall how often that motion would be
16 granted or how many times you've made that kind of motion?

17 A I believe I've probably made it more often than not,
18 but whether it's been granted, I don't know. And whether
19 it's been for cause or just as using a strike, I think it
20 probably would fall more on a strike with fire department
21 and if it was cause, it was law enforcement.

22 Q Okay. So moving on to the plea offer, did you tell the
23 applicant about that plea offer from the solicitor's office?

24 A Obviously, I must have. I can tell you that this day
25 is one of those being a criminal defense lawyer primarily in

1 the bulk of my 18 years, is one that has not left my memory
2 as far as feeling very bad for the defendant. There was no
3 doubt or question in my mind -- and stop me if I'm going
4 outside the scope of your question, but I felt very bad for
5 my client. It was clear from the drug task force's
6 investigation that he was simply not a main target, and the
7 consequences he suffered I thought were particularly severe,
8 and I always felt very bad about the outcome. I'm not
9 saying that I didn't maybe not do the best I could, but I
10 attempted and obviously I made a big mistake in the filing
11 of the appeal, but I think that's already been addressed. I
12 do recall this to that extent. I know that I felt bad. It
13 was a pivotal issue here that we almost thought the judge
14 was going to agree with but did not. A fourth amendment
15 issue as far as the search.

16 Q And let me move on to the search issue. You did object
17 and argue vigorously against both the search being legal and
18 the actual introduction of the drugs, correct?

19 A For a very long time. To the point where it was
20 probably one of the worst scolding's that I've ever got as
21 an attorney from a judge. But yes, Judge King unraveled at
22 one point and came out of his seat for something I had said
23 -- I don't remember. But it was very heated. I think the
24 judge absolutely had a very hard time making the decision.
25 He considered it, as he should have, very thoroughly, and it

1 was a difficult call for him also. But he made the call and
2 I respect that.

3 Q And once he did make that call, was that pretty tough
4 to get over, the fact that they actually found that amount
5 of drugs in the defendant's car?

6 A Not really. I mean, I've been doing it long enough at
7 that point to understand that more likely than not it would
8 have ended up that way and yet, me personally, yes; but as a
9 professional, I had to move on.

10 Q From a defense standpoint, once the drugs were going to
11 be introduced during trial, was it going to be an uphill
12 battle for you to try it?

13 A Sure. At that point, I pretty much knew we were in
14 trouble. It was -- the question for the jury wasn't there;
15 it was definitely going to be an issue of a question of law
16 as opposed to a question of fact. Then, when we lost that
17 argument, I knew -- or I thought we were in trouble.

18 Q And in regards to Applicant's statement about buying
19 the four ounces of drugs, you did have a Jackson v. Denno
20 hearing about that, correct?

21 A Absolutely.

22 Q And did you argue to the best of your ability to not
23 have those statements come into trial?

24 A To my recollection, yes. The best of my ability in
25 remembering that, yes.

1 Q But again, once the trial court decided to let those
2 statements in, was that pretty damaging to the defense in
3 this case?

4 A Sure, absolutely. And that's why, honestly, I'm having
5 a hard time remembering the facts that are specific to it.
6 I think that was intertwined with my issue as to the
7 discovery.

8 Q To which you did renew your Rule 5 and Brady motion
9 several times?

10 A Yes, sir. Yes, sir. Always do.

11 Q And I believe just to clarify, did you -- you didn't
12 believe you didn't need to publish or make a court's exhibit
13 that report that the solicitor's office handed up?

14 A In reference to?

15 Q In reference to the Brady violations, the witnesses?

16 A Correct. I did not, based on the record go so far as
17 to request that being marked as an exhibit, no. Nor did I
18 introduce it as evidence, I did not.

19 Q And did you do a thorough investigation of this case?

20 A I hope so. I'm sure that I did. Hopefully, I did. I
21 remember there was a great deal of work on this case. There
22 was a great deal at stake. This was one of the first times
23 I've ever had a client sentenced to that amount of time and
24 it's a tough profession. And I'm one that has always taken
25 it more personally than professionally and it's not been

1 easy. That's why I've turned grayer than most. It's been
2 interesting.

3 Q Do you recall how many times you might have met with
4 Mr. Gomez in preparation for this case?

5 A I honestly don't and obviously, language was a barrier.
6 Because of the language barrier, I would have to assume that
7 our meetings were fewer than if he had spoken English,
8 because it's required to have a translator to take to the
9 jail. I'm almost certain that he was incarcerated, so I had
10 to make arrangements in order to speak with him. So it
11 probably was fewer than not normal visitations than if he
12 had been free and out on bond.

13 Q And correct me if I'm wrong, but did you not also have
14 a paralegal at the time who spoke Spanish?

15 A Yes, sir. My paralegal at the time was one of my best
16 workers and who had worked for me the longest, Anna Lopez,
17 was bilingual. And she was -- actually the Court allowed
18 her to be the translator for me on that particular case,
19 whether she was the interpreter for the Court I can't
20 remember, but she was my own translator for Mr. Gomez.

21 Q And so would she have helped you and assisted you in
22 having those meetings and better communicating with Mr.
23 Gomez?

24 A Yes. Yes. I do believe though that there was also a
25 certified court reporter (sic) involved, because I know that

1 Ms. Lopez was not a certified court reporter (sic), so she
2 was allowed to interpret to the extent from my office and my
3 communications with my client.

4 Q And in your private meetings and discussions of trial
5 strategy, correct?

6 A Yes, sir.

7 Q Finally, did y'all have a plea offer issue? Do you
8 specifically recall Mr. Gomez telling you to go accept the
9 plea offer with the Solicitor's Office?

10 A Honestly, I do not. I can only imagine that I probably
11 would have -- I don't know. I can't answer that. I think
12 looking back on it now, I would have hoped that I would have
13 urged him to take that offer, but I'm not sure at that point
14 in my career whether I in fact would have. So I'm not sure
15 that I did. I do remember making sure that he was fully
16 aware of it, understood that it was available to him, and
17 allowed him to make that decision. But as to whether or not
18 I urged him more than I would have now, I don't know.

19 Q Would it be your standard practice if a client of yours
20 asked you to accept a plea offer on their behalf, would you
21 do that in a timely fashion?

22 A Absolutely. Unless, professionally, I would advise
23 against it, and I would let him or her know my reasons why
24 and then still let them make the decision and follow my
25 client's request.

1 Q Would you have advised him against taking the plea
2 offer that was offered in this case?

3 A Absolutely not, no.

4 ATTY. GEN. LIMBAUGH: That's all I have for this
5 witness, Your Honor.

6 REDIRECT EXAMINATION

7 BY MR. FALK:

8 Q Would there be any reason for you to have tried to put
9 the offer back on the table had you not been aware that your
10 client wanted to accept the plea offer?

11 A I'm sorry?

12 Q So I'm just getting back to try and help you with your
13 recollection of conversations that you might have had. But
14 you will admit that on the day of the trial after the jury
15 had been empaneled, you moved to try and enforce the plea
16 offer?

17 A Yes, sir. That was a big issue because I thought it
18 was very unfair of the Solicitor's Office at the time not to
19 at least afford him the availability to plea to what was
20 already there.

21 Q Would it be fair to say that you would not have done
22 that unless you knew that your client wanted to accept the
23 offer?

24 A Correct.

25 Q Thank you.

1	RECROSS-EXAMINATION

2 BY ATTY. GEN. LIMBAUGH:

3 Q Could it very well be possible that Mr. Gomez told you
4 the morning that his trial was set to go forth that he
5 wanted to accept that offer?

6 A That's possible, yes. Because I don't remember exactly
7 how that came about, but that's very possible.

8 ATTY. GEN. LIMBAUGH: Thank you, Your Honor.

9 THE COURT: Okay. You may step down, Mr. Colongeli.
10 Any other witnesses to call at this time.

11 MR. FALK: I would call my client to the stand.

12 THE COURT: Okay. If he will take the stand. You may
13 swear him.

14 (Whereupon, Mr. Gomez is duly sworn.)

15 DIRECT EXAMINATION

16 BY MR. FALK:

17 Q Do you recall having a conversation with your lawyer
18 about the State's plea offer?

19 A Yes, two weeks before the trial.

20 Q So it's your testimony that you told him two weeks
21 before the trial started that you wanted to take the deal?

22 A Yes. He told me there was an offer, but it was too
23 late because we had to go to trial. And they were going to
24 give me the same as what they offered. I would get the same
25 offer.

