

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Kershaw County

Clifton Newman, Circuit Court Judge

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S.C. Supreme Court

JAVIER A. ROSAS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPENDIX

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STATE OF SOUTH CAROLINA
COUNTY OF KERSHAW

COURT OF GENERAL SESSIONS

STATE OF SOUTH CAROLINA :

-vs- :

JAVIER ROSAS :

STATE OF SOUTH CAROLINA :

-vs- :

JUAN ESTRADA :

2008-GS-28-1448

TRANSCRIPT OF RECORD

2008-GS-28-1449

MONDAY, APRIL 26, 2010
CAMDEN, SOUTH CAROLINA

B E F O R E:

HONORABLE G. THOMAS COOPER, JUDGE.

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

LIR DERIEG, ASSISTANT SOLICITOR
ATTORNEY FOR THE STATE

NEIL RILEY, ESQUIRE
ATTORNEY FOR DEFENDANT ESTRADA

JOSH KENDRICK, ESQUIRE
ATTORNEY FOR DEFENDANT ROSAS

DIANNE A. RUTLEDGE
CIRCUIT COURT REPORTER

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E X H I B I T S

(NO EXHIBITS WERE INTRODUCED DURING THE GUILTY PLEA.)

1 (THE INTERPRETER WAS FIRST DULY SWORN.)

2 (JAVIER ROSAS AND JUAN ESTRADA WERE FIRST DULY
3 SWORN.)

4 THE COURT: ALL RIGHT. NOW, MR. KENDRICK, DOES YOUR
5 CLIENT SPEAK ENGLISH?

6 MR. KENDRICK: NOT AT ALL, YOUR HONOR.

7 THE COURT: ROSAS, NO ENGLISH. MR. RILEY, DOES YOUR
8 CLIENT SPEAK ENGLISH?

9 MR. RILEY: HE'S ABOUT 95 PERCENT PROFICIENT, JUDGE.

10 THE COURT: CORRECT?

11 MR. ESTRADA: YES, SIR.

12 THE COURT: MR. ESTRADA. ALL RIGHT. MR. KENDRICK,
13 HAVE YOU BEEN OVER THE ADVICE OF RIGHTS FORM WITH YOUR
14 CLIENT?

15 MR. KENDRICK: I HAVE, YOUR HONOR.

16 THE COURT: AND HAS IT BEEN EXPLAINED TO HIM IN HIS
17 NATIVE LANGUAGE?

18 MR. KENDRICK: IT HAS, YOUR HONOR. I READ TO THE
19 TRANSLATOR, AND THEN READ IT TO HIM.

20 THE COURT: WHAT IS HIS NATIVE COUNTRY OF ORIGIN?

21 MR. KENDRICK: MEXICO, YOUR HONOR.

22 THE COURT: MEXICO. AND, MR. ESTRADA, MEXICO?

23 MR. ESTRADA: MEXICO, TOO.

24 THE COURT: OKAY. ALL RIGHT. SOLICITOR, THE ROSAS
25 INDICTMENT HAS BEEN AMENDED FOR SOME REASON.

1 MR. DERIEG: YES, YOUR HONOR.

2 THE COURT: WHAT IS THE EXPLANATION FOR THAT?

3 MR. DERIEG: ORIGINALLY IT WAS JUAN ROSAS, AND IT WAS
4 AMENDED TO READ JAVIER ROSAS.

5 THE COURT: JUST THE NAME?

6 MR. DERIEG: YES, SIR.

7 THE COURT: OKAY. YES, I SEE. SO HIS CORRECT NAME
8 IS JAVIER?

9 MR. KENDRICK: CORRECT, YOUR HONOR.

10 THE COURT: OKAY. MR. KENDRICK, DO YOU REPRESENT
11 JAVIER AGULAR ROSAS?

12 MR. KENDRICK: I DO, YOUR HONOR.

13 THE COURT: HAVE YOU EXPLAINED TO YOUR CLIENT THE
14 CHARGES CONTAINED IN THIS INDICTMENT -- SIR, YOU'RE GOING
15 TO HAVE TO CONTEMPORANEOUSLY -- AND I'LL TRY TO GO SLOW. I
16 WILL GO SLOW. YOU NEED TO CONTEMPORANEOUSLY TRANSLATE TO
17 HIM EVEN WHEN I TALK TO THE LAWYER AND THE LAWYER RESPONDS.
18 ALL RIGHT.

19 INTERPRETER: YES, SIR.

20 THE COURT: MR. KENDRICK, HAVE YOU EXPLAINED TO YOUR
21 CLIENT THE CHARGES CONTAINED IN THESE INDICTMENTS, AND HIS
22 RIGHT TO A TRIAL BY JURY?

23 MR. KENDRICK: YES, YOUR HONOR.

24 THE COURT: HOW DOES YOUR CLIENT INTEND TO PLEAD TO
25 THESE CHARGES OF MURDER?

1 MR. KENDRICK: GUILTY, YOUR HONOR.

2 THE COURT: ALL RIGHT. MR. ROSAS, YOU ARE CHARGED IN
3 THIS INDICTMENT WITH MURDER, A CHARGE WHICH CARRIES A
4 PENALTY OF 30 YEARS TO LIFE IN PRISON. DO YOU UNDERSTAND?

5 MR. ROSAS: (THROUGH INTERPRETER.) YES.

6 THE COURT: UNDERSTANDING THE CHARGES YOU FACE AND
7 THE PUNISHMENT YOU COULD RECEIVE, HOW DO YOU WISH TO PLEAD,
8 GUILTY OR NOT¹ GUILTY?

9 MR. ROSAS: (THROUGH INTERPRETER.) GUILTY.

10 THE COURT: ALL RIGHT. MR. RILEY, HAVE YOU EXPLAINED
11 THE INDICTMENT -- THE CHARGES CONTAINED IN THE INDICTMENT
12 AND THE PUNISHMENT THERE FOR TO YOUR CLIENT?

13 MR. RILEY: I HAVE, YOUR HONOR.

14 THE COURT: THAT IS TO THE MURDER INDICTMENT; IS THAT
15 CORRECT?

16 MR. RILEY: YES, SIR.

17 THE COURT: HOW DOES YOUR CLIENT INTEND TO PLEAD?

18 MR. RILEY: GUILTY, YOUR HONOR.

19 THE COURT: MR. ESTRADA, YOU ARE CHARGED IN THIS
20 INDICTMENT WITH MURDER; DO YOU UNDERSTAND THAT?

21 MR. ESTRADA: I UNDERSTAND, SIR.

22 THE COURT: THAT CHARGE CARRIES A PENALTY OF FROM 30
23 YEARS TO LIFE IN JAIL; DO YOU UNDERSTAND THAT?

24 MR. ESTRADA: I UNDERSTAND.

25 THE COURT: OR LIFE IN PRISON. UNDERSTANDING THE

1 CHARGES YOU FACE AND THE PUNISHMENT YOU COULD RECEIVE, HOW
2 DO YOU WISH TO PLEAD, GUILTY OR NOT GUILTY?

3 MR. ESTRADA: GUILTY, SIR.

4 THE COURT: ALL RIGHT. NOW, I'M GOING TO ASK EACH OF
5 YOU ONE QUESTION. AND I'M GOING TO ASK YOU TO ANSWER
6 SEPARATELY SO THE COURT REPORTER CAN HEAR WHAT YOU HAVE TO
7 SAY.

8 DO YOU UNDERSTAND BY PLEADING GUILTY YOU'RE GIVING UP
9 YOUR RIGHT TO REMAIN SILENT?

10 MR. ROSAS: (THROUGH INTERPRETER.) YES.

11 MR. ESTRADA: YES, SIR.

12 THE COURT: UNDERSTAND BY PLEADING GUILTY, YOU'RE
13 GIVING UP YOUR RIGHT TO A TRIAL BY JURY?

14 MR. ROSAS: (THROUGH INTERPRETER.) YES.

15 MR. ESTRADA: YES, SIR.

16 THE COURT: IF YOU REQUESTED OR DEMANDED A TRIAL BY
17 JURY, THE STATE WOULD GIVE YOU A TRIAL. COMPRENDE?

18 MR. ROSAS: (THROUGH INTERPRETER.) YES.

19 MR. ESTRADA: I UNDERSTAND, SIR.

20 THE COURT: AT THAT TRIAL YOU WOULD HAVE THE RIGHT TO
21 CROSS EXAMINE AND CONFRONT ALL WITNESSES AGAINST YOU. DO
22 YOU UNDERSTAND?

23 MR. ROSAS: (THROUGH INTERPRETER.) YES.

24 MR. ESTRADA: I UNDERSTAND.

25 THE COURT: YOU WOULD HAVE THE RIGHT TO PRESENT

1 WITNESSES AND EVIDENCE IN YOUR OWN DEFENSE. DO YOU
2 UNDERSTAND?

3 MR. ROSAS: (THROUGH INTERPRETER.) YES.

4 MR. ESTRADA: I UNDERSTAND, SIR.

5 THE COURT: YOU'D HAVE A RIGHT TO TESTIFY IN YOUR OWN
6 DEFENSE IF YOU WISHED TO DO SO. DO YOU UNDERSTAND?

7 MR. ROSAS: (THROUGH INTERPRETER.) YES.

8 MR. ESTRADA: YES, SIR.

9 THE COURT: NO ONE COULD MAKE YOU TESTIFY AT YOUR OWN
10 TRIAL. DO YOU UNDERSTAND?

11 MR. ROSAS: (THROUGH INTERPRETER.) YES.

12 MR. ESTRADA: YES.

13 THE COURT: IF YOU DECIDED TO GO TO TRIAL AND NOT
14 TESTIFY, THE JUDGE WOULD TELL THE JURY THEY COULD NOT HOLD
15 YOUR FAILURE TO TESTIFY AGAINST YOU. DO YOU UNDERSTAND?

16 MR. ROSAS: (THROUGH INTERPRETER.) YES.

17 MR. ESTRADA: YES.

18 THE COURT: IN FACT, THE JURY COULD NOT EVEN CONSIDER
19 YOUR FAILURE TO TESTIFY IN THEIR DELIBERATIONS.

20 MR. ROSAS: (THROUGH INTERPRETER.) YES.

21 MR. ESTRADA: YES, SIR.

22 THE COURT: YOU WOULD BE PRESUMED INNOCENT THROUGHOUT
23 YOUR TRIAL. UNDERSTAND?

24 MR. ESTRADA: I UNDERSTAND.

25 MR. ROSAS: (THROUGH INTERPRETER.) YES.

1 THE COURT: THE STATE WOULD HAVE TO PROVE YOU GUILTY
2 TO A JURY OF 12 PEOPLE.

3 MR. ROSAS: (THROUGH INTERPRETER.) YES.

4 MR. ESTRADA: I UNDERSTAND.

5 THE COURT: AND ALL 12 PEOPLE WOULD HAVE TO FIND YOU
6 GUILTY IF YOU WERE TO BE CONVICTED.

7 MR. ROSAS: (THROUGH INTERPRETER.) YES.

8 MR. ESTRADA: YES, SIR.

9 THE COURT: EVEN IF YOU WERE CONVICTED, YOU'D STILL
10 HAVE THE RIGHT TO APPEAL THAT CONVICTION. DO YOU
11 UNDERSTAND?

12 MR. ROSAS: (THROUGH INTERPRETER.) YES.

13 MR. ESTRADA: YES, SIR.

14 THE COURT: DO YOU UNDERSTAND YOUR RIGHTS AS I
15 DESCRIBED THEM TO A JURY TRIAL?

16 MR. ROSAS: (THROUGH INTERPRETER.) YES.

17 MR. ESTRADA: YES, SIR.

18 THE COURT: UNDERSTANDING THOSE RIGHTS, YOU STILL
19 WANT TO PLEAD GUILTY?

20 MR. ROSAS: (THROUGH INTERPRETER.) YES.

21 MR. ESTRADA: YES, SIR.

22 THE COURT: ALL RIGHT. MR. SOLICITOR, ARE THERE ANY
23 NEGOTIATIONS OR AGREEMENTS WITH REGARD TO THE CHARGES IN
24 THIS CASE OR WITH REGARD TO SENTENCING?

25 MR. DERIEG: NO, SIR, YOUR HONOR. BOTH ARE CHARGED

1 WITH ---

2 THE COURT: WAIT. JUST LET HIM TRANSLATE.

3 INTERPRETER: I JUST FINISHED.

4 THE COURT: DO YOU UNDERSTAND WHAT I'M ASKING THE
5 SOLICITOR?

6 INTERPRETER: YES, SIR.

7 MR. DERIEG: NO, SIR, YOUR HONOR. BOTH DEFENDANTS
8 ARE CHARGED WITH MURDER, AND THEY'RE BOTH PLEADING TO
9 MURDER WITHOUT RECOMMENDATION OR NEGOTIATION.

10 THE COURT: ALL RIGHT. NO OTHER CHARGES ---

11 MR. DERIEG: NO, SIR.

12 THE COURT: --- ARE BEING ---

13 MR. DERIEG: NO, SIR.

14 THE COURT: --- DISMISSED AS A RESULT OF THIS PLEA?

15 MR. DERIEG: THE ONLY CHARGE THAT EACH IS CHARGED
16 WITH IS MURDER.

17 THE COURT: OKAY. ALL RIGHT. HAS ANYONE -- ONCE
18 AGAIN, HAS ANYONE OFFERED YOU ANYTHING, THREATENED YOU IN
19 ANY MANNER, OR IN ANY WAY MADE YOU, FORCED YOU INTO
20 ENTERING THIS PLEA?