1 Q Did you have any conversations about that plea offer
2 prior to that?

3 A No.

4 Q So it's your testimony that the first you knew of this
5 plea offer was ---

6 A Was two weeks before the trial.

7 Q And you recall your lawyer saying that it was too late?

8 A Yes.

9 Q No further questions.

10 THE COURT: Any cross?

11 ATTY. GEN. LIMBAUGH: Yes, Your Honor.

12 CROSS-EXAMINATION

13 BY ATTY. GEN. LIMBAUGH:

14 Q So you don't recall your counsel having told you about
15 the plea offer prior to that?

16 A No, he didn't say anything before.

17 ATTY. GEN. LIMBAUGH: Nothing further, Your Honor.

18 THE COURT: Okay. You may have a seat back at the
19 table. Any other witnesses?

20 MR. FALK: No further witnesses. We would rest.

21 THE COURT: Does the State have any other witnesses?

22 ATTY. GEN. LIMBAUGH: Nothing further from the State.

23 THE COURT: All right. Happy to hear anything else
24 from the attorneys to the extent that is necessary.

25 MR. FALK: Your Honor, obviously, the arguments that

1 we've already made, again I would just want to reiterate the
2 fact that on some of these issues, I think there is
3 potentially an error of preservation issue that this case
4 could go up on appeal and still there could have problems
5 with that search of the vehicle, but there was testimony
6 from the K-9 handler saying that he alerted on the car and
7 there was testimony from the forensic expert who had done
8 the analysis on the contraband as to what that was and there
9 was no objection to that. So I think it was an error of
10 preservation question about whether or not he had to
11 constantly renew his objection to any testimony regarding
12 the fruits of the stop on the side of the road. And
13 obviously, most of my presentation was about that, but that
14 at the very end, we do also have what I consider very
15 significant Doyle violation where police officers clearly
16 would know better testifying before the jury that my client,
17 you know, did not want to talk anymore and that he wanted to
18 talk to his lawyer. I do not think that was appropriate for
19 the jury to hear that. I think that's what the case law is
20 about. You can't let the jury hear that the client is using
21 his exercising his right to counsel, he's exercising his
22 protections under Miranda, because the jury is allowed to
23 take it as unfair inference from the fact that he doesn't
24 want to talk and that he wants to talk to his lawyer. That
25 was an issue that was not objected to at all at the trial,

1 so that would be another direct appeal issue.

2 THE COURT: And then regarding the plea offer made and
3 did Mr. Colongeli convey?

4 MR. FALK: Whether or not my client knew he had the
5 opportunity to get sentenced in a range of seven to twenty-
6 five versus a sentencing range with a minimum of twenty-
7 five, my client testifies that when he first heard about the
8 offer, that it had already expired, but that he wanted to
9 accept the offer. If that's the case, I think that's a poor
10 communication between client and lawyer.

11 THE COURT: Okay. Mr. Limbaugh?

12 ATTY. GEN. LIMBAUGH: Yes, Your Honor. I would just
13 rely on Mr. Colongeli's testimony about the plea offer that
14 he would have relayed the offer to Mr. Gomez. It was common
15 practice to accept his offers in a timely fashion if it was
16 indicated to do so by his clients and that it's entirely
17 possible with that information that he only renewed or try
18 to enforce the plea offer the day of the trial because Mr.
19 Gomez told him that day he wanted to accept.

20 In regards to the Doyle violation and his indication of
21 his rights to a lawyer, the State would just ask that the
22 Court review the record. I believe a single mention of his
23 indication of his rights is not prejudicial to the
24 Applicant. If my recollection is that it wasn't used in
25 part of the opening or the closing statement by the

1 Solicitor and that might have been one of maybe two times,
2 if not the only time, that was ever brought up in testimony.
3 So under the test for Doyle, I do not believe it would be
4 prejudicial to Applicant in this case.

5 The Appellate preservation issues are what they are. I
6 believe a lot of these search issues were addressed and
7 brought up in the White appeal.

8 THE COURT: Is that part of the record?

9 ATTY. GEN. LIMBAUGH: It is, Your Honor. There is a
10 bunch of petitions for writ of cert and amended PWC's, but
11 it should be behind those in some of the smaller stapling's.

12 THE COURT: Okay.

13 ATTY. GEN. LIMBAUGH: The State would ask you to review
14 the record in this case in regards to those allegations.

15 THE COURT: Okay.

16 ATTY. GEN. LIMBAUGH: Thank you, Your Honor.

17 THE COURT: I will take a complete review of the record
18 and your arguments and testimony of the witnesses today
19 under advisement and ask for an Order from one side or the
20 other within the next 30 days.

21

22

23

24

25

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

Rebecca H. Hill

Rebecca H. Hill,
Official Court Reporter

STATE OF SOUTH CAROLINA
FOURTEENTH JUDICIAL CIRCUIT

Post Office Box 2226
Beaufort, South Carolina 29901



Telephone: (843) 470-3725
Facsimile: (843) 470-3732

RANDOLPH MURDAUGH, III
SOLICITOR

PLEA OFFER:

DEFENDANT'S NAME: Osiel Gomez Narciso

CHARGE(S): Trafficking Cocaine (100 - 199 grams)
2005-GS-07-1304

PLEA TO: Lesser Included offense:
Trafficking Cocaine (28 - 99 grams)



DISPOSITION OF OTHER CHARGES:

N/A

SENTENCE RECOMMENDATION / NEGOTIATION:

Judge's Discretion, offense carries Seven (7) to Twenty-Five (25) Years
(original charge carries mandatory Twenty-Five (25) years)

OFFER EXPIRES: October 5th, 2005

CASE MUST BE PLED BY: October 20th, 2005

SOLICITOR: Angela McCall-Tanner
DEFENSE ATTORNEY:

DATE: 9-29-05
DATE:



STATE OF SOUTH CAROLINA
FOURTEENTH JUDICIAL CIRCUIT

Post Office Box 2226
Beaufort, South Carolina 29901



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Facsimile: (843) 470-3732

ISAAC MCDUFFIE STONE, III
SOLICITOR

PLEA OFFER:

DEFENDANT'S NAME: Osiel Gomez Narciso

CHARGE(S):

Trafficking Cocaine (100 -199 grams)
2005-GS-07-01304

PLEA TO: lesser included offense:
Trafficking Cocaine (28 - 99 grams)

DISPOSITION OF OTHER CHARGES:

N/A

SENTENCE RECOMMENDATION / NEGOTIATION:

Sentence in the Judge's discretion.

*this offense carries 7 - 25 years

charge as indicted carries mandatory 25 years

OFFER EXPIRES: June 28, 2006

CASE MUST BE PLED BY: July 13, 2006

SOLICITOR: Angela McCall-Tanner
DEFENSE ATTORNEY:

DATE: 6-28-06
DATE:



STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2015CP0702196

Osiel Narciso Gomez

South Carolina State Of

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

Attorney for: ☐ Plaintiff ☐ Defendant
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.
- ☒ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit);
☒ Other: PCR Application Denied/Dismissed
- ☐ Rule 43(k), SCRCP (Settled);
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j) SCRCP; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____
- ☐ **STAYED DUE TO BANKRUPTCY**
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other:

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order ☐ Statement of Judgment by the Court:

Order of Dismissal

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.

Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk.

Note: Title abstractors and researchers should refer to the official court order for judgment details.

E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

s/ J. B. McCoy

2764

1/27/2020

Circuit Court Judge

Judge Code

Date

For Clerk of Court Office Use Only

This judgment was entered on **January 31, 2020**, and a copy mailed first class or placed in the appropriate attorney's box on **February 3, 2020**, to attorneys of record or to parties (when appearing pro se) as follows:

Osiel Narciso Gomez #319935 McCormick Corr. Inst.
 F1A-258 386 Redemption Way McCormick, SC 29899
 James Kristian Falk PO Box 1058 Charleston, SC 29402

Sara Elyssa Gunton PO Box 11549 Columbia, SC 29211

 ATTORNEY(S) FOR THE PLAINTIFF(S)

 ATTORNEY(S) FOR THE DEFENDANT(S)

 MMK

 Court Reporter

 Jerri Ann Roseneau - Clerk of Court

Court Reporter:

E-Filing Note: In E-Filing counties, the date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgement to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF BEAUFORT) FOURTEENTH JUDICIAL CIRCUIT

2020 JAN 31 PM 1:18

Osiel Narciso Gomez, #319935,) Case No.: 2015-CP-07-2196
BEAUFORT COUNTY, S.C.

Applicant,)

ORDER OF DISMISSAL

v.)

State of South Carolina,)

Respondent.)

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Beaufort County Clerk of Court. In August 2005, the Beaufort County Grand Jury indicted Applicant for trafficking cocaine, 10g to 28g, first offense (2005-GS-07-1304). That indictment was amended on the record on January 17, 2006, to trafficking cocaine in excess of 100 grams. Donald C. Colongeli, Esquire, represented Applicant. Assistant Solicitor Kimberly Smith, Esquire, prosecuted the case. On January 16, 2006, Applicant proceeded to trial before the Honorable Howard P. King. The jury found Applicant guilty as indicted. On January 18, 2007, Judge King sentenced Applicant to imprisonment for twenty-five years for trafficking cocaine in excess of 100 grams. Applicant did not appeal his conviction or sentence at the time.

2007-CP-07-2195

On August 1, 2007, Applicant filed an application for post-conviction relief. In an attachment to the application, Applicant wrote, "My allegation of ineffective assistance of counsel is presently based entirely upon the fact that my attorney did not file a notice of appeal, after stating for the court and upon the record that he would do so." Respondent made its return on May 15, 2008.

1/JBM

An evidentiary hearing into the matter was convened on August 26, 2008, before the Honorable J. Cordell Maddox. At the hearing, both parties signed a consent order granting Applicant a belated direct appeal pursuant to White v. State. The consent order stated, “The White v. State issue is Applicant’s only allegation in the PCR application. Applicant understands that he must proceed on all PCR claims at this time and anything not raised now is waived. Applicant wishes to waive all other PCR claims and proceed with a belated direct appeal.” Applicant subsequently filed a notice of appeal in which he asked the court to review the waiver of his other PCR allegations. The South Carolina Court of Appeals affirmed the conviction and remanded the case to the PCR court for a determination as to whether he knowingly and voluntarily waived his right to raise additional PCR claims. The remittitur was issued on March 30, 2012.

On February 20, 2014, after the court’s remand, a second evidentiary hearing was held into the PCR matter. Applicant was represented by Carol Ruff, Esquire, and Harley Ruff, Esquire. Present and testifying at the hearing were Philip Rios, Esquire, Rebecca McCann, Esquire, Donald Colongeli, Esquire, and Applicant. An interpreter was present to assist Applicant at the hearing. By order dated June 5, 2014, the court found “the PCR waiver fails the test outlined in Brannon and Spoone,” declared Applicant’s waiver of his PCR rights in the Consent Order to be null and void, and granted Applicant’s request to bring a PCR application. The State subsequently filed a petition for writ of certiorari on December 22, 2014. The South Carolina Supreme Court denied the petition on June 17, 2015. The remittitur was issued on July 6, 2015. Applicant subsequently filed his current PCR application on September 9, 2015.

Attached to this Return and incorporated by reference are the records of the Beaufort County Clerk of Court regarding the subject conviction, Applicant's records from the South Carolina Department of Corrections, the trial transcript, Applicant's appellate records, Applicant’s

previous PCR records, and the current application. Respondent reserves the right to amend this Return upon receipt of any relevant materials.

II.

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

1. "Fourth Amendment Violation."
 - a. "Illegal search incident to arrest"
 - b. "Applicant's trial took place in 2007, two years prior to Arizona v. Gant, 556 U.S. 332 (2009)."
 - c. "Law enforcement's actions violated Applicant's Fourth Amendment rights."
2. "Ineffective Assistance of Counsel."
 - a. "Trial Counsel committed constitutionally ineffective assistance by failing to move for suppression of State's drug evidence on specific ground of lack of sufficient probable cause of criminal activity that surpassed Applicant's statutory-based defense to the traffic stop."
 - b. "Failing to accept a plea bargain of a lesser included offense of 7-25 years, which would have significantly reduced Applicant's sentence."
 - c. "Failing to object to hearsay testimony."
 - d. "Failing to move for an evidentiary hearing under Franks v. Delaware to demonstrate coordinated police introduction of information to magistrate judge with reckless disregard for truth of such information, prejudiced Applicant's Sixth Amendment right to effective assistance of counsel."

Applicant amended his application on August 20, 2019 to include the following allegations:

1. Applicant was a non-English speaker from a Latin American country facing charges of trafficking in cocaine. Applicant is informed and believes that because of his client's nationality and the nature of the offense, trial counsel provided ineffective of counsel by failing to submit proposed voir dire questions that could have helped ensure that the veniremen did not harbor any unfair prejudices against Applicant. The record shows that the Court asked trial counsel if he had any additional voir dire to which trial counsel responded that he had none. (Transcript Page 8 lines 14-16). Additionally after the jury was selected, but prior to being sworn, trial counsel moved to excuse Juror 43 for cause. Trial counsel provided ineffective assistance of counsel by failing to make a timely motion to excuse Juror 43. (Transcript page 17 lines 14-17).
2. Trial counsel provided ineffective assistance of counsel by failing make a contemporaneous objection and thus failing to preserve for appellate review the lawfulness of the search and seizure of the vehicle that Applicant was driving. (Officer

Jody Hiers' testimony regarding the K-9 search of the vehicle. Transcript page 150 line 20 through 153 line 6); (Officer Heir's testimony that drugs were found in the vehicle. Transcript page 151 line 24-152 line 15); (Sergeant Florencio's testimony regarding State's Exhibit S-1-A; S-2-A. Transcript pages 183 and 188); (Staff Sergeant Berry's entire testimony regarding the results of her forensic analysis of the cocaine seized from the car that Applicant was driving).

3. Trial counsel failed to provide effective assistance of counsel by failing to move to have the Incident Report In Case No. 20050803-474 made a Court's exhibit. (Transcript Page 248 lines 8-11). At the close of the case trial counsel renewed his motions under both Rule 5 SCRCrimP and Brad v. Maryland and then moved for a mistrial. Trial counsel believed that the State failed to abide by its obligation to disclose the names of all witnesses with knowledge of the case. In denying trial counsel's motion the Court relied upon the disclosures set forth in the above described incident report. By failing to move to have the report made a Court's exhibit, trial counsel failed to fully preserve the issue for appellate review.
4. Trial counsel provided ineffective assistance of counsel by not requesting a charge on a lesser included offense. When agents searched the car Defendant was driving a small bag of cocaine was found between the driver's seat and center counsel. The bulk of the cocaine was seized from the storage compartment in the rear of the vehicle. The defendant made a statement that he purchased 4 ounces of cocaine. (Transcript page 291 lines 21 through page 292 line 12). Therefore the jury could have believed that Applicant was only in constructive possession of the small bag found next to the driver's seat and returned a verdict on the lesser included offense.
5. Trial counsel provided ineffective assistance of counsel by not preserving for appellate review his objection to Defendant's statement. The Court conducted a pre-trial Jackson v Denno hearing. The trial court found that the statement was made knowingly and voluntarily. Trial counsel failed to make a contemporaneous objection when Sergeant Florencio testified about Applicant's statement. (Transcript page 194 lines 14- 25).
6. Trial Counsel failed to object when Sergeant Florencio testified in violation of Applicant's Due Process rights under the 14Th Amendment and as recognized in Dovle v Ohio, 426 U.S. 610 (1976). Sergeant Florencio testified that Applicant stated: at that time he stated that he did not want to answer any more questions and requested a lawyer. (Transcript 194 lines 20- 23).

At the evidentiary hearing, Applicant proceeded with the allegations in his amended application with the sole inclusion of the allegation that counsel failed to accept the plea bargain. Applicant abandoned any other allegations contained in his original application for post-conviction relief.

This Court will address the allegations presented during the evidentiary hearing.

Findings of Facts and Conclusions of Law

This Court has thoroughly reviewed the record in its entirety. Additionally, this Court heard the testimony presented at the evidentiary hearing and was able to observe the witnesses presented, which allowed the Court to scrutinize the credibility presented. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (1985). The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668 (1984); Lomax v. State, 379 S.C. 93, 665 S.E.2d 164 (2008).

In a post-conviction relief action, an applicant bears the burden of proving the allegations in his or her application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the applicant must prove that “counsel’s conduct so undermined the proper functioning of the adversarial process that [it] cannot be relied upon as having produced a just result.” Strickland, 466 U.S. 668; Butler, 286 S.C. at 442, 334 S.E.2d at 814.

Strickland does not guarantee perfect representation, only a “‘reasonably competent attorney.’” 466 U. S. at 687 (quoting McMann v. Richardson, 397 U. S. 759, 770 (1970)); Representation is constitutionally ineffective only if it “so undermined the proper functioning of the adversarial process” that the defendant was denied a fair trial. Strickland, 466 U.S. at 686. Just as there is no expectation that competent counsel will be a flawless strategist or tactician, an attorney may not be faulted for a reasonable miscalculation or lack of foresight or for failing to prepare for what appear to be remote possibilities. See generally Id.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland, 466 U.S. 668. First, an applicant must prove that

counsel's performance was deficient. *Id.*; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Butler, 286, 442, 334 S.E.2d at 814. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id.* (citing Strickland, 466 U.S. at 690). The applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

Although courts may not indulge "post hoc rationalization" for counsel's decision making that contradicts the available evidence of counsel's actions, Wiggins, 539 U.S. at 526-527, neither may they insist counsel confirm every aspect of the strategic basis for his or her actions. There is a "strong presumption" that counsel's attention to certain issues to the exclusion of others reflects trial tactics rather than "sheer neglect." Yarborough v. Gentry, 540 U. S. 1, 8 (2003) (per curiam). After an adverse verdict at trial even the most experienced counsel may find it difficult to resist asking whether a different strategy might have been better, and, in the course of that reflection, to magnify their own responsibility for an unfavorable outcome. Strickland, however, calls for an inquiry into the objective reasonableness of counsel's performance, not counsel's subjective state of mind. Strickland, 466 U.S. at 688; Harrington v. Richter, 562 U.S. 86 (2011)

With respect to prejudice, an applicant must demonstrate “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.* at 694. It is not enough “to show that the errors had some conceivable effect on the outcome of the proceeding.” *Id.* at 693. Counsel’s errors must be “so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.” *Id.* at 687; Harrington, 562 U.S. 86.