21 MR. ROSAS: (THROUGH INTERPRETER.) NO.

22 MR. ESTRADA: NO.

23 THE COURT: THIS PLEA IS OF YOUR OWN FREE WILL AND
24 ACCORD?

25 MR. ROSAS: (THROUGH INTERPRETER.) YES.

1 MR. ESTRADA: YES, SIR.

2 THE COURT: ALL RIGHT. ARE YOU SATISFIED WITH YOUR
3 LAWYER?

4 MR. ROSAS: (THROUGH INTERPRETER.) YES.

5 MR. ESTRADA: YES, SIR.

6 THE COURT: HAS HE FULLY BEEN OVER YOUR CASE WITH
7 YOU?

8 MR. ROSAS: (THROUGH INTERPRETER.) YES.

9 MR. ESTRADA: YES, SIR.

10 THE COURT: HAS HE TOLD YOU HOW THE CASE WOULD BE
11 TRIED AND WHAT HIS OPINION OF THE CASE IS?

12 MR. ROSAS: (THROUGH INTERPRETER.) YES.

13 MR. ESTRADA: YES, SIR.

14 THE COURT: IN OTHER WORDS, HE'S SHARED THE EVIDENCE
15 THAT THE STATE HAS WITH YOU?

16 MR. ROSAS: (THROUGH INTERPRETER.) YES.

17 MR. ESTRADA: YES, SIR.

18 THE COURT: ALL RIGHT. HAS HE DONE EVERYTHING YOU
19 ASKED HIM TO DO PRIOR TO THIS PLEA?

20 MR. ROSAS: (THROUGH INTERPRETER.) YES.

21 MR. ESTRADA: YES, SIR.

22 THE COURT: DO YOU NEED ANY MORE TIME TO TALK TO YOUR
23 LAWYER ABOUT THIS PLEA?

24 MR. ROSAS: (THROUGH INTERPRETER.) NO.

25 MR. ESTRADA: I DON'T THINK SO, SIR.

1 THE COURT: ARE YOU SATISFIED WITH YOUR LAWYER'S
2 ADVICE?

3 MR. ROSAS: (THROUGH INTERPRETER.) YES.

4 MR. ESTRADA: YES, SIR.

5 THE COURT: ARE YOU UNDER THE INFLUENCE OF ANY
6 ALCOHOLIC BEVERAGES, DRUGS, OR PRESCRIPTION MEDICATIONS?

7 MR. ROSAS: (THROUGH INTERPRETER.) NO.

8 MR. ESTRADA: NO.

9 THE COURT: DO YOU HAVE ANY MENTAL CONDITION THAT
10 WOULD KEEP YOU FROM UNDERSTANDING WHAT YOU'RE DOING HERE
11 TODAY?

12 MR. ROSAS: (THROUGH INTERPRETER.) NO.

13 MR. ESTRADA: NO, SIR.

14 THE COURT: ARE YOU PLEADING GUILTY OF YOUR OWN FREE
15 WILL AND ACCORD? I'LL ASK YOU AGAIN.

16 MR. ROSAS: (THROUGH INTERPRETER.) YES.

17 MR. ESTRADA: YES, SIR.

18 THE COURT: ALL RIGHT. SOLICITOR, GIVE ME A FACTUAL
19 BASIS FOR THE PLEA AND DO IT SLOWLY BECAUSE IT'S
20 TRANSLATED.

21 MR. DERIEG: MAY IT PLEASE THE COURT, YOUR HONOR.
22 WE'RE HERE TODAY ON INDICTMENT 2008-GS-28-1448; THAT IS
23 INDICTMENT FOR MURDER. THE DEFENDANT IS JAVIER AGULAR
24 ROSAS.

25 WE'RE ALSO HERE TODAY ON INDICTMENT NO. 2008-GS-28-

1 1449; THAT IS ALSO AN INDICTMENT RETURNED BY THE KERSHAW
2 COUNTY GRAND JURY FOR MURDER ON JUAN CARLOS CRUZ ESTRADA.

3 THE VICTIM OF THIS MURDER IS MS. ADA TORUCLO. AND
4 PRESENT TODAY IN THE COURTROOM IS MS. ESMIRNA SECUNDINO
5 (PHONETIC), THE VICTIM'S SISTER.

6 FOR A FACTUAL BASIS, YOUR HONOR. CHRONOLOGICALLY,
7 MS. TORUCLO AND ESTRADA WERE MARRIED FOR APPROXIMATELY 2
8 AND A HALF YEARS AND SEPARATED SOME TIME EARLY IN 2008.

9 MR. ESTRADA SHARED A SECRET WITH THE VICTIM THAT HE
10 HAD, WHICH WAS THAT HE HAD KILLED HIS WIFE IN MEXICO BACK
11 IN 2004 AND WAS WANTED IN MEXICO FOR THE MURDER OF HIS
12 FORMER WIFE BACK IN 2004.

13 MR. ESTRADA AFTER THE SEPARATION BECAME SCARED THAT
14 MS. TORUCLO WOULD TELL ANYONE ABOUT HIS SECRET, AND ALSO HE
15 WAS SOMEWHAT JEALOUS OF THE NEW BOY FRIEND.

16 ON FRIDAY, MAY 23, 2008, MS. TORUCLO AND MR. ESTRADA
17 SPOKE TOGETHER. AND THEY MADE SOME PLANS ON GETTING BACK
18 TOGETHER, POSSIBLY EVEN MOVING TO MEXICO TOGETHER.
19 HOWEVER, MS. TORUCLO CHANGED HER MIND, SAID THAT SHE WANTED
20 TO STAY IN THE UNITED STATES WITH HER NEW -- WITH HER NEW
21 THEN BOY FRIEND.

22 IT WAS AT THAT TIME THAT MR. ESTRADA BEGAN TO PLAN TO
23 KILL MS. TORUCLO. HE BEGAN THAT PLAN ON MAY THE 26TH,
24 2008. HE ENLISTED MR. JAVIER ROSAS. AND IN EXCHANGE, MR.
25 ROSAS WAS TO GET \$300, AND ULTIMATELY GOT CAR SPEAKERS AND

1 A SOUND SYSTEM IN RETURN FOR HIS AID IN THIS MURDER.

2 BOTH DEFENDANTS AND THE ADA VICTIM LEFT CHARLOTTE ON
3 MAY 29TH, 2008 IN THE MID AFTERNOON. THEY HAD GIVEN THE
4 VICTIM A LIE THAT THEY WERE GOING ON A DRUG RUN TO SOUTH
5 CAROLINA, AND ASKED FOR HER ASSISTANCE. AND IN RETURN, SHE
6 WOULD RECEIVE \$3,000. SHE AGREED TO DO SO.

7 THE COURT: WHAT WAS THE DATE OF THAT?

8 MR. DERIEG: MAY 29, 2008.

9 THE COURT: OKAY.

10 MR. DERIEG: THE ROUTE THEY TOOK DOWN TO SOUTH
11 CAROLINA WAS THEY WENT SOUTHBOUND ON I-77. THEY TOOK EXIT
12 55 OFF OF I-77, WHICH IS THE CHESTER/GREAT FALLS EXIT.
13 THEY DROVE SOUTH ON SR-97 TOWARDS LIBERTY HILL FOR
14 APPROXIMATELY 14 MILES. THEY TURNED LEFT ONTO KELLY ROAD.
15 AND SOME WAYS DOWN KELLY ROAD, MR. ROSAS, WHO WAS DRIVING
16 THE VEHICLE, LET MR. ESTRADA AND MS. TORUCLO OUT OF THE CAR
17 AND THEY WENT INTO THE WOODS. MR. ROSAS LEFT UNDER THE
18 GUISE OF GOING TO MEET THE DRUG DEALERS. HE WOULD RETURN
19 APPROXIMATELY 5 TO 10 MINUTES LATER.

20 WHILE IN THE WOODS OFF OF KELLY ROAD HERE IN KERSHAW
21 COUNTY, THE DEFENDANT CONFRONTED THE VICTIM -- MR. ESTRADA
22 CONFRONTED MS. TORUCLO ABOUT WHETHER OR NOT SHE WAS GOING
23 TO TELL ANYONE ABOUT HIS SECRET FROM MEXICO.

24 THE COURT: THEY WERE STILL MARRIED?

25 MR. DERIEG: THEY WERE SEPARATED.

1 THE COURT: SEPARATED?

2 MR. DERIEG: YES, SIR. THEY SEPARATED EARLY 2008,
3 SOME TIME IN FEBRUARY.

4 MS. TORUCLO TOLD MR. ESTRADA THAT NOT ONLY WAS SHE
5 GOING TO TELL THE POLICE OF HIS SECRET, BUT THAT SHE HAD
6 ALREADY TOLD HER THEN BOY FRIEND, A MAN NAMED MR. NIEVES,
7 N-I-E-V-E-S.

8 AT THIS POINT MR. ROSAS HAD RETURNED. MR. ESTRADA
9 PUNCHED MS. TORUCLO IN THE FACE, KNOCKING HER OVER
10 BACKWARDS. BOTH HER MOUTH AND NOSE WERE BLOODY. MR. ROSAS
11 GRABS THE VICTIM BY HER FACE AND TRIED TO TAPE HER MOUTH
12 SHUT, HOWEVER, WAS UNABLE TO DO SO DUE TO ALL THE BLOOD.
13 THEREFORE, HE HELD HIS HAND OVER HER FACE AND MOUTH. AND
14 MR. ESTRADA PULLED OUT A 6 INCH KITCHEN KNIFE WITH A WOODEN
15 HANDLE THAT HE HAD BROUGHT WITH HIM AND PROCEEDED TO STAB
16 THE VICTIM 5 TO 6 TIMES IN THE CHEST.

17 AT THAT POINT, YOUR HONOR, THEY -- BOTH DEFENDANTS
18 PLACED MS. TORUCLO'S BODY IN THE TRUNK OF THE RED FORD
19 ESCAPE THAT THEY WERE DRIVING, WHICH HAPPENED TO BE THE
20 VICTIM'S CAR. THE BODY WAS PLACED IN THE BACK OF THE
21 ESCAPE.

22 THE VICTIM'S CLOTHES WERE TAKEN OFF AND USED TO WIPE
23 HER BLOOD OFF OF BOTH DEFENDANTS.

24 THEY PROCEEDED TO LEAVE KELLY ROAD AND DRIVE BACK
25 NORTH ON 97. THEY STOPPED AT A STORE, WHICH MR. ROSAS WENT

1 AND BOUGHT TWO NEW TEE SHIRTS FOR EACH OF THE DEFENDANTS TO
2 CHANGE INTO AND TWO BLACK PLASTIC BAGS.

3 AFTER THAT THEY PROCEEDED TO A NEARBY GAS STATION
4 WHERE IT IS ALLEGED THAT THEY BOUGHT SOME CHICKEN WINGS AND
5 SAT AND ATE CHICKEN WINGS IN THE CAR WITH MS. TORUCLO'S
6 DEAD BODY IN THE BACK OF THE CAR. AFTER THEY ATE, THEY
7 PROCEEDED BACK NORTH UP SR-97, CROSSING INTO LANCASTER
8 COUNTY.

9 MR. ROSAS WAS DRIVING AT THIS POINT. AND IT'S ALSO
10 ALLEGED THAT DURING THIS DRIVE, MR. ESTRADA CLIMBED INTO
11 THE BACK SEAT WHERE THE BODY -- WHERE THE DEAD BODY OF MS.
12 TORUCLO WAS AND HAD SEX WITH HER, STATING THAT HE JUST HAD
13 TO HAVE HER ONE LAST TIME BECAUSE SHE WAS THAT GOOD.

14 THEY PROCEEDED ACROSS THE LANCASTER COUNTY LINE FOR
15 ABOUT A MILE AND A HALF. THEY TURNED ONTO A SMALL DIRT
16 ROAD, GREEN ROAD. AND ABOUT A MILE DOWN GREEN ROAD THEY
17 CAME TO WHAT ONE OF THEM DESCRIBED AS A CANAL, ONE HAS
18 DESCRIBED AS A DITCH, AND AT WHICH POINT THEY STOPPED AND
19 PUT THE BODY OF MS. TORUCLO INTO THAT DITCH. THEY TOOK HER
20 CLOTHES, THEIR 2 BLOODY TEE SHIRTS, AND THE MURDER WEAPON,
21 THE KNIFE, AND PUT THAT INTO ONE OF THE PLASTIC BAGS AND
22 ADDITIONALLY THREW THAT INTO THE DITCH OR THE CANAL.

23 YOUR HONOR, I WOULD HAND UP TO THE COURT AT THIS
24 POINT A PICTURE OF WHERE THE BODY WAS FOUND IN LANCASTER
25 COUNTY OFF OF GREEN ROAD.

1 THE COURT: OKAY.

2 MR. DERIEG: ADDITIONALLY, YOUR HONOR, BESIDES THE
3 ITEMS THAT I'VE LISTED, ONE OF THE CARPET MATS FROM THAT
4 FORD ESCAPE WAS ALSO THROWN INTO THE DITCH AS IT WAS
5 COVERED IN THE VICTIM'S BLOOD.

6 INTERPRETER: I'M SORRY. WHAT WAS INCLUDED WITH
7 THAT?

8 MR. DERIEG: THE FLOOR MAT.

9 INTERPRETER: OKAY.

10 MR. DERIEG: MS. TORUCLO WAS FIRST REPORTED MISSING
11 BY HER COUSIN, ANESTEY (PHONETIC) HERNANDEZ IN EARLY JUNE
12 OF 2008.

13 AN INVESTIGATION BY THE CHARLOTTE MECKLENBURG POLICE
14 DEPARTMENT INTO A MISSING PERSON OF ADA TORUCLO WAS THEN
15 CONDUCTED.

16 YOUR HONOR, ALL THREE -- BOTH DEFENDANTS AND THE
17 VICTIM ALL LIVED IN CHARLOTTE AT THIS POINT.

18 THROUGH ASSISTANCE OF FRIENDS AND FAMILY MEMBERS AND
19 WITH EMAILS AND CELL PHONE RECORDS, THE CHARLOTTE
20 MECKLENBURG POLICE DEPARTMENT WAS ABLE TO DEVELOP MR.
21 ESTRADA AS A SUSPECT.

22 HE INITIALLY ADMITTED -- WELL, FIRST HE WAS GOING BY
23 A NAME OF JUAN CASTIO (PHONETIC). EVENTUALLY HE ADMITTED
24 TO HIS LAST NAME BEING ESTRADA AND ADMITTED TO MURDERING
25 HIS EX-WIFE IN 2004 IN MEXICO, HOWEVER INITIALLY DENIED

1 INVOLVEMENT IN THE MURDER OF MS. TORUCLO.

2 AT THAT POINT HE WAS TAKEN BY ICE IMMIGRATION TO
3 ATLANTA SUBJECT TO BE DEPORTED.

4 ON JULY 3, 2008 MR. ESTRADA CONFESSED TO THE MURDER
5 OF MS. TORUCLO TO ICE AGENTS TO AVOID DEPORTATION BACK TO
6 MEXICO, TO AVOID STANDING TRIAL AND PUNISHMENT FOR THE
7 MURDER OF HIS EX-WIFE BACK IN 2004.

8 ON JULY 7TH CHARLOTTE MECKLENBURG POLICE DEPARTMENT
9 WAS ABLE TO OBTAIN AN EMAIL WRITTEN BY MR. ESTRADA FROM AN
10 ASSOCIATE TO MR. ESTRADA NAMED FRANCO FLORES. THIS EMAIL
11 WAS IN SPANISH, BUT IT WAS TRANSLATED BY DETECTIVE SANTIAGO
12 OF THE MECKLENBURG -- CHARLOTTE MECKLENBURG POLICE
13 DEPARTMENT AND IT READS: HELLO. I AM SO SORRY THAT ALL OF
14 THIS HAD TO FINISH LIKE THIS. I COULD NOT CONTROL MY
15 EMOTIONS. I ONLY WANT THAT THEY REMEMBER ME LIKE I WAS, A
16 SIMPLE PERSON WITH MANY DESIRES TO MOVE FORWARD.
17 UNFORTUNATELY, I MET WITH A WOMAN THAT ENDED MY DREAMS AND
18 MADE ME LOSE MY HEAD. SHE CAUSED A LOT OF DAMAGE TO MY
19 FEELINGS. SHE KNEW THAT I LOVED HER VERY MUCH. FOR THAT
20 REASON, SHE TOOK ADVANTAGE TO DO WHAT SHE DID TO ME. BUT
21 SHE PAID WITH HER LIFE. NOW I ALSO GIVE MINE BECAUSE I
22 LOVE HER SO MUCH THAT I CANNOT LIVE WITHOUT HER. PLEASE,
23 FRANCO, GIVE THIS LETTER TO WHOMEVER IT CONCERNS FRIDAY
24 JUNE 27TH, AND ASK THAT THEY LOOK FOR ME. I AM WITH HER IN
25 THE PLACE WHERE SHE DIED. PLEASE, ON FRIDAY JUNE 27TH.

1 TO THE CORRESPONDING AUTHORITIES, THE PLACE IS
 2 HIGHWAY 77, EXIT 55. YOU ENTER HIGHWAY 97 PAST THE DAM,
 3 THERE IS A RIGHT-HAND TURN ON THE WAY TO LIBERTY HILL.
 4 ABOUT 5 MINUTES FROM THE TURN THERE IS A DIRT ROAD ON THE
 5 LEFT-HAND SIDE.

6 AND AS YOU SAY, I AM CRAZY OR WAS CRAZY. DO NOT
 7 FORGET THAT FOR ME YOU ARE THE BEST. THANKS FOR THE
 8 SUPPORT THAT YOU, YEA YEA, AND SISTER GAVE ME. WHENEVER
 9 YOU NEED IT, A THOUSAND THANKS FROM ALL MY HEART.

10 AGAIN, THIS WAS GIVEN TO CHARLOTTE MECKLENBURG POLICE
 11 DEPARTMENT BY FRANCO FLORES ON JULY 27TH, 2008.

12 AFTER BEING EXTRADITED TO NORTH CAROLINA FROM ATLANTA
 13 BY IMMIGRATION, ON JULY THE 8TH, 2008 MR. ESTRADA GAVE A
 14 TAPED VIDEO CONFESSION TO DETECTIVE SANTIAGO AND DETECTIVE
 15 FLAGG OF THE CHARLOTTE MECKLENBURG POLICE DEPARTMENT.

16 IN THIS CONFESSION WERE MOST OF THE DETAILS THAT YOU
 17 HAVE HEARD TODAY, EXCLUDING THE -- EXCLUDING MR. ESTRADA
 18 GETTING IN THE BACK SEAT AND HAVING INTERCOURSE WITH THE
 19 VICTIM AFTER SHE HAD DIED.

20 IN THAT TAPED CONFESSION MR. ESTRADA NAMED MR. ROSAS
 21 AS HIS ACCOMPLICE.

22 ON JULY THE 9TH, 2008 MR. ROSAS WAS QUESTIONED BY
 23 CHARLOTTE MECKLENBURG POLICE DEPARTMENT. WHEN CONFRONTED
 24 BY MR. ESTRADA'S CONFESSION, MR. ROSAS ALSO CONFESSED. IT
 25 WAS AT THIS POINT IN THIS CONFESSION HE CONFIRMED THE OTHER

1 DETAILS OF THE TRIP AND OF THE ACTUAL MURDER AND OF THE
 2 DISPOSAL OF THE BODY. AND THIS IS WHEN IT WAS ADDED IN
 3 THAT MR. ESTRADA HAD INTERCOURSE WITH THE VICTIM AFTER SHE
 4 DIED.

5 MR. ROSAS TOOK CHARLOTTE MECKLENBURG POLICE
 6 DEPARTMENT TO BOTH THE GENERAL LOCATION ON KELLY ROAD WHERE
 7 THE MURDER OCCURRED, THOUGH HE COULD NOT SPECIFICALLY POINT
 8 TO THE EXACT SPOT, BUT HE DID SAY AND WAS CONFIRMED BY MR.
 9 ESTRADA THAT IT WAS AT THAT AREA HERE IN KERSHAW COUNTY.
 10 AND HE ALSO DIRECTED CHARLOTTE MECKLENBURG POLICE TO WHERE
 11 THE BODY AND THE PLASTIC BAG WITH THE CLOTHES AND THE
 12 CARPET AND THE KNIFE WERE LOCATED IN LANCASTER COUNTY.

13 AT THAT POINT CHARLOTTE MECKLENBURG POLICE DEPARTMENT
 14 CONTACTED THE LANCASTER SHERIFF'S DEPARTMENT, AS YOU SEE
 15 THERE WITH THE BODY. AND THOSE PICTURES WERE TAKEN BY THE
 16 LANCASTER COUNTY SHERIFF'S DEPARTMENT OF THE AREA WHERE THE
 17 BODY WAS FOUND.

18 CHARLOTTE MECKLENBURG POLICE DEPARTMENT ALSO
 19 CONTACTED THE KERSHAW COUNTY SHERIFF'S OFFICE. CAPTAIN
 20 TOMLEY, LIEUTENANT CRAWFORD, AND INVESTIGATOR PANOFOLK
 21 (PHONETIC) REGARDING THE MURDER LOCATION AND SHOWED KERSHAW
 22 COUNTY SHERIFF'S OFFICE WHERE THE MURDER LOCATION WAS.

23 AT THAT POINT CHARLOTTE MECKLENBURG POLICE DEPARTMENT
 24 TRANSFERRED CUSTODY OF MR. ESTRADA TO KERSHAW COUNTY
 25 SHERIFF'S DEPARTMENT. AND MR. ROSAS AT THAT POINT WAS

1 ARRESTED BY THE KERSHAW COUNTY SHERIFF'S DEPARTMENT FOR THE
2 MURDER OF MS. ADA TORUCLO.

3 THE COURT: WHEN WAS THAT?

4 MR. DERIEG: JULY 9, 2008.

5 THE COURT: OKAY.

6 MR. DERIEG: YOUR HONOR, I WOULD HAND UP THE MISSING
7 PERSON'S FLYER THAT WAS GENERATED BY THE CHARLOTTE
8 MECKLENBURG POLICE DEPARTMENT, WITH BOTH THE PICTURE OF THE
9 VICTIM, PICTURE OF MR. ESTRADA, AND THE RED FORD ESCAPE
10 THAT WAS DRIVEN DURING THE INCIDENT.

11 ADDITIONALLY, YOUR HONOR, I WOULD HAND UP THE PHOTOS
12 OF THE AUTOPSY DONE BY DR. JOEL SEXTON, WHO CONFIRMED THAT
13 MS. TORUCLO DIED FROM STAB WOUNDS TO THE CHEST.

14 THE COURT: HOW LONG AFTER THE -- HOW LONG HAD THE
15 BODY STAYED IN THE WOODS?

16 MR. DERIEG: APPROXIMATELY A MONTH AND A HALF IN THE
17 HEAT OF THE SUMMER.

18 THE COURT: JOEL SEXTON DID IT?

19 MR. DERIEG: YES, SIR. I'LL ALSO HAND UP A COPY OF
20 DR. SEXTON'S AUTOPSY REPORT.

21 THE COURT: OKAY.

22 MR. DERIEG: YOUR HONOR, BOTH THESE CHARGES WERE
23 SCHEDULED TO COME TO TRIAL TODAY. HOWEVER, BOTH DEFENDANTS
24 HAVE CHOSEN TO PLEAD GUILTY STRAIGHT UP TO MURDER. AT THE
25 APPROPRIATE TIME THE VICTIM MS. ADA TORUCLO'S SISTER

1 ESMIRNA SECUNDINO WOULD LIKE TO ADDRESS HIS HONOR ABOUT
2 MS. TORUCLO.

3 THE COURT: ALL RIGHT. MR. ROSAS, HAVE YOU LISTENED
4 TO WHAT THE SOLICITOR TOLD ME?

5 MR. ROSAS: (THROUGH INTERPRETER.) YES.

6 THE COURT: IS THAT WHAT HAPPENED?

7 MR. ROSAS: (THROUGH INTERPRETER.) YES.

8 THE COURT: MR. ESTRADA, HAVE YOU LISTENED TO WHAT
9 THE SOLICITOR TOLD ME?

10 MR. ESTRADA: YES, SIR.

11 THE COURT: IS THAT WHAT HAPPENED?

12 MR. ESTRADA: NOT REALLY, SIR. ACTUALLY, I WOULD ADD
13 SOMETHING ELSE, THAT WE COME ABOUT THREE TIMES TO SEE HER
14 -- I MEAN, HER REMAINS. AND BECAUSE I WANTED TO MAKE SURE
15 SHE WAS THERE. AND I TRIED -- AND I TRIED -- MY PLAN WAS I
16 TRY KILL MYSELF.

17 MR. RILEY: YOUR HONOR, THE MAJOR DISAGREEMENT THAT
18 MY CLIENT HAS WITH THE FACTS AS HAVE BEEN RELATED IS THE
19 ALLEGATION CONCERNING CLIMBING IN THE BACK OF THE VEHICLE
20 AFTER THE VICTIM HAD DIED; THE SOURCE OF THAT IS MR. ROSAS.

21 THE COURT: WELL ---

22 MR. RILEY: AND MY CLIENT ABSOLUTELY DENIES THAT.

23 THE COURT: ALL RIGHT.

24 MR. RILEY: THE OTHER THING WAS HE WAS 'ABOUT TO GET
25 INTO I'LL PRESENT TO THE COURT AT THE APPROPRIATE TIME.

1 THE COURT: I WANT TO KNOW IF HE ---

2 MR. RILEY: HE DOES NOT DISAGREE WITH ANY OF THE REST
3 OF IT.

4 THE COURT: IS THAT CORRECT, MR. ROSAS (SIC)?

5 MR. ESTRADA: YES, SIR.

6 THE COURT: I MEAN, MR. ESTRADA? YOU AGREE WITH THE
7 FACTS AS RELATE TO THE KILLING?

8 MR. ESTRADA: YEAH. I UNDERSTAND -- SAY IT AGAIN
9 PLEASE.

10 THE COURT: WHEN HE TOLD ME ABOUT THE KILLING, DO YOU
11 AGREE THAT THAT'S WHAT HAPPENED?

12 MR. ESTRADA: YES, SIR.

13 THE COURT: AND THAT YOU ARE RESPONSIBLE FOR THE
14 DEATH OF THIS LADY?

15 MR. ESTRADA: YES, SIR.

16 THE COURT: I FIND THE DECISIONS OF THE DEFENDANTS
17 JAVIER AGULAR ROSAS AND JUAN CARLOS CRUZ ESTRADA TO PLEAD
18 GUILTY TO BE FREELY, VOLUNTARILY, AND INTELLIGENTLY MADE.
19 THEY'VE HAD THE REPRESENTATION OF COMPETENT COUNSEL IN THE
20 PERSONS OF MR. KENDRICK AND MR. RILEY WITH WHOM THEY SAY
21 THEY ARE SATISFIED. I FIND A FACTUAL BASIS FOR THE PLEAS,
22 AND, THEREFORE, I WILL ACCEPT THEIR PLEAS.

23 MR. ROSAS, MR. ESTRADA, IF YOU DISAGREE WITH THE
24 SENTENCE I GIVE YOU OR THE PROCEDURE WE HAVE JUST
25 COMPLETED, YOU HAVE 10 DAYS FROM TODAY'S DATE WITHIN WHICH

1 TO FILE A NOTICE TO APPEAL. DO YOU UNDERSTAND?

2 MR. ROSAS: (THROUGH INTERPRETER.) YES.

3 MR. ESTRADA: I UNDERSTAND, SIR.

4 THE COURT: ALL RIGHT. WHO WOULD LIKE TO -- WELL,
5 LET ME ASK THE SOLICITOR, DO THEY HAVE ANY PRIOR RECORDS?

6 MR. DERIEG: YOUR HONOR, MR. ESTRADA.

7 THE COURT: HAVE YOU CONFIRMED WHAT YOU TOLD ME ABOUT
8 MEXICO?

9 MR. DERIEG: YES, SIR. THE VICTIM IN THAT CASE WAS A
10 LADY BY THE NAME OF MARIA VALADEZ, V-A-L-A-D-E-Z.

11 ADDITIONALLY, HERE IN THE UNITED STATES MR. ESTRADA HAD A
12 SIMPLE ASSAULT AND POSSESSION OF CONTROLLED SUBSTANCE IN
13 SAN DIEGO.