“Surmounting Strickland’s high bar is never an easy task.” Padilla v. Kentucky, 559 U.S. 356, 371 (2010). An ineffective assistance of counsel claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial, and so the Strickland standard must be applied with scrupulous care, lest “intrusive post-trial inquiry” threaten the integrity of the very adversary process the right to counsel is meant to serve. Strickland, 466 U.S. at 689–690. Even under de novo review, the standard for judging counsel’s representation is a most deferential one. Unlike a later reviewing court, the attorney observed the relevant proceedings knew of materials outside the record and interacted with the client, with opposing counsel, and with the judge. It is “all too tempting” to “second-guess counsel’s assistance after conviction or adverse sentence.” *Id.* at 689; see also Bell v. Cone, 535 U. S. 685, 702 (2002); Lockhart v. Fretwell, 506 U. S. 364, 372 (1993). The question is whether an attorney’s representation amounted to incompetence under “prevailing professional norms,” not whether it deviated from best practices or most common custom. Strickland, 466 U.S. at 690.

In assessing prejudice under Strickland, the question is not whether a court can be certain counsel’s performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if counsel acted differently. Wong v. Belmontes, 558 U. S. 15 (2009); Strickland, 466 U.S. at 693. Instead, Strickland asks whether it is “reasonably likely” the result

would have been different. Id. at 696. This does not require a showing that counsel's actions "more likely than not altered the outcome," but the difference between Strickland's prejudice standard and a more-probable-than-not standard is slight and matters "only in the rarest case." Id. at 693, 697. The likelihood of a different result must be substantial, not just conceivable. Id. at 693; Harrington, 562 U.S. 86.

Based on this standard set forth above, this Court finds Applicant has failed to meet his requisite burden of establishing any constitutional ineffectiveness of counsel as to any of his various allegations. Applicant's allegation is addressed fully below:

Failure to request voir dire concerning Applicant being a non-English speaker from a foreign country and for failing to timely move to excuse a juror

Jury selection is a process that inherently falls within the expertise and experience of trial counsel. Palacio v. State, 333 S.C. 506, 517, 511 S.E.2d 62, 68 (1999) (citations omitted). "The selection of a jury is inevitably a call upon experience and intuition. The trial lawyer must draw upon his own insights and empathetic abilities." Id. (quoting Romero v. Lynaugh, 884 F.2d 871, 878 (5th Cir. 1989)). "[A] criminal defendant has no right to a trial by any particular jury, but only a right to a trial by a competent and impartial jury." Id. (citing State v. Patterson, 324 S.C. 5, 482 S.E.2d 760 (1997)). Consequently, in order to prevail upon a claim that the trial attorney should have struck a juror, the applicant "must provide credible evidence that the trial attorney's refusal to strike a juror prejudiced the defense." Id. Further, "where counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel." Whitehead v. State, 308 S.C. 1 19, 122, 417 S.E.2d 529, 531 (1992) (citing Goodston v. U.S. 564 F.2d 1071 (4th Cir. 1977)).

Counsel testified that he believed the judge sufficiently voir dired the jury and that he did not feel that any further voir dire was necessary. Counsel testified that in hindsight he could have

requested some question be asked concerning any bias against persons living in this country but not speaking the language. Counsel testified that he moved to strike juror 43 because he was a firefighter and they frequently work closely with law enforcement. Counsel testified that it appeared that juror 43 had been seated when he was removed from the jury, but that his objection was a renewal of an objection from the previous day. Counsel testified that he did not request a voir dire question as to whether or not there were any other potential jurors who were first responders.

The Court finds no deficiency on the part of counsel, nor prejudice therefrom. First, Applicant provided no evidence to show that Counsel's failure to strike the juror prior to being seated or asking for additional voir dire prejudiced the defense, but merely speculated that jurors could have potentially held negative biases. Second, Applicant provided no evidence he asked Counsel to strike the juror and was refused; the only testimony was that counsel moved to strike the juror for being a first responder. Third, Counsel articulated a valid strategic reason for exercising a strike against the juror insofar as he wished to exclude someone he knew to work closely with law enforcement from the jury. For all these reasons, Applicant's request for relief by way of this allegation is denied.

Failure to preserve for appellate review the lawfulness of the search and seizure of the vehicle Applicant was driving

Applicant contends that counsel was ineffective for failing to make contemporaneous objections to the lawfulness of the search and seizure of the vehicle, thus failing to preserve the issue for appellate review.

In addition to the protections afforded by the United States Constitution, the South Carolina Constitution provides its own protections to the state's citizens against unreasonable

searches and seizures. State v. Forrester, 343 S.C. 637, 643, 541 S.E.2d 837, 840 (2001); see S.C. Const. art. I, § 10 (“The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures and unreasonable invasions of privacy shall not be violated[.]”); see also U.S. Const. amend. IV (“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated[.]”). Furthermore, primarily in order to guard against invasive technological advancements, the South Carolina Constitution also expressly protects our citizens from “unreasonable invasions of privacy.” S.C. Const. art. I, § 10; see Forrester, 343 S.C. at 647, 541 S.E.2d at 842 (“[T]he drafters of our state constitution’s right to privacy provision were principally concerned with the emergence of new electronic technologies that increased the government’s ability to conduct searches.”).

Through the additional provision regarding invasions of privacy, “the people of South Carolina have indicated that searches and seizures that do not offend the federal Constitution may still offend the South Carolina Constitution.” State v. Weaver, 374 S.C. 313, 322, 649 S.E.2d 479, 483 (2007). Thus, “the South Carolina Constitution favors an interpretation offering a higher level of **privacy** protection than the Fourth Amendment.” Id. (emphasis added). However, the South Carolina Constitution by its express language only forbids searches, seizures, and invasions of privacy that are unreasonable. S.C. Const. art. I, § 10; see State v. Foster, 269 S.C. 373, 378, 237 S.E.2d 589, 591 (1977) (“It is only unreasonable searches and seizures that are prohibited.”); see also Maryland v. Buie, 494 U.S. 325, 331 (1990) (“It goes without saying that the Fourth Amendment bars only unreasonable searches and seizures[.]”); cf. State v. Snapp, 174 Wash. 2d 177, 194, 275 P.3d 289, 297-298 (Wash. 2012) (recognizing a provision of the Washington State Constitution that protects a person’s private affairs from being

disturbed without authority of law is – unlike the Fourth Amendment of the United States Constitution and Article 1, Section 10 of the South Carolina Constitution – **not** “grounded in notions of reasonableness”). Accordingly, just like the search and seizure protections offered by the federal constitution, the touchstone of our state constitution’s search and seizure protections is reasonableness. Cf. Florida v. Jimeno, 500 U.S. 248, 250 (1991) (“The touchstone of the Fourth Amendment is reasonableness.”).

Historically, in South Carolina, our courts – relying on guidance from the United States Supreme Court – have measured the reasonableness of a traffic stop, which constitutes a seizure for constitutional purposes, along with the reasonableness of other searches and seizures in a purely objective manner. See State v. Williams, 351 S.C. 591, 600, 571 S.E.2d 703, 708 (Ct. App. 2002) (“Reasonableness ‘is measured in objective terms by examining the totality of the circumstances.’ ” (quoting Ohio v. Robinette, 519 U.S. 33, 39 (1996)); see also State v. Maybank, 352 S.C. 310, 315, 573 S.E.2d 851, 854 (Ct. App. 2002) (recognizing a traffic stop of a vehicle constitutes a seizure); see generally Mack v. Lott, 415 S.C. 22, 23, 780 S.E.2d 761, __ (2015) (indicating “the proper standard for determining probable cause [to arrest] is an objective standard”). Critically, the underlying reason why our courts conduct an objective analysis when considering issues involving searches and seizures is the recognition “‘[e]venhanded law enforcement is best achieved by the application of objective standards of conduct, rather than standards that depend upon the subjective state of mind of the officer.’ ” Jackson v. City of Abbeville, 366 S.C. 662, 667, 623 S.E.2d 656, 659 (Ct. App. 2005) (quoting Horton v. California, 496 U.S. 128, 138 (1990)).

Similarly, in South Carolina, our courts – again relying on guidance from the United States Supreme Court – have found the initiation of a traffic stop to be reasonable per se when

either probable cause exists to believe a traffic violation has occurred or reasonable suspicion exists to believe the occupants of the vehicle are involved in criminal activity. See State v. Nelson, 336 S.C. 186, 193, 519 S.E.2d 786, 789 (1999) (“As a general matter, the decision to stop an automobile is reasonable where police have probable cause to believe that a traffic violation has occurred.”); Knight v. State, 284 S.C. 138, 141, 325 S.E.2d 535, 537 (1985) (“[A] police officer may stop an automobile and briefly detain its occupants, even without probable cause to arrest, if he has a reasonable suspicion that the occupants are involved in criminal activity.”); Williams, 351 S.C. at 598, 571 S.E.2d at 707 (“Where probable cause exists to believe that a traffic violation has occurred, the decision to stop the automobile is reasonable per se.”). Significantly, in determining whether such a stop is reasonable, our courts have consistently concluded the subjective motivations of the law enforcement officer initiating the stop are **irrelevant**. See Moore, 415 S.C. at 252, 781 S.E.2d at 901 (recognizing subjective motivations are irrelevant when analyzing the constitutionality of an officer’s actions); State v. Provet, 405 S.C. 101, 108, 747 S.E.2d 453, 457 (2013) (“The test whether reasonable suspicion exists is an objective assessment of the circumstances; the officer’s subjective motivations are irrelevant.”).