14 MR. ROSAS HAS THREE MISDEMEANOR TRAFFIC ARRESTS FROM
15 FLORIDA IN EARLY 2007. HOWEVER, I WAS UNABLE TO CONFIRM A
16 DISPOSITION ON THOSE THREE MISDEMEANOR TRAFFIC ARRESTS.

17 MR. RILEY: JUDGE, MR. ESTRADA HAS NEVER BEEN IN SAN
18 DIEGO. THAT, OBVIOUSLY, IS A MISTAKE.

19 THE COURT: ALL RIGHT. IT IS WHAT IT IS. MR. RILEY.

20 MR. RILEY: JUDGE, MR. ESTRADA, IS 40 YEARS OLD.
21 HE'S BEEN IN CUSTODY CONTINUOUSLY SINCE JULY THE 9TH OF
22 2008 ON THIS CHARGE.

23 THE COURT: BOTH WERE ARRESTED ON THE SAME DAY?

24 MR. RILEY: I BELIEVE SO, SIR, YES. MOVED TO THE
25 UNITED STATES IN 2004. PRIOR TO THAT IN MEXICO, HE MOSTLY

1 HAD EARNED A LIVING AS A WELDER AND METAL WORKER. MADE
2 METAL WINDOWS FOR HOUSES, THAT SORT OF THING.

3 AFTER HE MOVED TO UNITED STATES IN 2004, HE MADE USE
4 OF -- HE WORKED A COUPLE OF MONTHS IN A WELDING-TYPE
5 POSITION. BUT HE DECIDED TO MAKE USE OF HIS ABILITIES AS A
6 MUSICIAN. AND MOST OF THE TIME THAT HE LIVED IN THE
7 CHARLOTTE MECKLENBURG AREA, HE WORKED AND EARNED MONEY AS A
8 MUSICIAN.

9 WITH HIS FIRST WIFE IN MEXICO, HE WAS MARRIED TWICE
10 IN MEXICO. HE HAD THREE CHILDREN. HE HAS LOST CONTACT
11 WITH THEM. HE DOESN'T KNOW THEIR WHEREABOUTS, EXCEPT IN
12 THE MOST GENERAL WAY.

13 HE SERVED ABOUT 2 YEARS IN THE MEXICAN NAVY. AND I'M
14 NOT SURE OF THE EQUIVALENT RANK, BUT HE -- AND, OF COURSE,
15 HERE THE RANK SERGEANT WOULD BE AN ARMY RANK. BUT HE SAID
16 IT WAS ABOUT THE EQUIVALENT OF A SERGEANT WHEN HE LEFT THE
17 NAVY.

18 HE'S A HIGH SCHOOL GRADUATE OR GRADUATED FROM A
19 SCHOOL IN MEXICO THAT WE WOULD CONSIDER THE EQUIVALENT OF
20 HIGH SCHOOL.

21 SINCE HE HAS BEEN INCARCERATED FOR, WELL, NOW, I
22 GUESS IT'S A YEAR AND 9 MONTHS, HE'S BEEN INCARCERATED.
23 HE'S TAUGHT HIMSELF ENGLISH, BECAUSE HE WAS NOT THE LEAST
24 BIT FLUENT WHEN I FIRST MET HIM, DIDN'T SPEAK ANY ENGLISH
25 AT ALL.

1 HE'S TAUGHT HIMSELF TO PLAY CHESS, AND HE BEATS MUCH
2 MORE EXPERIENCED PLAYERS THAN HE IS.

3 HE'S TURNED HIS TALENTS IN THE AREA OF MUSIC TO THE
4 PURSUIT OF SONG WRITER. HE'S WRITTEN SOME SONGS, WHICH IS
5 HIS HOPE ULTIMATELY SOME DAY PERHAPS, MIGHT BE PUBLISHED.

6 AND HE HAS ALSO TAUGHT HIMSELF DRAWING. HE DOES
7 SKETCHING AND DRAWING DURING HIS TIME IN JAIL.

8 HAS SERVED AS A TRANSLATOR.

9 PERSONNEL AT THE DETENTION CENTER TELL ME THAT HE HAS
10 BEEN A MODEL INMATE, HAS NEVER GIVEN ANYONE DOWN THERE ANY
11 DIFFICULTIES OR PROBLEMS, HAS BEEN POLITE, COURTEOUS,
12 GENTLEMANLY, AND COOPERATIVE WITH EVERYONE.

13 HE ADMITTED, AS YOUR HONOR HAS ALREADY HEARD, HE
14 ADMITTED HIS GUILT TO THIS CRIME OPENLY AND CANDIDLY, NEVER
15 HELD ANYTHING BACK.

16 SOMEWHERE AROUND THE BEGINNING OF 2008 -- AND MR.
17 ESTRADA HAD STARTED TO EXPLAIN THIS TO YOUR HONOR. WHEN HE
18 AND MS. TORUCLO WERE SORT OF EITHER SEPARATED OR ABOUT TO
19 SEPARATE, HE WENT TO HER -- WHERE SHE WAS LIVING, AND SAW
20 AN UNFAMILIAR MOTOR VEHICLE, LOOKED IN ONE OF THE WINDOWS,
21 AND SAW MS. TORUCLO IN BED ENGAGED IN INTERCOURSE WITH
22 ANOTHER MAN. THIS WAS, HE SAID, THE THIRD TIME THAT HE
23 KNEW OF HER HAVING BEEN UNFAITHFUL TO HIM.

24 HE WENT HOME AND HE TELLS ME THAT IF HE HAD HAD A
25 GUN, HE WOULD HAVE COMMITTED SUICIDE. HE DID NOT HAVE A

1 GUN. HE TOOK SEVERAL HANDFULS OF PILLS. I DON'T KNOW
2 WHAT. HE DOESN'T KNOW WHAT. BUT HE HAD BASICALLY
3 ATTEMPTED SUICIDE, WHICH WAS UNSUCCESSFUL.

4 HE WAS COMPLETELY DEVASTATED BY WHAT HE HAD WITNESSED
5 WITH HIS OWN EYES. COULDN'T BELIEVE THAT SHE HAD TREATED
6 HIM THAT WAY, AND THE EVENTS THAT HAVE BEEN RELATED TO THE
7 COURT FOLLOWED.

8 HE IS DEEPLY SORRY FOR WHAT HE HAS DONE. HE KNOWS
9 THAT HE'S TAKEN A HUMAN LIFE AND WIPED IT OFF THE FACE OF
10 THE EARTH, WISHES -- AS DO SO MANY PEOPLE WHO HAVE DONE
11 REGRETTABLE THINGS -- WISHES THAT HE COULD TURN BACK TIME.

12 I WOULD URGE THE COURT IN LIGHT OF THE FACT THAT HE
13 IS SPARING THE STATE AND THE COURT THE EXPENSE OF A TRIAL,
14 HE IS SPARING THE RELATIVES OF THE VICTIM THE ANGUISH AND
15 THE ANXIETY OF A TRIAL, HE IS STANDING BEFORE YOUR HONOR
16 ADMITTING HIS GUILT, WHICH HE HAS BASICALLY DONE EVER SINCE
17 THE POLICE CAUGHT HIM. I WOULD ASK YOUR HONOR TO BE AS
18 LENIENT AS POSSIBLE.

19 HE HAS MADE GOOD USE OF HIS TIME SINCE HE'S BEEN
20 INCARCERATED. HE HAS -- HE'S AN INTELLIGENT MAN, AND HE
21 HAS HIGH AMBITIONS. OF COURSE, HE REALIZES THAT UNDER THE
22 BEST POSSIBLE OUTCOME FROM THIS PROCEEDING, HE'S GOING TO
23 BE INCARCERATED FOR A SIGNIFICANT PORTION OF HIS REMAINING
24 LIFE. BUT HE HAS HOPES OF MAKING GOOD USE OF THAT TIME AND
25 NOT WASTING IT.

1 AND I ALSO BELIEVE, JUDGE, THAT MR. RIVIERA (SIC)
2 MIGHT WISH TO ADDRESS THE COURT.

3 THE COURT: MR. ESTRADA, GO AHEAD.

4 MR. RILEY: IF YOU WANT TO SAY ANYTHING.

5 MR. ESTRADA: YEAH. I TRIED -- I IN JAIL ABOUT 28
6 MONTHS. MY ATTORNEY SAY I NOT WASTING MY TIME. THIS IS --
7 IT'S KIND OF LIKE PLAN B, BECAUSE THE MURDER WAS MY PLAN A.
8 SO I HAVE MY PLAN B BE SUCCESSFUL. I'VE BEEN WRITING SONGS
9 -- ENGLISH SONGS AND SPANISH SONGS. AND AM STILL LEARNING
10 ENGLISH. I TRIED FINISH MY GED BOOK WHERE EVER IN PRISON
11 OR RIGHT THERE IN JAIL TO FINISH MY ENGLISH. I UNDERSTAND
12 MY ENGLISH IS NOT COMPLETE -- IS NOT FULL. EVERYTHING I --
13 I HAVE BEEN THINKING IS LEARN -- LEARN ABOUT WHAT -- WHAT I
14 DID. AND I AM -- I'M SORRY -- SO SORRY FOR THIS. MOST
15 RECENT I CAME BACK AND CONFESS IS BECAUSE HER FAMILY.
16 COMPLETELY, I STILL LOVE HER. AND ALL I CAN SAY IS I'M
17 SORRY FOR HER FAMILY. IF I COULD, I WOULD GO BACK IN TIME
18 -- I GUESS -- I -- I WILL STOP THIS. BUT NOW I'M PREPARING
19 FOR WHATEVER YOU GIVE ME, 30 YEARS, 15 YEARS IN PRISON.
20 I'M GOING TO TAKE ADVANTAGE FOR THIS -- THIS TIME. THANK
21 YOU, YOUR HONOR, FOR HEARING ME.

22 THE COURT: ALL RIGHT. MR. KENDRICK.

23 MR. KENDRICK: THANK YOU, YOUR HONOR. YOUR HONOR, MY
24 CLIENT, MR. ROSAS, IS 31 YEARS OLD.

25 THE COURT: SLOW DOWN. KEEP IT SLOW.

1 MR. KENDRICK: HE'S ORIGINALLY FROM MEXICO WHERE HE
2 GREW UP WAS ABOUT 2 HOURS FROM MEXICO CITY.

3 YOUR HONOR, MY CLIENT TELLS ME HE JUST WENT TO
4 PRIMARY SCHOOL IN MEXICO AND QUIT AROUND THE TIME OF I
5 GUESS WOULD BE THE SECOND GRADE TO GO TO WORK WITH HIS
6 FATHER IN THE FIELDS. HE TELLS ME THAT HE HAD A HAPPY
7 CHILDHOOD. HE HAD A VERY SMALL FAMILY. ABOUT THAT TIME
8 THAT HE QUIT SCHOOL, HE HAD TO WORK IN THE FIELDS SO THE
9 YOUNGER SIBLINGS WOULD HAVE THE OPPORTUNITY TO GO TO
10 SCHOOL.

11 YOUR HONOR, HE TELLS ME THAT THOSE SIBLINGS DID IN
12 FACT HAVE THE OPPORTUNITY TO FINISH ALL THE WAY THROUGH
13 WHAT WE WOULD CALL HIGH SCHOOL. AND HE MADE A GREAT
14 SACRIFICE FOR THEM.

15 HE WAS MARRIED, YOUR HONOR, AND CAME HERE TO AMERICA
16 IN THE HOPES HE COULD ADVANCE HIS LIFE TO DO BETTER. HE
17 ENDED UP IN CHARLOTTE. MY UNDERSTANDING, HE MET MR.
18 ESTRADA AT A BAR THAT THEY BOTH WORKED IN. I DON'T THINK
19 HE REALLY KNEW MR. ESTRADA VERY WELL. MR. ESTRADA WAS A
20 LITTLE BIT OLDER THAN HIM.

21 YOUR HONOR, I SPENT A GOOD BIT OF TIME TALKING WITH
22 MY CLIENT ABOUT WHAT HAPPENED BECAUSE HE DOESN'T SEEM THE
23 TYPE TO COMMIT A CRIME LIKE THIS. AND I'VE ASKED HIM WHAT
24 THE REASON WAS. AND I DON'T THINK HE REALLY HAS AN
25 EXPLANATION. I THINK THERE WAS A PART OF HIM THAT REALLY

1 DIDN'T THINK THAT THIS WAS GOING TO HAPPEN. HE CERTAINLY
2 DIDN'T HAVE ANY MOTIVE FOR THIS. IT'S MY UNDERSTANDING HE
3 DIDN'T HAVE ANY IDEA WHO THIS WOMAN WAS AND REALLY HAD NO
4 IL-WILL TOWARDS HER. HE IS CERTAINLY SORRY TO BE HERE.

5 ONE OF THE THINGS I'VE EXPLAINED TO HIM EXTENSIVELY
6 IS THE CONCEPT OF THE HAND OF ONE IS THE HAND OF ALL. AND
7 I THINK THAT WHILE THERE MIGHT HAVE BEEN SOME SLIGHT
8 DIFFERENCES IN HIS OPINION WHEN THE SOLICITOR WENT OVER THE
9 FACTS, HE AGREES WITH ME THAT BY BEING PRESENT, TAKING PART
10 IN BRINGING HER DOWN THERE TO THE SCENE AND HELPING THE
11 OPPORTUNITY ARISE FOR HER MURDER, THAT OUR LAW CONSIDERS
12 HIM GUILTY.

13 HE'S VERY SORRY HE FINDS HIMSELF HERE, BECAUSE HE'S
14 WASTED THE REST OF HIS LIFE. HE'S NEVER BEEN IN TROUBLE
15 BEFORE, YOUR HONOR. HE TELLS ME THAT THE THREE TRAFFIC
16 TICKETS IN FLORIDA WERE NOT HIM. I DON'T THINK HE'S EVER
17 BEEN TO FLORIDA, BUT I DON'T KNOW IF THE COURT WOULD EVEN
18 TAKE THAT MUCH INTO ACCOUNT. IT'S NOT MUCH OF A RECORD AT
19 ALL.

20 YOUR HONOR, I THINK BASED ON HIS ROLE IN THIS, THAT
21 EVEN THOUGH HE IS GUILTY, HE WAS CLEARLY ALONG. HE DIDN'T
22 HAVE ANY REAL PART IN THE PLANNING OF THIS, HAS NO PRIOR
23 CRIMINAL RECORD AT ALL. HE HAS A VERY MINIMUM EDUCATION.
24 I THINK 30 YEARS WOULD BE AN APPROPRIATE SENTENCE. EVEN
25 THOUGH THAT'S THE LOWEST SENTENCE, IT'S OBVIOUSLY EXTREMELY

1 HARSH. HE'D BE 60 YEARS OLD.

2 I'VE SPOKE WITH HIM A LITTLE BIT ABOUT IT, YOUR
3 HONOR. I THINK HIS EDUCATION LEVEL MAKES IT DIFFICULT FOR
4 HIM TO LEARN MUCH OF ANYTHING EVEN IN THE JAIL. BUT HE DID
5 ASK ME IF WHILE IN THE DEPARTMENT OF CORRECTIONS IF HE
6 COULD TAKE ADVANTAGE OF ANY PROGRAMS THERE. SO I THINK
7 OVER THIS PERIOD OF A LONG SENTENCE, HE'LL HAVE THE
8 OPPORTUNITY TO TRY TO BETTER HIMSELF AND ADD TO HIS
9 EDUCATION.

10 HE'S AWARE, YOUR HONOR, THAT EVEN IF THE COURT IS
11 MOST MERCIFUL, THAT HIS LIFE HAS EFFECTIVELY ENDED HERE.
12 BUT HE DOES HAVE A CHANCE TO COME OUT DOWN THE ROAD AND
13 HAVE SOME YEARS LEFT.

14 HE'S ASKED ME TO PLEAD TO YOU THAT HE GETS THAT
15 MINIMUM SENTENCE.

16 THE COURT: DOES MR. ROSAS HAVE ANYTHING HE WISHES TO
17 SAY?

18 MR. ROSAS: (THROUGH INTERPRETER.) NO.

19 THE COURT: ALL RIGHT. SOLICITOR, ANYBODY WANT TO
20 SPEAK ON BEHALF OF THE FAMILY?

21 MR. DERIEG: YES, YOUR HONOR. THE VICTIM'S SISTER,
22 ESMIRNA SECUNDINO IS HERE AND WOULD LIKE TO SPEAK ON HER
23 BEHALF.

24 ESMIRNA SECUNDINO: HELLO, YOUR HONOR.

25 THE COURT: GOOD AFTERNOON.

1 ESMIRNA SECUNDINO: I WOULD LIKE TO SAY THAT WHEN MY
2 SISTER WAS ALIVE, WE ALMOST SPOKE EVERY SINGLE DAY. AFTER
3 THIS HAPPEN, SOME TIME I FORGOT THAT SHE'S NOT WITH US ANY
4 MORE AND I PICK THE PHONE TO TRY TO CALL HER. AND WHATEVER
5 THAT SHE DID WRONG, SHE NEVER GOING TO HAVE THE OPPORTUNITY
6 TO MAKE HER TIME BECAUSE WHAT HAPPENED. AND THE WORST PART
7 IS HER TWO CHILDRENS WHO ARE 8 AND ALMOST 9 -- I'M SORRY,
8 7 AND ALMOST 9, THEY'RE NEVER, NEVER GOING TO HAVE THE
9 OPPORTUNITY TO MAKE THEIR TIME WITH THEIR MOM, NEVER AGAIN.

10 THE COURT: WHERE ARE THE CHILDREN?

11 ESMIRNA SECUNDINO: MEXICO WITH MY MOTHER. THEY ASK
12 WHY THEIR MOM IS NOT -- NEVER GOING TO COME BACK WITH THEM,
13 AND THAT IS THE QUESTION THAT IS NEVER GOING TO BE
14 ANSWERED. NEVER GOING TO BE A ANSWER FOR ME TO TELL THEM
15 WHY.

16 SOMETIMES I TRY TO UNDERSTAND. I DON'T THINK I WILL
17 BE ABLE TO UNDERSTAND.

18 THE COURT: THE CHILDREN, IS THIS THEIR FATHER?

19 SISTER: NO. NO. AND I'M GLAD. THAT'S ALL I HAVE
20 TO TELL YOU, THAT I MISS HER. I MISS HER A LOT. AND I
21 WOULD NEVER, NEVER GOING TO MAKE MY TIME WITH HER, NEVER.
22 YOU NO HAVE AN IDEA HOW I FEEL TO HAVE TO DRIVE OVER HERE.
23 AND I KNOW FOR SURE THAT I'M NOT GOING TO SEE HER BECAUSE
24 OF THEM. SHE NEVER GOING TO HAVE HER OPPORTUNITY TO MAKE
25 HER TIME, NEVER AGAIN. NONE OF US -- BECAUSE WE LOVE HER

1 AND WE MISS HER, AND WE WISH THAT SHE STILL ALIVE; THAT'S
2 ALL I HAVE TO SAY.

3 THE COURT: THANK YOU, MA'AM.

4 SISTER: THANK YOU.

5 MR. DERIEG: YOUR HONOR, I WOULD LIKE TO THANK MS.

6 SECUNDINO FOR BEING HERE. SHE DROVE 18 HOURS -- SHE DROVE
7 18 HOURS FROM HOUSTON, TEXAS TO BE HERE.

8 AND WITH THAT, THE STATE WOULD HAVE NOTHING FURTHER.

9 THE COURT: ALL RIGHT. THANK YOU. ANYTHING FURTHER,
10 MR. RILEY?

11 MR. RILEY: NO, SIR, YOUR HONOR.

12 THE COURT: ANYTHING FURTHER, MR. KENDRICK?

13 MR. KENDRICK: NO, YOUR HONOR.

14 THE COURT: ALL RIGHT. MR. ROSAS, JAVIER ROSAS, THE
15 SENTENCE OF THE COURT IS YOU BE COMMITTED TO THE STATE
16 DEPARTMENT OF CORRECTIONS FOR A PERIOD OF 30 YEARS, GIVE
17 YOU CREDIT FOR TIME SERVED SINCE JULY 9, 2008.

18 MR. JUAN ESTRADA, THE SENTENCE OF THE COURT IS YOU BE
19 COMMITTED TO THE STATE DEPARTMENT OF CORRECTIONS FOR A
20 PERIOD OF 30 YEARS, GIVE YOU CREDIT FOR TIME SERVED FROM
21 JULY 9, 2008.

22 GOOD LUCK TO YOU GENTLEMEN.

23 MR. RILEY: THANK YOU, JUDGE.

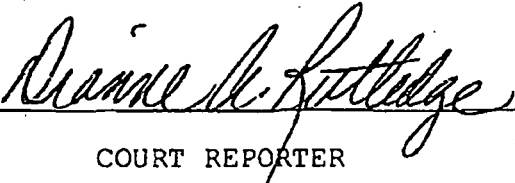
24 MR. DERIEG: THANK YOU, YOUR HONOR.

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

1 I, THE UNDERSIGNED DIANNE A. RUTLEDGE, OFFICIAL COURT
 2 REPORTER FOR THE FIFTH JUDICIAL CIRCUIT OF THE STATE OF
 3 SOUTH CAROLINA, DO HEREBY CERTIFY THAT THE FOREGOING IS A
 4 TRUE, ACCURATE, AND COMPLETE TRANSCRIPT OF THE RECORD OF
 5 THE PROCEEDINGS HAD AND EVIDENCE INTRODUCED IN THE GUILTY
 6 PLEA OF THE CAPTIONED CASES, RELATIVE TO APPEAL, IN THE
 7 CIRCUIT COURT FOR KERSHAW COUNTY, SOUTH CAROLINA ON THE
 8 26TH DAY OF APRIL 2010.

9 I DO FURTHER CERTIFY THAT I AM NEITHER OF KIN,
 10 COUNSEL, NOR INTEREST TO ANY PARTY HERETO.

11 DECEMBER 9, 2010

12
 13 
 14 _____
 15 COURT REPORTER

16
 17
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20104666

ATTORNEY GENERAL'S OFFICE

RECEIVED 15 33 10

ADDRESS: _____

FILE _____

HAVE _____

ROUTE TO _____

ORDER _____

FOR RECORDS _____

OTHER _____

(c) N/A

5. The date upon which sentence was imposed and the terms of the sentence:

(a) April 26, 2010 ; 30 years

(b) N/A

(c) N/A

6. Check whether a finding of guilty was made:

(a) after a plea of guilty

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

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

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

No

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

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

i. N/A

ii. N/A

iii. N/A

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

i. N/A

ii. N/A

iii. N/A

(c) the date of each such result:

i. N/A

ii. N/A

iii. N/A

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

i. N/A

ii. N/A

iii. N/A

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

(a) Ineffective assistance of counsel

(b) N/A

FILED
U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
OCT 27 AM 11:53
SAN JOSE, CALIF.

10-27-10 11:53 AM

(c) N/A

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) Writ issued at later date

(c) Writ issued at later date

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 conjoined Memorandum...; 811

(b) Writ issued at later date

(c) Writ issued at later date

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

(a) any petition in a State Court under South Carolina Law? N/A

(b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? N/A

(c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? N/A

(d) any other petitions, motions or applications in this or any other Court? N/A

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

(a) the specific nature thereof:

i. N/A

ii. N/A

iii. N/A

iv. N/A

(b) the name and location of the Court in which each was filed:

i. N/A

ii. N/A

iii. N/A

iv. N/A

2010 OCT 27 AM 11:53
FBI - CHARLOTTE
COMMUNICATIONS SECTION

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) Ineffective assistance of counsel is a cognizable PCR claim.

(b) N/A

(c) N/A

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

(a) your arraignment and plea? yes

(b) your trial, if any? N/A

(c) your sentencing? yes

(d) your appeal, if any, from the judgment of conviction or the imposition of sentence? N/A

(e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed?

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. Mr. Joshua Snow Kendrick, Attorney at Law,
P.O. Box 886 Columbia, SC 29202

ii. N/A

iii. N/A

(b) the proceedings at which each such attorney represented you:

i. Plea, sentencing, pretrial motions.

ii. N/A

iii. N/A

FILED IN COURT
CLERK OF COURT
JERRY S.C.

2010 OCT 27 AM 11:54

FILED FOR RECORD

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

Vacate the judgement of the plea court; Reclassify and/or Resentence the Applicant's conviction; and further relief as this Court may deem to be just and proper.

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

No.

STATE OF SOUTH CAROLINA)
County of Kershaw)

VERIFICATION

RECORDED
2010 OCT 27 AM 11:54
CLERK OF COURT
SOUTH CAROLINA

I, Javier Aquilar Rosas # 340559, 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.

[Signature]

SWORN to and subscribed before me this 22nd day of October, 2010.

Ludrean Bryant (L.S.)
Notary Public

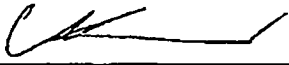
My Commission Expires: May 26, 2020

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

5 OCT 27 AM 11:54
CLERK OF COURT
SHAW COUNTY

I, Javier Aguilar Rosa, #1: 340559, 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.



Applicant

SWORN or affirmed to and subscribed before me this
22nd day of October, 2010.



Notary Public

My Commission Expires: May 26, 2020

STATE OF SOUTH CAROLINA COUNTY OF KERSHAW
In The Court of Common Pleas

Javier Aguilar Rosas, #1340559,
Applicant,
vs.
The State of South Carolina,
Respondent.

MEMORANDUM SUPPORTING
APPLICATION FOR POST-
CONVICTION RELIEF

2010 OCT 27 AM 11:55
RECORDED
INDEXED

CASE No. : 2010-CP-2011-84

THE ABOVE CAPTIONED APPLICANT supplies the instant Memorandum to support the conjoined Application for Post-Conviction Relief ("PCR" hereinafter), for brevity purposes, on section(s) / question(s) so designated below:

§ 11, PCR Application

(a) 1. Counsel was ineffective for advising defendant to plead guilty, where counsel's advice was not within the range of competence demanded in criminal cases for failure to advise the defendant of affirmative defenses to the crime charged, i.e., illegally obtained evidence, statements, and prosecutions burden of proof, that if defendant was properly advised of defenses that he would otherwise not have pleaded guilty (see Hill v. Lockhart, 106 S.Ct. 366) Counsel's conversations with defendant did not lead to the defendant making an intelligent and knowing plea because the majority of counsel's advice was interlarding to the fact that he could receive a lot of time (See Dover v. St. 405 S.E. 2d 391)

Also the plea inside of itself was invalid because the record does not clearly establish that the defendant was properly advised of his privilege against compulsory self-incrimination, the right to trial by jury, and the right to confront one's accusers, and the duty of this requirement lies within the officers of the courts to each and every one of the aforementioned constitutional rights (See Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709 (1969); State v. Patterson, 275 S.C. 319, 295 S.E. 2d 264 (1982)).