Notably, in Whren v. United States, 517 U.S. 806, 808 (1996), the United States Supreme Court directly addressed the question of whether a pretextual traffic stop violates the federal constitution’s prohibition against unreasonable searches and seizures. In that case, vice-squad officers in an unmarked vehicle were patrolling an area known for drug activity located in the District of Columbia and, during the patrol, drove past a vehicle that drew their suspicions. Id. Based on those suspicions, the officers turned around, and, when they did, the suspicious vehicle turned without signaling and drove off at an unreasonable speed, which were both acts that

constituted civil traffic violations in Washington, D.C. Id. The officers then followed the suspicious vehicle, and, when it stopped in traffic, one of the officers approached it, identified himself, asked the driver to place the vehicle in park, and quickly observed bags of crack cocaine in the passenger's hands. Id. at 809. Subsequently, the driver and passenger were arrested, charged with several drug crimes, convicted, and appealed those conviction. Id. at 809. On appeal, their cases eventually made their way to the Supreme Court, and they raised constitutional challenges to the reasonableness of the stop. Id. Upon considering the matter, the Supreme Court **unanimously** affirmed their convictions. Id. at 819. In doing so, the Supreme Court thoroughly examined its prior decisions, which had consistently applied objective standards when analyzing search and seizures issues, and rejected any suggestion that "the constitutional reasonableness of traffic stops depends on the actual motivations of the individual officers involved." Id. at 812-813. Instead, the Supreme Court concluded a traffic stop is reasonable for Fourth Amendment purposes when the police have probable cause to believe that a traffic violation has occurred. Id. at 810. Because the stop at issue in the petitioners' case was indisputably supported by probable cause to believe a traffic violation had occurred, the Supreme Court held the stop was constitutionally reasonable and the evidence found during the stop was properly admitted during the trial. Id. at 819. Furthermore, in attempting to assuage the concerns of the petitioners, the Supreme Court explained one of their chief concerns – the possibility law enforcement officers might conduct pretextual traffic stops based on impermissible factors like race – was already constitutionally prohibited by the Equal Protection Clause, which meant that concern provided no basis for reaching a contrary conclusion regarding the reasonableness of stops under the Fourth Amendment. Id. at 813.

Atwater v. City of Lago Vista, 532 U.S. 318, 354 (2001) (“If an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender.”). Because Applicant’s arrest was lawful and proper, any question regarding whether the arrest was a pretext for some further investigation was entirely irrelevant. See Whren v. United States, 517 U.S. 806, 813 (1996) (“Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.”); see also Arkansas v. Sullivan, 532 U.S. 769, 772 (2001) (reversing a decision to suppress evidence discovered during an inventory search conducted after Sullivan was arrested because the evidence was improperly suppressed as the fruit of an allegedly pretextual arrest); see, e.g., State v. Banda, 371 S.C. 245, 253, n. 3, 639 S.E.2d 36, 40 (2006) (“Evidence that the Greenville officers were more interested in apprehending the drug target does not factor into a probable cause analysis in the otherwise valid stop of a vehicle for stolen license tags.”). Thus, the subjective intentions of the arresting officer in Applicant’s case are irrelevant when considering whether the inevitable discovery doctrine should have been applied. See Nix, 467 U.S. at 445 (“A police officer who is faced with the opportunity to obtain evidence illegally will rarely, if ever, be in a position to calculate whether the evidence sought would inevitably be discovered.”); see also Atwater, 532 U.S. at 353-354 (“We are sure there are [other foolish, warrantless misdemeanor arrests], but just as surely the country is not confronting anything like an epidemic of unnecessary minor-offense arrests. That fact caps the reasons for rejecting Atwater’s request for the development of a new and distinct body of constitutional law.”).

A lawful traffic stop begins at the point that an officer stops a vehicle to investigate a traffic violation and “ordinarily continues, and remains reasonable, for the duration of the stop.” Arizona v. Johnson, 555 U.S. 323, 333 (2009). Once a lawful traffic stop is initiated, an officer

may order the driver and any passengers out of the vehicle pending completion of the stop and “may request a driver’s license and vehicle registration, run a computer check, and issue a citation.” Pichardo, 367 S.C. at 98, 623 S.E.2d at 847 (citing United States v. Sullivan, 138 F.3d 126 (4th Cir. 1998)); see Maryland v. Wilson, 519 U.S. 408, 415 (1997) (“[A]n officer making a traffic stop may order passengers to get out of the car pending completion of the stop.”). “Normally, the stop ends when the police have no further need to control the scene, and inform the driver and passengers they are free to leave.” Johnson, 555 U.S. at 333.

During the course of the stop, an officer can inquire into matters unrelated to the initial justification for the stop without converting the stop into something other than a lawful seizure so long as the unrelated questioning does not measurably extend the duration of the stop. Id.; see also Muehler v. Mena, 544 U.S. 93, 100-101 (2005) (instructing that additional questioning during a detention unrelated to the original purpose of the detention does not constitute an additional seizure or independent Fourth Amendment violation). Such an investigatory traffic stop must be temporary and last no longer than necessary to effectuate its purpose. Pichardo, 367 S.C. at 98, 623 S.E.2d at 848; see also United States v. Branch, 537 F.3d 328, 336 (4th Cir. 2008) (“The maximum acceptable length of a routine traffic stop cannot be stated with mathematical precision. Instead, the appropriate constitutional inquiry is whether the detention lasted longer than was necessary, given its purpose.”).

Even if a traffic stop is initially lawful, the detention “can become unlawful if it is prolonged beyond the time reasonably required to complete [its] mission.” Illinois v. Caballes, 543 U.S. 405, 407 (2005); see Pichardo, 367 S.C. at 98, 623 S.E.2d at 848 (“Once the purpose of that stop has been fulfilled, the continued detention of the car and the occupants amounts to a second detention.”). However, a further detention extending the scope of a traffic stop beyond

its original purpose is not automatically unconstitutional. Pichardo, 367 S.C. at 99, 623 S.E.2d at 848. Instead, continued questioning beyond the duration of an initial traffic stop is lawful and permissible where: (1) the officer has a reasonable articulable suspicion of other illegal activity; or (2) the traffic stop becomes a consensual encounter. Id.

Reasonable suspicion consists of “ ‘a particularized and objective basis’ that would lead one to suspect another of criminal activity.” State v. Lesley, 326 S.C. 641, 644, 486 S.E.2d 276, 277 (Ct. App. 1997) (quoting United States v. Cortez, 449 U.S. 411, 417 (1981)). “Reasonable suspicion ‘is not readily, or even usefully, reduced to a neat set of legal rules, but, rather, entails common sense, nontechnical conceptions that deal with factual and practical considerations of everyday life on which reasonable and prudent persons, not legal technicians, act.’ ” State v. Provet, 391 S.C. 494, 500, 706 S.E.2d 513, 516 (Ct. App. 2011) (quoting United States v. Foreman, 369 F.3d 776, 781 (4th Cir. 2004)). “In this highly fact-specific inquiry, reasonable suspicion ‘is a fluid concept which takes its substantive content from the particular context in which the standard is being assessed.’ ” State v. Wallace, 392 S.C. 47, 51-52, 707 S.E.2d 451, 453 (Ct. App. 2011) (quoting Foreman, 369 F.3d at 781), cert. dismissed as improvidently granted, 401 S.C. 264, 737 S.E.2d 480 (2012). The reasonable suspicion standard “is a less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence[.]” Illinois v. Wardlow, 528 U.S. 119, 123 (2000). “Reasonable suspicion is more than a general hunch but less than what is required for probable cause.” State v. Willard, 374 S.C. 129, 134, 647 S.E.2d 252, 255 (Ct. App. 2007); see State v. Rogers, 368 S.C. 529, 534, 629 S.E.2d 679, 682 (Ct. App. 2006) (“Reasonable suspicion is something more than an inchoate and unparticularized suspicion or hunch.”).