(a) 2. Ineffectiveness of counsel invalidated guilty plea for advising the defendant to plead guilty without informing the defendant that if he went to trial, he could have requested a jury charge on a lesser offense and might have been convicted of the lesser offense (See Kerrigan v State, 304 SC 501, 406 S.C. 2d 160; Watson v State, 287 SC 350, 338 S.E. 2d 636.)

(a) 3. Counsel was ineffective for advising defendant to plead guilty when evidence of guilt not overwhelming and defendant's statement was involuntary. Had the applicant elected to go to trial the involuntary statement would have been inadmissible under the Due Process Clause of 5th and 14th Amendments. Also the statements of the co-defendant, and defendant would have been Scrutinized in a Denno hearing to determine their voluntariness. Further, all waivers to counsel additionally would have had to meet the Zerbst knowing and intelligent waiver standard. Because of the susceptibilities of the defendants, their intelligence and education, no familiarity with the American criminal justice system, and coercive conduct of the police, the waivers to counsel in a custodial interrogation would have failed to meet the burden of the Zerbst standard. (See Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L. Ed. 2d 694 (1966)).

Respectfully Submitted,
JAVIER AGUILAR ROSAS
Javier Aguilar Rosas, #1340559
Lieber Correctional Institution
P.O. Box 205, Ridgeville, SC 29472

STATE OF SOUTH CAROLINA)	
)	IN THE COURT OF COMMON PLEAS
COUNTY OF KERSHAW)	
)	
ROSAS Javier A -)	2010CP2801184
# 00340559,)	
)	
Applicant,)	
)	
v.)	RETURN
)	
State of South Carolina,)	
)	
Respondent.)	
_____)	

The Respondent, making its Return to the application for post conviction relief (PCR) filed October 27, 2010, would respectfully show this Court:¹

I.

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Richland County Clerk of Court. The Applicant was represented by Joshua S Kendrick, Esquire. On April 26, 2010, the Applicant pled guilty and was sentenced by The Honorable G. Thomas

¹
<http://publicindex.sccourts.org/kershaw/publicindex/PCCaseDetails.aspx?County=28+&Casenum=2010CP2801184&CourtType=G&CaseType=Civil&CourtAgency=28002>

Cooper, Jr.. The Applicant had been indicted and/or pled guilty to the following:

Murder - (2008-GS-28-1448).²

<u>Offender Type</u>	Adult-straight Sentence
<u>Offense</u>	Murder
<u>Sentence Start Date</u>	07/09/2008
<u>Sentence Length</u>	30 YRS, 0 MOS, 0 DYS
<u>Admission Date</u>	04/29/2010
<u>Committing County</u>	Kershaw
<u>Location</u>	Lieber
<u>Projected Release Date</u>	07/02/2038
<u>Projected Parole Date</u>	Not Eligible
<u>Supervised Furlough Eligibility</u>	Not Eligible
<u>Sex Offender Registry</u>	No

II.

Attached herewith and incorporated herein are the records of the Richland County Clerk of Court regarding the subject conviction(s), the Applicant's records from the South Carolina Department of Corrections, and the guilty plea transcript. The Respondent reserves the right to amend this Return upon receipt of any relevant materials or submit an amended Return to reflect any amended allegations and/or to provide a more detailed procedural history.

III.

For the purposes of this Return, the Respondent interprets each of the Applicant's unspecified allegations to be claims that he received ineffective

² <https://sword.doc.state.sc.us/incarceratedInmateSearch/incarceratedInmateFaceSheet.do?id=00340559&youth=N&type=F>

assistance of counsel. The Respondent contends that the Applicant's trial counsel rendered adequate assistance and provided representation within the range of competence required by attorneys in criminal cases.

In a post-conviction relief action, the Applicant bears the burden of proving the allegations in their 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, 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. With respect to guilty plea counsel, the Applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed. 2d 203 (1985).

The Respondent submits that the Applicant cannot satisfy either 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, 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.

Each and every allegation contained within the application not hereinbefore either expressly admitted, qualified or explained is hereby denied. The Respondent therefore requests that this Court convene an evidentiary hearing solely on the issue of ineffective assistance of counsel. As to all other allegations, the Respondent moves for summary dismissal pursuant to S.C. Code Ann. § 17-27-70 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.

V.

WHEREFORE, having made its Return, the State requests that an evidentiary hearing be held. The Respondent will coordinate with the Applicant's attorney who is, according to the Respondent's file, Jeremy A. Thompson, Esquire regarding when the hearing should be set.³

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

BRIAN T. PETRANO
Assistant Attorney General

By: 
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
Telephone: (803) 734-3737
bpetrano@scag.gov

February 4, 2011

³ The current PCR Roster for the 5th Circuit is available at <http://www.scattorneygeneral.com/inside/pdf/5th.pdf>
State's Return - (2010CP2801184) – Applicant: ROSAS Javier A
Page 6 of 6

State of South Carolina)
)
 County of Kershaw)

In the Court of Common Pleas
 Fifth Judicial Circuit
 2010-CP-28-1184

Javier A. Rosas,)
)
 Applicant,)
)
 vs.)
)
 State of South Carolina,)
)
 Respondent.)
)
)
)

Transcript of Record

February 16, 2012
 Columbia, South Carolina

B E F O R E:

The Honorable Clifton B. Newman, Judge

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

Jeremy A. Thompson, Esquire
 Attorney for the Applicant

Rob A. Corney, Esquire, Assistant Attorney General
 Attorney for the Respondent

Also Present:
 Wilmer Aviles, Interpreter for Applicant

Elizabeth B. Harris, CVR-M
 Circuit Court Reporter

I N D E X

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Witness/Description Page No.

Javier Rosas

Direct Examination by Mr. Thompson 6

Cross-examination by Mr. Corney 16

Joshua Kendrick

Direct Examination by Mr. Thompson 18

Cross-examination by Mr. Corney 22

Ruling of the Court 25

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E X H I B I T S

No. Description Page No.

No Exhibits Introduced.

1 MR. CORNEY: May it please the court, Your Honor?

2 THE COURT: Your Honor.

3 MR. CORNEY: Your Honor, this is Javier Rosas. We
4 have an interpreter in the room for Mr. Rosas today. So,
5 I'm going to try to move a little slowly here.

6 THE COURT: All right. We need to swear the
7 interpreter then.

8 MR. CORNEY: Yes, sir.

9 THE COURT: Raise your right hand. What is your name,
10 sir?

11 INTERPRETER: Wilmer Aviles.

12 THE COURT: Aviles, and what type of interpreting will
13 you be doing today?

14 INTERPRETER: Simultaneous whenever the defendant is
15 not being addressed, consecutive when he is.

16 THE COURT: All right, and do you -- are you with an
17 interpreting firm?

18 INTERPRETER: Yes, Your Honor. It's just a little
19 service of my own.

20 THE COURT: Okay, and then the oath.

21 WHEREUPON, WILMER AVILES DULY SWEARS TO ACCURATELY
22 INTERPRET THE MATTER BEFORE THE COURT.

23 THE COURT: Yes, sir.

24 MR. CORNEY: Your Honor, this is Javier Rosas, docket
25 number 2010-CP-28-1184. Mr. Rosas was true bill indicted

1 at the August 2008 term of the Kershaw County Grand Jury,
2 and that indictment was amended at the February 2010 term,
3 and he was indicted for murder. He pled guilty April 26,
4 2010, before Judge Cooper as indicted without negotiations
5 or recommendations and received thirty years on that murder
6 charge.

7 Mr. Rosas filed a timely PCR application October 27,
8 2010, and is represented by Mr. Jeremy Thompson today. Mr.
9 Joshua Kendrick was his plea counsel and is here today. I
10 believe he stepped out to make a call, but he is present
11 and prepared to testify, Your Honor.

12 THE COURT: All right.

13 MR. THOMPSON: May it please the court, Your Honor?

14 THE COURT: Yes, sir.

15 MR. THOMPSON: For the record, my name is Jeremy
16 Thompson. I do represent the applicant in this case. He
17 alleges generally that he received ineffective assistance
18 of counsel in violation of his Sixth and Fourteenth
19 Amendment rights to the United States Constitution, as well
20 as pursuant to the corresponding provisions of the South
21 Carolina Constitution. And that his plea of guilty was not
22 knowingly and voluntarily or intelligently entered.

23 THE COURT: Okay.

24 MR. THOMPSON: Just by way of brief factual
25 background, Your Honor, essentially my client's claim here

1 today is that he was not advised that if he proceeded to
2 trial, that he could present a mere presence defense. He
3 was charged along with his co-defendant, Juan Estrada.
4 They both pled guilty on the same day. So, colloquy with
5 Mr. Estrada and what Mr. Estrada did is included in the
6 plea transcript.

7 They were both charged with murder after Mr. Estrada
8 killed his ex-wife. My client claims that he did not know
9 anything about the murder the day it was going to happen.
10 That he did not participate in the killing. That he did
11 assist Mr. Estrada with disposing the body, but that that
12 means that he was only an accessory and not an accomplice
13 or a principal to the crime.

14 COURT REPORTER: Excuse me, Your Honor. If I could
15 interrupt? I'm having difficulty hearing with the
16 interpreter. I need him to lower his voice, please.

17 (A PAUSE.)

18 THE COURT: All right. Yes, sir.

19 MR. THOMPSON: Again, so essentially my client's claim
20 is that had he known he could present a mere presence
21 defense, he would have gone to trial. With that background
22 in mind, Your Honor, we would call Mr. Rosas as his own
23 first witness.

24 JAVIER ROSAS, BEING DULY SWORN,
25 TESTIFIES AS FOLLOWS. ALL QUESTIONS AND ANSWERS ARE

1 INTERPRETED BY MR. AVILES.

2 BAILIFF: Please state your full name for the record.

3 INTERPRETER: Javier Aguilar Rosas.

4 DIRECT EXAMINATION MR. THOMPSON:

5 Q. Mr Rosas, when we met at your institution the last
6 time, I told you that I was going to try and make questions
7 as specific as possible. I know sometimes the translation
8 gets a little bit hard; something gets lost in the
9 translation. So, if you have any issue with the question
10 that I've asked you, just ask me to repeat it, and I'll try
11 and rephrase it, okay?

12 A. Okay.

13 Q. And just for the record, do you speak any English?

14 A. Very little.

15 Q. Who, Mr. Rosas, who represented you on this murder
16 charge?

17 A. My attorney, Kendrick.

18 Q. And did you hire him, or was he appointed to represent
19 you?

20 A. He was assigned to me.

21 Q. And how many times would you say that you met with him
22 prior to your plea?

23 A. About three times.

24 Q. And how long did Mr. Kendrick represent you?

25 A. From 2008 until we went to court.

J. ROSAS - DIRECT EXAMINATION BY MR. THOMPSON

7

1 Q. Do you remember when in 2008? Early, beginning, late?

2 A. No.

3 Q. So, anywhere from a year and a half to two years?

4 A. It could be.

5 Q. Did you tell Mr. Kendrick what happened, the events
6 that happened leading up to the victim's death in this
7 case?

8 A. Yes.

9 Q. And did you tell him in particular your involvement in
10 the crime?

11 A. Yes.

12 Q. And was his advice to plead guilty or to go to trial?

13 A. He told me to plead guilty because there wasn't enough
14 evidence for me to go in to trial and win a case.

15 Q. Did y'all ever discuss arguing that you were merely
16 present at the time of the crime and that you were not an
17 accomplice?

18 A. Yes.

19 Q. You discussed you being merely present?

20 A. If we spoke about everything that happened at that
21 moment, no.

22 Q. Did he talk to you and tell you that if you went to
23 trial, you could testify and argue that you were merely
24 present, that you didn't participate in the killing?

25 A. Yes.

1 Q. But still it was his advice for you to plead guilty?

2 A. He did, and he told me that he was working for me, but
3 that there was no other evidence that would support me in
4 my case if I went to trial, and so I respected his
5 decision.

6 Q. If you had known that if you could go to trial and
7 present -- did you realize that if you were -- if you went
8 to trial and were found not guilty, that you wouldn't be
9 serving any time for the murder?

10 A. Yes.

11 Q. I want to talk a little bit about what actually
12 happened the day of the incident. Who was your
13 co-defendant?

14 A. Carlos Estrada Cruz.

15 Q. And who was the victim?

16 A. His wife.

17 Q. Did you know her personally prior to this?

18 A. No.

19 Q. Did you know Mr. Estrada?

20 A. I met him at the Astro. He used to sing there.

21 Q. And how long had you known Mr. Estrada prior to this
22 incident occurring?

23 A. About a year.

24 Q. And did Mr. Estrada approach you with -- did he say
25 anything to you about any issues he was having with his

J. ROSAS - DIRECT EXAMINATION BY MR. THOMPSON

9

1 wife?

2 A. No.

3 Q. He didn't come talk to you?

4 A. No. It wasn't until later.

5 Q. That's what I'm trying to get at. Later, he came to
6 you about the problems with his wife?

7 INTERPRETER: Interpreter requests that he repeats his
8 answer.

9 MR. THOMPSON: Say that again.

10 INTERPRETER: Interpreter requests that he repeats his
11 answer. His low tone is not allowing me to hear him well.

12 MR. THOMPSON: You want him to repeat his answer?

13 INTERPRETER: Yes.

14 MR. THOMPSON: Can you tell him to repeat his answer?

15 (THE INTERPRETER COMPLIES.)

16 BY MR. THOMPSON:

17 A. He told me his motives for wanting to do what he did,
18 but until after the event.

19 Q. Did you know that Mr. Estrada wanted to kill his wife?

20 A. No.

21 Q. He never told you prior to the incident occurring that
22 that's what he wanted to do?

23 A. Not at the beginning.

24 Q. When did he tell you that's what he wanted to do?

25 A. When he killed her.

1 Q. On the day of the incident, what were you doing? What
2 did you do with Mr. Estrada that day?

3 A. On the day of the incident, he spoke to me over the
4 phone, and I went to his apartment.

5 (WITNESS RESUMES ANSWER TO INTERPRETER.)