In determining the existence of reasonable suspicion, the totality of the circumstances must be considered. Pichardo, 367 S.C. at 104, 623 S.E.2d at 85. In reviewing the totality of the circumstances, the individual factors of the traffic stop must not be considered piecemeal or in isolation. See Branch, 537 F.3d at 337 (“Courts must look at the ‘cumulative information available’ to the officer . . . and not find a stop unjustified based merely on a ‘piecemeal refutation of each individual’ fact and inference[.]” (citations omitted)). Instead, all of the circumstances of the stop, including the officer’s own experience and specialized training, must be considered as a whole to determine whether the officer’s actions were reasonable in light of all of the information available to him at the time. See United States v. Mason, 628 F.3d 123, 129 (4th Cir. 2010) (“[J]ust as one corner of a picture might not reveal the picture’s subject or nature, each component that contributes to reasonable suspicion might not alone give rise to reasonable suspicion.”); see also United States v. Arvizu, 534 U.S. 266, 273 (2002) (“[W]e have said repeatedly that [reviewing courts] must look at the ‘totality of the circumstances’ of each case to see whether the detaining officer has a ‘particularized and objective basis’ for suspecting legal wrongdoing. The process allows officers to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that ‘might well elude an untrained person.’ ” (citations omitted)). “In applying the concept of reasonable suspicion to the various facts of a case, ‘[i]t is the entire mosaic that counts, not single tiles.’ ” Wallace, 392 S.C. at 52, 707 S.E.2d at 453 (quoting United States v. Whitehead, 849 F.2d 849, 858 (4th Cir. 1988)). Thus, the presence of several factors seemingly consistent with innocent travel can establish reasonable suspicion when viewed together in totality. United States v. Sokolow, 490 U.S. 1, 9 (1989).

One of the recognized and accepted exceptions is the automobile exception. State v. Bailey, 276 S.C. 32, 36, 274 S.E.2d 913, 915 (1981). That exception is based on: (1) the ready mobility of automobiles along with the potential that evidence may be lost or removed before a warrant is obtained; and (2) the lessened expectation of privacy in motor vehicles. State v. Cox, 290 S.C. 489, 491, 351 S.E.2d 570, 571 (1986). Under the automobile exception, law enforcement officers can conduct a warrantless search of an automobile based on probable cause alone. Bultron, 318 S.C. at 332, 457 S.E.2d at 621. "If a vehicle is readily mobile and probable cause exists to believe it contains contraband, the Fourth Amendment permits police to search the vehicle without more." Weaver, 374 S.C. at 320, 649 S.E.2d at 482; see also State v. Moore, 377 S.C. 299, 310, 659 S.E.2d 256, 262 (Ct. App. 2008) (recognizing that the rationale for a vehicle search under the automobile exception is not negated even if the vehicle is immobilized or taken into police custody).

If probable cause exists supporting the search of a lawfully stopped automobile, the search can be extended to every part of the vehicle and all of its contents potentially containing the object of the search. Bultron, 318 S.C. at 332, 457 S.E.2d at 621; see also Wyoming v. Houghton, 526 U.S. 295, 307 (1999) ("We hold that police officers with probable cause to search a car may inspect passengers' belongings found in the car that are capable of concealing the object of the search."). "The scope of a warrantless search based on probable cause is no narrower – and no broader – than the scope of a search authorized by a warrant supported by probable cause." United States v. Ross, 456 U.S. 798, 823 (1982). "The scope of a warrantless search of an automobile is defined by the object of the search and the places in which there is probable cause to believe that it may be found." State v. Perez, 311 S.C. 542, 546, 430 S.E.2d 503, 505 (1993).

Probable cause is “a justifiable determination, based upon the totality of the circumstances and in view of all the evidence available to law enforcement officials at the time of the search, that there exists a practical, nontechnical probability that a crime is being committed or has been committed and incriminating evidence is involved.” Bultron, 318 S.C. at 332, 457 S.E.2d at 621; see Illinois v. Gates, 462 U.S. 213, 238 (1983) (identifying probable cause as “a fair probability that contraband or evidence of a crime will be found”). “Probable cause may be found somewhere between suspicion and sufficient evidence to convict.” State v. Blassingame, 338 S.C. 240, 250, 525 S.E.2d 535, 540 (Ct. App. 1999). However, the probable cause standard does **not** require absolute certainty. In re Care and Treatment of Brown v. State, 372 S.C. 611, 619, 643 S.E.2d 118, 122 (Ct. App. 2007).

In regards to the inevitable discovery due to the inventory search that would have been conducted by the Sheriff’s Department¹, Counsel testified at the evidentiary hearing that he failed to object to the testimony of Officer Heirs concerning the K-9 search, Sergeant Florencio’s testimony concerning the drugs seized, or Staff Sergeant Berry’s testimony concerning the forensic analysis done on the drugs seized. However, in reviewing the trial transcript, the only contemporaneous objection counsel failed to make was to the testimony of Heirs. Counsel objected on at least three occasions to the drugs being introduced: objected to the drugs being introduced through Florencio’s testimony, objected to the drugs being introduced through

¹ See, e.g. State v. Miller, 423 S.C. 95, 814 S.E.2d 166 (2018) (affirming tow and inventory search of vehicle where defendant was arrested for driving with a suspended license, and the car was neither his nor that of anybody present at the apartment complex at which it was parked); see also United States v. Bullette, 854 F.3d 261, 265 (4th Cir. 2017) (“An inventory search of an automobile is lawful (1) where the circumstances reasonably justified seizure or impoundment, and (2) law enforcement conducts the inventory search according to routine and standard procedures designed to secure the vehicle or its contents.”); United States v. Brown, 787 F.2d 929, 932 (4th Cir. 1986) (“The question . . . is . . . whether the police officer’s decision to impound was reasonable under the circumstances.”).

Berry's testimony, and objected/moved to suppress the drug evidence at the close of the State's case. Therefore, this Court finds that counsel properly objected to the evidence introduced in the aforementioned instances and must only address any potential deficiency in failing to object to the testimony of Heirs. Here, counsel was not deficient in failing to object to the testimony of Heirs where there was no articulable basis for the objection. Appellate courts do not require parties to engage in futile actions in order to preserve issues for appellate review. Fettler v. Gentner, 396 S.C. 461, 722 S.E.2d 26 (Ct. App. 2012). As will be addressed subsequently, counsel had no basis for objecting to the testimony and therefore cannot be found deficient for failing to object. Further, Applicant can establish no prejudice from counsel's alleged failure where the issue had no merit at trial and would not have warranted a meritorious appeal.

Applicant can establish no prejudice suffered due to counsel's alleged failure to object to Heir's testimony due to the objection's lack of merit. The objection lacked merit for two reasons; the search and seizure of the vehicle was proper under the automobile exception to warrantless searches and the evidence would have been inevitably discovered when the vehicle was properly seized and inventoried by the Sheriff's Department.

There are four steps that need to be considered to determine whether the traffic stop was Constitutional and whether the automobile exception applies. First, the pretextual traffic stop conducted by the Drug Task Force was constitutional per Whren. The Task Force wanted to stop Applicant's vehicle due to an ongoing drug investigation where they suspected drugs were in fact in the vehicle at the time. However, the traffic stop was properly initiated where the officer ran the license plate on Applicant's vehicle to find that the registration was suspended. P. 78-79. The officer had a valid reason for performing the traffic stop, therefore, any pretextual reason for making the stop is irrelevant and constitutes no meritorious basis for challenging the stop.

Second, the arrest of the Applicant for the traffic violations was constitutional pursuant to Atwater. The United States Supreme Court has consistently held that law enforcement has the ability to arrest even for minor offenses such as traffic violations. Here, Applicant was arrested for driving with a suspended registration. Testimony from Cobb, Heirs, and Florencio at trial confirmed that Applicant was indeed arrested for driving with a suspended registration. P. 131, 150, 186. Applicant's arrest was clearly constitutional and therefore constituted no meritorious basis for an objection.

Third, the K-9 search that provided probable cause to search the vehicle was constitutional because it did not improperly prolong the traffic stop. Hernandez. Here, the facts do not equate to a situation where a K-9 search of a vehicle would be improper because Applicant had already been arrested at the time of the search and it did not prolong the stop in any capacity. Cobb, the K-9 handler, testified at trial that she was requested to come to the scene of the traffic stop as backup. Cobb further testified that Applicant was placed under arrest as she arrived on the scene and she proceeded with the K-9 search once Applicant was in custody. P. 150. There was no testimony at trial that the traffic stop was delayed for the purposes of calling a K-9 unit and Applicant was already under arrest by the time the K-9 unit arrived as backup. Counsel failing to object to Heir's testimony concerning the K-9 search was not deficient because there was no meritorious basis for the objection where the K-9 search in no way improperly prolonged the length of the traffic stop.

Fourth, law enforcement gained probable cause to search the entire vehicle based on the K-9 alerting to drugs in the vehicle and not based on the arrest of Applicant. The testimony from Cobb at trial was that the search of Applicant's vehicle was based on the K-9 alerting to drugs in the vehicle and not Applicant's arrest. P. 142. The K-9 alerted to the presence of drugs in the

vehicle and the officers subsequently searched the vehicle based on that probable cause. The K-9 alerted to the driver's door handle which provided probable cause to continue the search within the vehicle. P. 151. The K-9 proceeded to the backseat of the vehicle, adjacent to the cargo compartment, indicating that there were drugs in the immediate vicinity. P. 151. Officers proceeded to search the cargo compartment and found a large quantity of cocaine. Under the automobile exception, law enforcement officers can conduct a warrantless search of an automobile based on probable cause alone. Bultron, 318 S.C. at 332, 457 S.E.2d at 621. "If a vehicle is readily mobile and probable cause exists to believe it contains contraband, the Fourth Amendment permits police to search the vehicle without more." Weaver, 374 S.C. at 320, 649 S.E.2d at 482; see also State v. Moore, 377 S.C. 299, 310, 659 S.E.2d 256, 262 (Ct. App. 2008) (recognizing that the rationale for a vehicle search under the automobile exception is not negated even if the vehicle is immobilized or taken into police custody). Here, the vehicle was mobile even though it had taken into police custody and law enforcement had probable cause to search the vehicle after the K-9 alerted to the presence of drugs in the vehicle. Therefore, counsel's failure to object was not prejudicial to Applicant where there was no meritorious basis for the objection due to law enforcement properly searching the vehicle under the automobile exception to warrantless searches.

Even if the automobile exception did not apply, the evidence would have still been proper under the doctrine of inevitable discovery because the vehicle was to be towed and inventoried pursuant to department policy. First, the towing and inventory search of the vehicle would have been reasonable for the following reasons; Applicant was arrested for the traffic violations, the vehicle did not belong to the Applicant, and there was nobody else on the scene that could have taken the vehicle. See, e.g. State v. Miller, 423 S.C. 95, 814 S.E.2d 166 (2018). Second, the

inventory search would have been reasonable because the vehicle was properly seized and Florencio testified at trial that the vehicle was to be towed and inventoried pursuant to the Beaufort County Sheriff Department's policies. P. 82. see also United States v. Bullette, 854 F.3d 261, 265 (4th Cir. 2017). The evidence shows that the vehicle would have been properly towed and inventoried, therefore the discovery of the drugs in the cargo compartment was inevitable making there no meritorious basis for an objection by counsel. Therefore, Applicant was not prejudiced by counsel's failure to object where there was no merit to the proposed objection. Ultimately, Applicant has failed to show deficiency by counsel in failing to object or any resulting prejudice resulting therefrom. This Court finds that Applicant has failed to meet his burden and this allegation is dismissed.

Failure to move the incident report into evidence where the Court relied upon the report in denying Applicant's motion for a mistrial

Applicant alleges that trial counsel was deficient for failing to move the incident report into evidence since the trial court relied upon the record in denying Applicant's motion for a mistrial, thus not properly preserving the issue for appellate review. Counsel testified at the evidentiary hearing that he did not mark the incident report as an exhibit because the court identified the incident report on the record, it was published to the court, and the court ruled on his motion. Counsel made timely objections to the potential Brady/Rule 5 violations and the court ruled on those objections. The trial court thoroughly ruled on the objection and went through specifics in the report that he relied upon in making his decision. Applicant did not present evidence or a meritorious argument at the evidentiary hearing as to why counsel was deficient in his performance, how Applicant was prejudiced, or why counsel's contemporaneous

objections did not preserve the issue for appellate review. Therefore, this Court finds that Applicant has failed to meet his burden and the allegation is dismissed.

Failure to request a charge on a lesser-included offense

Applicant alleges trial counsel was ineffective for failing to request a charge on a lesser-included offense. At trial through Applicant's statement, and reiterated by PCR counsel at the evidentiary hearing, Applicant admitted that he purchased four ounces of cocaine. PCR counsel emphasized at the evidentiary hearing that the jury could have determined that Applicant was responsible for the four ounces of cocaine. Subsequently, Applicant withdrew this allegation from the Court's consideration when he was made aware that four ounces was over one hundred grams and would still make him culpable for trafficking one hundred to two hundred grams. Therefore, this Court finds that Applicant has withdrawn this allegation and the allegation had no merit considering the evidence presented. This allegation is dismissed.

**Failure to make a contemporaneous objection to Sergeant Florencio's testimony
concerning Applicant's statement**

Applicant alleges trial counsel was deficient for failing to contemporaneously object to testimony at trial concerning Applicant's statement to law enforcement. Counsel testified at the evidentiary hearing that he thought that he had objected to the testimony, but that the record reflects that he did not. Counsel testified that he was not surprised about the testimony. Appellate courts do not require parties to engage in futile actions in order to preserve issues for appellate review. Fettler v. Gentner, 396 S.C. 461, 722 S.E.2d 26 (Ct. App. 2012). A Jackson v. Denno hearing was held pretrial to determine the voluntariness of the statement and whether Applicant was properly advised of his rights. Florencio testified at trial that he advised Applicant as to the reason for his arrest and proceed to read him his Miranda rights. P. 193. Florencio testified that

he is fluent in Spanish and, knowing that Applicant did not speak English well, read him his Miranda rights in Spanish. P. 193-194. There was no testimony pretrial or at trial that would indicate that the statement was not given voluntarily by Applicant. Further, Applicant was advised of his right to testify as to the voluntariness of the statement at no risk to himself during the pretrial hearing and refused to do so. Applicant has failed to show deficiency on the part of counsel for failing to object to testimony regarding Applicant's statement where there was no evidence to show the statement was given involuntarily and Applicant refused to testify as to any issues concerning the statement. Therefore, this Court finds that Applicant has failed to meet his burden and the allegation is dismissed.

Failure to object to Sergeant Florencio's testimony concerning Applicant's invocation of his right to silence and his right to an attorney

Applicant alleges trial counsel was deficient for failing to object to Florencio's testimony concerning Applicant's invocation of his right to silence and his right to an attorney.

Under the United States and South Carolina Constitutions, criminal defendants have a constitutional right not to be compelled to incriminate themselves during trial. See U.S. Const. amend. V (prohibiting a criminal defendant from being "compelled in any criminal case to be a witness against himself[.]"); S.C. Const. art. I, § 12 ("[N]or shall any person be compelled in any criminal case to be a witness against himself."). Pursuant to that right, both comments by the prosecution on a defendant's silence and instructions by the trial judge indicating a defendant's silence constitutes evidence of guilt are prohibited. Griffin v. California, 380 U.S. 609, 615 (1965); see Doyle v. Ohio, 426 U.S. 610, 618 (1976) ("[W]hile it is true that the Miranda warnings contain no express assurance that silence will carry no penalty, such assurance is implicit to any person who receives the warnings. In such circumstances, it would be

fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial.”).

“In particular, the State may neither comment upon nor present evidence at trial of a defendant’s decision to exercise his right to remain silent[.]” Edmond v. State, 341 S.C. 340, 346, 534 S.E.2d 682, 685 (2000); see McFadden v. State, 342 S.C. 637, 640, 539 S.E.2d 391, 393 (2000) (“Specifically, the solicitor must not comment, either directly or indirectly, on a defendant’s silence, failure to testify, or failure to present a defense.”); State v. Weaver, 361 S.C. 73, 88-89, 602 S.E.2d 786, 794 (Ct. App. 2004) (“As a corollary of this right, a prosecutorial comment, whether direct or indirect, upon a defendant’s failure to testify at trial is constitutionally impermissible.”). “The obvious purpose [of that prohibition] is to try to prevent jurors from improperly inferring the accused is guilty simply because he exercised rights guaranteed him by the state and federal constitutions.” Edmond, 341 S.C. at 346, 534 S.E.2d at 685; see Wainwright v. Greenfield, 474 U.S. 284, 292 (1986) (“The point of the Doyle holding is that it is fundamentally unfair to promise an arrested person that his silence will not be used against him and thereafter to breach that promise by using the silence to impeach his trial testimony.”).

However, the mere mention of a defendant’s decision to exercise his right to remain silent during trial does not automatically constitute reversible error. See State v. Truesdale, 285 S.C. 13, 17, 328 S.E.2d 53, 56 (1984) (“When such a violation occurs, the question remains, however, whether it is cause for reversal or is harmless error beyond a reasonable doubt.”), rev’d on other grounds by Truesdale v. Aiken, 480 U.S. 527 (1989). Instead, such testimony only requires reversal where its admission results in prejudice to the defendant. Gill v. State, 346 S.C. 209, 221, 552 S.E.2d 26, 33 (2001); see State v. Johnson, 306 S.C. 119, 129, 410 S.E.2d

547, 553 (1991) (declining to reverse Johnson's conviction as a result of the introduction of testimony establishing Johnson invoked his right to counsel after determining the admission of that testimony was not prejudicial to Johnson's case). Significantly, the burden rests upon the defendant to establish the admission of the testimony deprived him of a fair trial. Gill, 346 S.C. at 221, 552 S.E.2d at 33; see also Weaver, 361 S.C. at 89, 602 S.E.2d at 794 ("[A]lthough it is improper for the solicitor to indirectly comment on a defendant's failure to testify, such comments do not necessarily mandate reversal of a conviction. Indeed, a criminal defendant is entitled to a fair trial, not a perfect one.").