6 A. And so when I arrived at the apartment, he opened the
7 door. His wife was there.

8 (WITNESS RESUMES ANSWER TO INTERPRETER.)

9 A. Since it was a rainy day, he asked me what was I doing
10 that day. I told him that I wasn't working because it had
11 been raining.

12 (WITNESS RESUMES ANSWER TO INTERPRETER.)

13 A. And so he asked me if there was any place where I knew
14 that he could take a stroll with his wife, and I said sure
15 I do. Exit 55 off 77. It's about forty-five minutes away.

16 Q. And where were you when this conversation occurred?

17 A. I told him that I could take him there because I would
18 work in the area. It was a wooded area with some ponds and
19 lakes that I knew of.

20 Q. Where were you when this conversation occurred?

21 A. First, they got off of the truck, and I went and
22 parked the truck ahead.

23 Q. Let me, let me try and clarify this. When you are at
24 Mr. Estrada's home, what city is Mr. Estrada's home
25 located?

J. ROSAS - DIRECT EXAMINATION BY MR. THOMPSON

11

- 1 A. In South Carolina.
- 2 Q. His home is located in South Carolina?
- 3 A. His apartment is in North Carolina.
- 4 Q. His apartment is in North Carolina?
- 5 A. In North Carolina on Central Avenue.
- 6 Q. And in what city?
- 7 A. Charlotte.
- 8 Q. Okay. Now, y'all left Charlotte and went to this exit
9 in South Carolina?
- 10 A. Yes.
- 11 Q. Who was in the truck?
- 12 A. It was us three. I was driving. He was in the back,
13 and she was in the passenger side.
- 14 Q. And where did y'all go in South Carolina?
- 15 A. I don't remember the name of the place, but it's off
16 Exit 55 on 77. I turned left off the exit.
- 17 Q. And when you got to this location, what did you do?
- 18 A. They got off the truck, and I went to park the truck.
- 19 Q. And what happened next?
- 20 A. I went to park the truck. They stayed at that place,
21 and about fifteen to twenty minutes later, I went to find
22 them, and they were having a discussion.
- 23 Q. Was it an angry discussion?
- 24 A. Not yet.
- 25 Q. Did you get involved?

1 A. No. I went back to my truck.

2 Q. And did you come back and talk to them and see what
3 was going on?

4 A. Afterwards, about twenty minutes after, I went back.

5 Q. And what happened when you went back?

6 A. I was about three meters' distance before them, and I
7 saw them. That they were arguing. He then hit her, and
8 she fell to the ground. He leaped on top of her, and he
9 pulled out his knife -- I don't know where he got that
10 knife from -- and started to stab her.

11 Q. And did you assist him in any way?

12 A. No, because in my mind, I had just seen them talking.
13 And from there to go to what he was doing, I just couldn't
14 move. I couldn't move at all. I was, like, in shock.

15 Q. And so you watched as he killed her?

16 A. Yes.

17 Q. And did you assist him in any way once she was killed?

18 A. He asked for my keys and my truck and went for my
19 truck.

20 Q. And what happened to the victim's body?

21 A. I questioned him as to what he had done. Had I known
22 what he had done, I would not have taken them on a stroll.

23 Q. Did y'all eventually get back into the truck?

24 A. Yes. I was in fear, so I helped him put her in the
25 bed of the truck.

J. ROSAS - DIRECT EXAMINATION BY MR. THOMPSON

13

1 Q. And did -- what ended up happening to the victim's
2 body?

3 A. We got in the truck, and we drove about another three
4 miles through the wooded area. And I was just in so much
5 fear that I kept on driving, and we got rid of the body.

6 Q. And did y'all eventually return to Charlotte?

7 A. Afterwards, yes.

8 Q. Now, that whole sequence of events, your not knowing
9 what was going to happen, you not witnessing -- you
10 witnessing the killing but not participating in it, did you
11 tell Mr. Kendrick about all of that?

12 A. Yes.

13 Q. And it was still his advice to you to plead guilty?

14 A. Because according to him, there was some videos and
15 the videos were never presented afterwards. According to
16 what he told me, the minimum would be thirty years to life,
17 and so it was up to me to make that position. And it was
18 best for me to take those thirty years so that some day, I
19 could get out of jail.

20 Q. That's what he told you? It was best to take thirty
21 years? You have to speak up.

22 A. Yes.

23 (WITNESS RESUMES ANSWER TO INTERPRETER.)

24 A. That was the minimum sentence, he said. That I would
25 get thirty years.

1 (WITNESS RESUMES ANSWER TO INTERPRETER.)

2 A. And so I pleaded with him if there wasn't a chance
3 that I could possibly get twenty or twenty-five because I
4 understood that I took part, and I was aware that I
5 participated, but I wasn't the one who had any motive,
6 motives to kill her. He was the one who had the motives to
7 kill her. And even if I had any motives to be upset with
8 her, I just don't have the heart to kill anyone.

9 Q. What specifically do you believe that Mr. Kendrick
10 should have done differently in your case to represent you?

11 A. I told him that I know nothing of laws. That I was
12 requesting his help, to please help me. That if he could
13 reduce that amount, that I would trust completely in him as
14 my attorney. But he told me that the minimum that they
15 would give me would be thirty years.

16 Q. Do you believe that he should have done anything
17 differently with regard to advising you to go to trial, to
18 present your side of the story?

19 A. Well, I trusted completely in him as my attorney. And
20 if the offer was thirty versus life if I went to trial,
21 then I'd rather plead guilty and that way not get life.

22 Q. So, do you actually want to go forward with this PCR
23 and take a chance that you could get life in prison?

24 A. Well, what I want is at least that the time can be
25 negotiated so that it could be reduced because I realize

1 that I participated, but I'm not the guilty person that
2 they claim me to be. I just want some relief from my
3 sentence because thirty years is just too much for a crime
4 that I didn't commit. They're putting me down as a
5 criminal when I didn't -- I wasn't the one who killed her.

6 Q. This judge cannot reduce your sentence.

7 (MR. AVILES RESUMES INTERPRETING.)

8 Q. The only relief that this judge can grant you is a new
9 trial where you would have a chance to, to reopen you case
10 to try and re-engage the solicitor's office and plea
11 negotiations, but you would still be facing thirty to life
12 for murder.

13 (MR. AVILES RESUMES INTERPRETING.)

14 Q. Knowing that, knowing that you can still get life in
15 prison if you went forward with this action, do you want to
16 go forward here today?

17 A. Then it would be the same result.

18 Q. That's not an answer to the question.

19 (MR. AVILES RESUMES INTERPRETING.)

20 Q. If you win this proceeding, you can still get life in
21 prison. Knowing that, do you want to go forward?

22 A. I'll go with what the judge decides. If he wants to
23 give me life in prison or wants to give me a reduced
24 sentence, then I'll go with what the judge says.

25 Q. So, you do want to go forward and take the risk?

1 A. Yes.

2 Q. Okay. I think I've been over everything that we had
3 discussed that we were going to raise here today, but this
4 is your one and only shot in a PCR hearing. So, is there
5 anything else you want to tell the judge about your case?

6 A. No. That's all.

7 MR. THOMPSON: No further questions.

8 THE COURT: All right.

9 MR. CORNEY: I've got a bad habit of speaking very
10 fast. I'll try to slow down, give you time to interpret.

11 CROSS-EXAMINATION BY MR. CORNEY:

12 Q. Mr. Rosas, you remember at your plea hearing when the
13 solicitor reviewed the facts about this murder?

14 A. Yes.

15 Q. And you remember when she finished telling the court
16 that you agreed that that -- those were the true facts?

17 A. Yes.

18 Q. Okay, and part of those facts were that when you were
19 in the woods with Mr. Estrada, he had punched her and you
20 grabbed her and tried to tape her mouth?

21 A. No.

22 Q. Okay, but that's what the solicitor said, and later on
23 you agreed with that, right?

24 A. No.

25 MR. CORNEY: And just for the court's convenience, I'm

J. ROSAS - CROSS-EXAMINATION BY MR. CORNEY

17

1 referring to page 14. The facts start, and on page 21 is
2 where Mr. Rosas agreed to the facts as they were listed.

3 BY MR. CORNEY:

4 Q. Now, what did you tell Mr. Estrada's wife that you
5 were going when you were riding in the car down from
6 Charlotte?

7 A. His wife? Nothing.

8 Q. Where did she think she was going in the car with
9 y'all?

10 A. To take a stroll. They had already spoken before I
11 got there, before they called me on the phone.

12 Q. Okay. So, you never heard Mr. Estrada say to his wife
13 that you're going to get drugs from South Carolina and --
14 or you never told her that either?

15 A. No. No.

16 Q. So, she just thought you were going on a forty-five
17 minute drive to go for a stroll through the woods?

18 A. Yes, but his wife already knew that area as well.
19 When I got off the exit into the area, she knew that area.

20 Q. Okay, and before this, Mr. Estrada had talked to you
21 about that he, he had some motive to want to kill his wife,
22 right?

23 A. Yes.

24 MR. CORNEY: Okay. That's all the questions I have.

25 MR. THOMPSON: No further questions.

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

2 (THE WITNESS EXITS THE STAND.)

3 MR. THOMPSON: The applicant would call Josh Kendrick.

4 THE COURT: All right.

5 BAILIFF: He's still under oath, isn't he?

6 THE COURT: Yes.

7 JOSHUA KENDRICK, HAVING BEEN DULY

8 SWORN AT AN EARLIER PROCEEDING IN THE DAY, TESTIFIES AS

9 FOLLOWS:

10 DIRECT EXAMINATION MR. THOMPSON:

11 Q. Mr. Kendrick, how are you?

12 A. Good. How are you?

13 Q. I'm doing all right. Last time we had one of these,
14 said I know you and I apologize if I slip up, I call you
15 Josh, okay?

16 A. That's fine.

17 Q. Do you recall your representation of Mr. Rosas?

18 A. I do.

19 Q. Were you appointed or retained to represent him?

20 A. Appointed.

21 Q. And how long would you say you represented him?

22 A. It looks like from the end of July in 2008 until the
23 date of his guilty plea, which I believe was in April of
24 2010.

25 Q. So, almost two years?

J. KENDRICK - DIRECT EXAMINATION BY MR. THOMPSON

19

1 A. That sounds right.

2 Q. And was he incarcerated, and was he held without --
3 was he held at the detention center?

4 A. Yes.

5 Q. How many times would you say that you met with him?

6 A. You know, I was looking at my time sheet, and it looks
7 like I only met with him about maybe five times during that
8 time period.

9 Q. And did you have an interpreter with you every time
10 you met with him?

11 A. Yes.

12 Q. Mr. Rosas testified earlier as to what occurred the
13 day of the incident. Is that consistent with what he told
14 you happened?

15 A. It is not.

16 Q. How is it different?

17 A. I don't -- like I said earlier in a PCR, I don't mind
18 explaining it but, you know, I consider that there's some
19 privilege issues. If he wants me to waive that and say
20 what he said, I'll be happy to go into it, but.

21 MR. CORNEY: Your Honor, I think under our PCR
22 statute, and I know this has been a point of contention all
23 around, but I believe, and I don't have -- know the exact
24 code section under 17-27. But I believe the statute sets
25 forth that attorney/client privilege is waived from the

1 moment that the applicant submits his PCR application. And
2 I know there's some argument to be made, and that's my
3 understanding of it and our office's stance on it, Your
4 Honor.

5 THE COURT: All right, Mr. Rosas, do you want your
6 lawyer to testify as to what he told him?

7 APPLICANT: No.

8 THE COURT: Okay.

9 BY MR. THOMPSON:

10 Q. Nevertheless, it was not consistent?

11 A. No.

12 Q. Would your advice to him to proceed to trial or take a
13 guilty plea have been different had he testified
14 consistently with what he testified to today?

15 A. No.

16 Q. You still would have told him to plead guilty?

17 A. Yes.

18 Q. And that was your advice to him, to plead guilty?

19 A. Yes.

20 Q. Now, Mr. Rosas, I believe, mentioned some issues with
21 some videotapes. Do you know what he's talking about?

22 A. Not specifically. I -- but I know about an issue with
23 a videotape.

24 Q. What was that issue?

25 A. I think that -- I can't remember if both he and his

J. KENDRICK - DIRECT EXAMINATION BY MR. THOMPSON

21

1 co-defendant were filmed in Mecklenburg County in the
2 Charlotte Police Department being interrogated, or if just
3 his co-defendant, but I do think it was both of them.

4 Q. And was he ever permitted to see that videotape?

5 A. I, I never showed it to him. Not because I didn't
6 permit him to. I just didn't get around to it.

7 Q. Did you, did you watch the videotape?

8 A. I did.

9 Q. Was the interview in Spanish or English?

10 A. Spanish.

11 Q. Did you watch it with an interpreter?

12 A. I did.

13 Q. Did the interpreter tell you what happened during the
14 video?

15 A. Yes. To be clear, I don't think we watched the entire
16 video. I think that I had a list of things I needed to
17 verify were in the video. And when we got to that point,
18 we stopped.

19 Q. How long was the video?

20 A. From the notes I looked at, I think everything I had
21 in Spanish was somewhere in the neighborhood of six hours.

22 Q. And following your review of the videotape, did you
23 discuss with Mr. Rosas what was contained on the videotape?

24 A. Yes.

25 Q. So, you went over its contents? You just didn't

1 actually physically show him the tape?

2 A. Correct, and one of the problems we had was that the
3 tape was very difficult to play. I don't think it would
4 play on any of my computers. I think I had to watch it in
5 -- when I watched it with an interpreter, I watched it in
6 this courthouse with the solicitor's office.

7 MR. THOMPSON: Beg the court's indulgence.

8 (COUNSEL CONFERS WITH THE APPLICANT.)