In determining whether the defendant was prejudiced by the admission of testimony concerning his post-arrest silence, any error resulting from the admission of that testimony will not result in reversal if a review of the entire record establishes the error was harmless beyond a reasonable doubt. State v. Arther, 290 S.C. 291, 296, 350 S.E.2d 187, 190 (1986); see United States v. Hastings, 461 U.S. 499, 509 (1983) ("[T]he [United States Supreme] Court has consistently made clear it is the duty of a reviewing court to consider the trial record as a whole and to ignore errors that are harmless, including most constitutional violations[.]"). In reviewing the record to determine whether an error was harmless, the following factors should be considered: (1) whether the reference to defendant's right to remain silent was a single reference; (2) whether the reference was repeated or alluded to at another point during trial; (3) whether the prosecutor tied the defendant's exercise of his right directly to his exculpatory story; (4) whether the exculpatory story was totally implausible; and (5) whether the evidence of guilt was overwhelming. Edmond, 341 S.C. at 348, 534 S.E.2d at 686-687; see Truesdale, 285 S.C. at 18-19, 328 S.E.2d at 56 (identifying the factors relied upon in the opinion of the Fifth Circuit Court of Appeals in Chapman v. United States, 547 F.2d 1240 (5th Cir. 1977), as relevant factors to be

considered in determining if a Doyle violation is harmless). However, none of those factors are alone dispositive, and the specific circumstances of each case should be considered individually on a case-by-case basis to determine whether the error was harmless beyond a reasonable doubt. Truesdale, 285 S.C. at 19, 328 S.E.2d at 56; see Alderman v. Austin, 695 F.2d 124, 126, n. 7 (5th Cir. 1983) (instructing that the factors for determining whether a Doyle violation is harmless identified in Chapman v. United States, 547 F.2d 1240 (5th Cir. 1977), are not to be treated as rigid rules or applied strictly to all cases); see also United States v. Shaw, 701 F.2d 367, 382 (5th Cir. 1983) (“Subsequent cases have illustrated, however, that factual situations are not always amenable to description with the rigid Chapman types. Consequently, we have held Chapman inapplicable and the error to be harmless even though the defendant’s story is ‘not totally implausible,’ but the evidence of guilt is ‘substantial.’ ” (citations omitted)); see, e.g., State v. Wiley, 387 S.C. 490, 497, 692 S.E.2d 560, 564 (Ct. App. 2010) (“No definite rule of law governs this finding [of harmlessness]; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case.”).

Counsel testified at the evidentiary hearing that he believed he made an issue of the statement pretrial but that the record reflected that he did not make a contemporaneous objection to Florencio’s testimony during trial. This Court examined the factors enumerated above in determining whether the admission of the testimony prejudiced Applicant sufficiently to warrant reversal. First, the reference to Applicant’s right to remain silent appears to have been a single reference. Second, the reference does not appear to have been alluded to at any other point in the trial. Third, the prosecutor made no efforts to tie Applicant’s exercise of his rights to his exculpatory story as there was no real exculpatory story put forth. Fourth, Applicant did not present any, or at least not an apparent, exculpatory story. Fifth, the evidence against Applicant

was overwhelming considering his voluntary admission to law enforcement about purchasing four ounces of cocaine and the drugs that were found in the vehicle. Therefore, Applicant has failed to show how counsel's failure to object to the testimony concerning Applicant's invocation of his rights amounted to sufficient prejudice to warrant reversal. This Court finds that Applicant has failed to meet his burden and this allegation is dismissed.

CONCLUSION

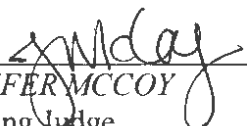
Based on all the forgoing, this Court finds and concludes Applicant has not established any constitutional violations or deprivations before or during his trial and sentencing proceedings. Counsel was not deficient, nor was Applicant prejudiced by Counsel's representation. Therefore, this PCR application must be denied and dismissed with prejudice.

The Court notes Applicant must file and serve a notice of appeal within thirty days from PCR counsel's receipt of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), Applicant has a right to appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides that if Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. The application for post-conviction relief be denied and dismissed with prejudice; and
2. Applicant be remanded to the custody of Respondent.

AND IT IS SO ORDERED this 27 day of January, 2019.



JENNIFER MCCOY
Presiding Judge
Fourteenth Judicial Circuit

WITNESSES

SGT. ANDRES FLORENCIO

ARREST WARRANT NUMBER

H915578

08/04/2005

ACTION OF GRAND JURY

June Bell

Patty Culbertson

Foreperson of Grand Jury

Date: AUG 25 2005

VERDICT

Foreperson of Petit Jury

Date:

DOCKET NO.

2005-GS-07-01304

THE STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

RANDOLPH MURDAUGH III., Solicitor

COURT OF GENERAL SESSIONS

08/25/2005

TERM

THE STATE
VS.

Narciso
NARCISO, OSIEL GOMEZ

Indictment for

Drugs/Traf cocaine, 10g/more to 28g-1st

SC Code : 44-53-0370(B) (2) (C)

CDR Code: 0278

Class:

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

INDICTMENT
2005-GS-07-01304

At a Court of General Sessions, convened on 08/25/2005 the
Grand Jurors of BEAUFORT COUNTY present upon their oath:

Drugs/Traf cocaine, 10g/more to 28g-1st
=====

44-53-0370 (E) (2) (C)

THAT ON OR ABOUT 08/03/05, THE DEFENDANT, OSIEL NARCISO ^{Gomez}, DID KNOWINGLY AND
INTENTIONALLY POSSESS A QUANTITY OF POWDER COCAINE, WITH A WEIGHT OF IN
EXCESS OF 100 GRAMS. THIS DID OCCUR IN BEAUFORT COUNTY, SOUTH CAROLINA.

Jan 17, 2006

Indictment amended on the record with consent.

Howard Phung
Presiding Judge

to Grand Jury
Presentment of amended indictment waived.

Osiel M

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

Randolph M. Mendenhall

SOLICITOR

STATE OF SOUTH CAROLINA

IN THE COURT OF GENERAL SESSIONS

COUNTY OF
STATE

Beaufort

VS.

Osiel Naraiso Gomez

INDICTMENT/CASE#:

05-GS-07-1304

AKA:

Race: H

Sex: M

Age:

DOB:

SS#:

Address:

City, State, Zip

Beaufort, GA

DL#

SID#

A/W#: H915578

Date of Offense: 8/3/05

S.C. Code §: 44-53-270(E)(2)(c)

CDR Code #: 012810

SENTENCE SHEET

In disposition of the said indictment comes now the Defendant who was ☒ CONVICTED OF or ☐ PLEADSTO: Trafficking in excess of 100 grams CocaineIn violation of 44-53-270 S.C. Code of Laws, bearing CDR Code # 0280☐ NON-VIOLENT☒ VIOLENT☒ SERIOUS☐ MOST SERIOUS☐ Mandatory GPS (CSCw/minor 1st or Lowd Act)☐ \$17-25-45The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. (Defendant initial)The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

Kimberly Smith

Solicitor

Osiel Naraiso Gomez

Defendant

[Signature]

Attorney for Defendant

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,for a determinate term of 25 days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years

and/or to pay a fine of \$ _____; provided that upon the service of _____ days/months/years and/or payment of \$ _____ plus costs and

assessments as applicable; the balance is suspended with probation for _____ months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

☐ CONCURRENT or ☐ CONSECUTIVE to sentence on:☒ The Defendant is to be given credit for time served pursuant to S.C. Code §24-13-40 to be calculated and applied by the State Department of Corrections.☐ The Defendant is to be placed on Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Heard, ☐ Waived, ☐ Ordered

Total: \$ _____ plus 20% fee: \$ _____

Payment Terms:

☐ set by SCDPPPS

PTUP

_____ days/hours Public Service Employment

Obtain GED

Attend Voc. Rehab. or Job Corp.

May serve W/E beginning _____

Substance Abuse Counseling _____

Random Drug/Alcohol Testing _____

Fine may be pd. in equal, consecutive weekly/monthly

pmts. of \$ _____ beginning _____

\$ _____ paid to Public Defender Fund

Other: _____

Recipient:

*Fine:

\$14-1-206 (Assessments 107.5%)

\$14-1-211(A)(1) (Conv. Surcharge)

\$100

\$14-1-211(A)(2) (DUI Surcharge)

\$100

\$56-5-2895 (DUI Assessment)

\$12

\$35.13 (Public Def/Prob)

\$500

\$73.3, 1B TP (Law Enforce. Funding)

\$25

\$33.7, 1B TP (Drug Court Surcharge)

\$100

\$50-21-114(BUI Breath Test Fee)

\$50

\$56-5-2842(J) (Vehicle Assessment)

\$40/ea

3% to County (if paid in installments)

TOTAL

\$231.75

☐ Appointed PD or appointed other counsel, \$35.13 TP

Requires \$500 be paid to Clerk during probation.

Court Reporter:

Dianne Rutledge

PRESIDING JUDGE

Judge Code:

Sentence Date:

Certified - A True Copy

[Signature]
Joni Fields - Clerk of Court
Beaufort County, SC - Pam Burles