9 BY MR. THOMPSON:

10 Q. Why would your advice to him have remained the same,
11 to still plead guilty, given what he testified to?

12 A. Because I don't believe that was a credible story.

13 Q. And you don't believe the jury would have believed it?

14 A. I do not believe they would have believed that. So,
15 again I would have advised him to plead guilty, but of
16 course if he didn't want to do that, I would go to trial
17 with him.

18 MR. THOMPSON: No further questions of this witness,
19 Your Honor.

20 MR. CORNEY: Very briefly, Your Honor.

21 CROSS-EXAMINATION MR. CORNEY:

22 Q. And, Mr. Kendrick, I don't mean to push the point on
23 the confidentiality. I know that's a difference in stance,
24 and I don't mean to step on your toes in that. But during
25 your discussions with him, were you able to review with him

1 the idea that just because he wasn't the one that did the
2 actual stabbing, he could still be guilty of this under the
3 law?

4 A. Yes.

5 Q. And he seemed to understand that, based on your
6 discussions?

7 A. He did. We spent a long time going over the legal
8 theories involved in this case. You know, I spent hours
9 with the interpreter explaining to him why he was facing a
10 murder charge even though he had not directly, physically
11 killed the victim.

12 Q. As far as any statements Mr. Rosas made to the police,
13 was that something you were developing or planning to
14 suppress if you had gone to trial, or attempt to suppress?

15 A. Attempt would have been a better, better argument.
16 Unfortunately, Mr. Rosas accompanied the police to where
17 the body was. And, you know, I did look at the video, and
18 it did seem like they gave him Miranda. I didn't see any
19 coercion. He didn't tell me about anything that wouldn't
20 have been reflected on the video. So, I, you know, I
21 didn't see any grounds where I would have gotten his
22 statement thrown out.

23 Q. Okay, and just one last question, just very briefly.
24 Tell me about the interpreter you incorporated into your
25 discussions leading up to this plea, and I guess their --

1 your work with them and their knowledge of the system.

2 A. I think at the time, the interpreters, all of the
3 interpreters I used were from Garber Language Services.
4 And the reason I use them was because they seemed to
5 understand the court system and legal terms so that they
6 were able to at least try to help me explain to him how the
7 law worked with regard to this case.

8 The law is very different where Mr. Rosas is from, and
9 I had to explain those differences so he would understand.
10 It's actually better here, so we went over the fact that he
11 was in a better situation than he was at home, but the
12 facts simply didn't support any real defenses.

13 Q. Okay, and did he seem to understand the discussions
14 and how the, in a general sense, how the criminal justice
15 system works?

16 A. He did. He was disappointed that thirty years was
17 going to be the best I could get him, but I was, too. The
18 solicitor simply wasn't going to offer me anything less
19 than a murder. But we were aware that if we pled to the
20 murder, we were basically going to get the minimum
21 sentence, which unfortunately was thirty years.

22 MR. CORNEY: That's all the questions I have, Your
23 Honor. Thank you.

24 THE COURT: Anything further?

25 MR. THOMPSON: No further questions, and no further

1 witnesses, Your Honor.

2 THE COURT: All right. Thank you, sir.

3 WITNESS: Thank you, Judge.

4 (THE WITNESS EXITS THE STAND.)

5 THE COURT: Any arguments?

6 MR. THOMPSON: Only just generally to restate my
7 client's testimony, Your Honor. That he believes that had
8 he been properly advised about going to trial and
9 presenting his side of the story, he would have done so and
10 taken the risk that he would get a life sentence. That is
11 essentially our case.

12 THE COURT: All right. The state?

13 MR. CORNEY: I don't have any argument. I think the
14 testimony before this court and the record, which is rather
15 short -- I saw you flipping through up there -- I think
16 that they both speak for themselves as far he agreed with
17 the facts as they are set forth from the solicitor. That
18 he played an active part in the beating and murder of this
19 woman under the hand of one is the hand of all, which Mr.
20 Kendrick explained to him in plain language. He testified
21 he explained it to him, and he understood he was guilty of
22 this murder, and then pled to the minimum he could get
23 under the charge.

24 RULING OF THE COURT:

25 THE COURT: All right. I think Mr. Kendrick

1 represented him properly. He was not entitled to a PCR,
2 and I deny the PCR.

3 MR. THOMPSON: Thank you, Your Honor.

4 THE COURT: All right.

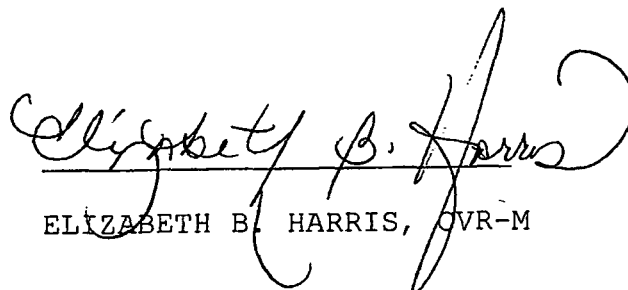
5 MR. CORNEY: Thank you, Your Honor.

6 --- END OF TRANSCRIPT OF RECORD ---

CERTIFICATE

I, THE UNDERSIGNED ELIZABETH B. HARRIS, CERTIFIED VERBATIM OFFICIAL COURT REPORTER FOR THE FIFTH 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 KERSHAW COUNTY, SOUTH CAROLINA, ON THE 16TH DAY OF FEBRUARY, 2012.

I DO FURTHER CERTIFY THAT I AM NEITHER OF KIN, COUNSEL, NOR INTEREST IN ANY PARTY HERETO.


ELIZABETH B. HARRIS, CVR-M

COLUMBIA, SOUTH CAROLINA

JUNE 21ST, 2012

STATE OF SOUTH CAROLINA)
COUNTY OF KERSHAW)

IN THE COURT OF COMMON PLEAS)
FOR THE FIFTH JUDICIAL CIRCUIT)

2010-CP-28-01184

Javier Rosas, # 340559,)

Applicant,)

v.)

State of South Carolina,)

Respondent.)

ORDER OF DISMISSAL

FILED FOR RECORD
2012 MAR 28 AM 11:17
JOYCE McDONALD
CLERK OF COURT
KERSHAW COUNTY, S.C.

PROCEDURAL HISTORY

This matter comes before the Court by way of an Application for Post-Conviction Relief filed October 27, 2010. The Respondent made its Return on February 8, 2011. An evidentiary hearing into the matter was convened on Thursday, February 16, 2012, at the Richland County Courthouse. The Applicant was present at the hearing and was represented by Jeremy Thompson, Esquire. The Respondent was represented by Robert D. Corney of the South Carolina Attorney General's Office.

At the hearing, the Applicant testified on his own behalf through Wilmer Aviles, a certified Spanish -English interpreter qualified and sworn by this Court at the start of the hearing. Also testifying was Applicant's plea counsel, Joshua Kendrick, Esquire ("counsel"). This Court also had before it a copy of the transcript of the proceedings against the Applicant, the records of the Kershaw County Clerk of Court, the Applicant's records from the South Carolina Department of Corrections.

The records before this Court indicate that the Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Kershaw

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1 of 8

ATTEST True, Correct & Certified
Copy of Original on File in this
Court.

Joyce McDonald
Clerk of Court Kershaw County

County Clerk of Court. The Applicant was indicted at the August 2008 term of the Kershaw County Grand Jury, and amended at the February 2010 term, for Murder (2010-GS-28-1448). Joshua Kendrick, Esquire, represented Applicant on the charge. On April 26, 2010, Applicant appeared before The Honorable G. Thomas Cooper at which time he pled guilty as indicted and was sentenced to the minimum thirty (30) year sentence. Applicant did not appeal the plea or sentence.

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

(a) 1. Counsel was ineffective for advising defendant to plead guilty, where counsel's advice was not within the range of competence demanded in criminal cases for failure to advise the defendant of affirmative defenses to the crime charged, i.e., illegally obtained evidence, statements, and prosecution's burden of proof, that if defendant was properly advised of defenses that he would otherwise not have pleaded guilty (See Hill v. Lockhart, 106 S.Ct. 336) Counsel's conversations with defendant did not lead to the defendant making an intelligent and knowing plea because the majority of counsel's advice was intimidating to the fact that he could receive a lot of time (See Dover v. St. 405 S.E. 2d 391).

Also the plea in itself was invalid because the record does not clearly establish that the defendant was properly advised of his privilege against compulsory self-incrimination, the right to trial by jury, and the right to confront one's accusers, and the duty of this requirement lies within the officers of the courts to each and every one of the aforementioned constitutional rights (See Brogan v. Alabama, 395 U.S. 238, 89 S.Ct. 1709 (1967); State v. Patterson, 278 S.C. 319, 275 S.E. 2d 264 (1982)).

(a) 2. Ineffectiveness of counsel invalidated guilty plea for advising the defendant to plead guilty without informing the defendant that if he went to trial, he could have requested a jury charge on a lesser offense and might have been convicted of the lesser offense (See Kerrigan v State, 304 SC 561, 406 S.C. 2d 160; Watson v State, 287 SC 350, 338 S.C. 2d 636).

(a) 3. Counsel was ineffective for advising defendant to plead guilty when evidence of guilt not overwhelming and defendant's statement was involuntary. Had the applicant elected to go to trial the involuntary statement would have been inadmissible under the Due Process Clause of 5th and 14th Amendments. Also the statements of the co-defendant, and defendant would have been scrutinized in a Denno hearing to determine their voluntariness. Further, all waivers to counsel additionally would have had to meet the Zerbst knowing and intelligent waiver standard. Because of the susceptibilities of the defendants, their intelligence and education, no familiarity with the American criminal justice system, and coercive conduct of the police, the waivers to counsel in a custodial interrogation would have failed to meet the burden of the Zerbst standard. (See Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed. 2d 694 (1966)).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony at the post-conviction relief hearing. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility and weigh their testimony accordingly. 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).

In a post-conviction relief action, the Applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRCP; 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 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 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, 286 S.C. 441, 334 S.E.2d 813 (1985). The Applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 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. With respect to guilty plea counsel, the Applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed. 2d 203 (1985)

Failure to Advise of Possibility of Lesser Included Offense At Trial

Applicant alleges counsel was ineffective in failing to advise Applicant of the possibility that he could be found guilty of the lesser included voluntary manslaughter charge if he chose to pursue a jury trial. Applicant testified he met with counsel roughly three (3) to discuss the charges, during which counsel advised Applicant to plead guilty because "there wasn't enough evidence for [Applicant] to go to trial and win." Applicant went on to say counsel did discuss the concept of "mere presence" as a defense to be used at trial. Regarding the actual crime committed, Applicant stated he was aware well before the murder that his co-defendant, Juan Estrada ("Estrada") had "motives for wanting to kill his wife" but did not know Estrada was going to kill his wife when Applicant rode with them down to South Carolina. Applicant testified Estrada was looking for a place to "take a stroll" with his wife when Applicant suggested they ride down to Interstate 77 to South Carolina around exit number 55 where there was a wooded area they could walk. Applicant drove Estrada and his wife to the exit where he let them out to walk into the woods; according to Applicant, he entered the woods some twenty (20) minutes later at which time Estrada and the victim were fighting. Applicant stated he walked back to the truck and when he returned to the woods some time later, Estrada punched his wife to the ground then started stabbing her. Applicant stated he didn't move as he was "in a state of shock", but he

did then help Estrada load victim's body into the truck and later dispose of it. Applicant testified that he explained this set of facts to counsel through an interpreter, but counsel never explained to him that he may be able to get the jury to decide on a lesser included charge at trial. On cross-examination, Applicant conceded that he did agree with the facts as recited by the solicitor at his plea hearing which included Applicant grabbing the victim and holding her during the stabbing. Applicant has requested this Court grant him relief in the form of a "time negotiation" or reduction in his sentence.

Counsel testified he was appointed to represent Applicant in July 2008 after which he met with Applicant roughly five (5) times to discuss the charges, at all of which counsel used an interpreter. Counsel opened his testimony by stating he did not wish to divulge the specifics of his conversations with Applicant, but stated Applicant's testimony at the PCR was wholly inconsistent with what Applicant told him during their meetings.¹ Counsel went on to say that even if Applicant had set forth the facts to him as he did at the PCR hearing, based on the evidence he still likely would have advised Applicant to enter a guilty plea under which he would receive the statutory minimum sentence. Counsel finished by stating he did not believe the facts set forth by Applicant would have been credible to a jury based on the other relevant information and evidence that would have come out at trial, nor would Applicant's set of facts have made any difference in the outcome.

Based on the testimony presented at the hearing in conjunction with a thorough review of the plea transcript, this Court finds Applicant failed to carry his burden in proving counsel was ineffective in this regard. Further, this Court finds counsel's testimony to be credible while

¹ Respondent contemporaneously objected to counsel's statement that he and Applicant's specific conversations are protected by attorney-client privilege, citing S.C. Code § 17-27-130. As the non-specific answers given by counsel have sufficiently satisfied this Court in determining the facts of the case and the sufficiency of counsel's performance, this issue need not be addressed.

finding Applicant's testimony to be wholly incredible. The facts surrounding the charge set forth by Applicant were not credible and, as counsel credibly testified, were entirely different than the facts he was told by Applicant during their meetings. Applicant, himself, readily admitted on direct examination that counsel did in fact discuss a potential "mere presence" defense with him, despite counsel now stating the facts he was given by Applicant would not have supported such a lesser included charge. Therefore, I find counsel did in fact advise Applicant of the potential for a lesser included offense at trial, a strategy which Applicant voluntarily and knowingly waived in deciding to enter this guilty plea. It is important to note we must examine whether counsel's performance fell within the range of "reasonableness based on professional norms" in light of the information he was given by Applicant. See Strickland v. Washington, *supra* at 691, 2066 (*The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant*). Where Applicant provided counsel with information substantially different than that presented at the PCR hearing, the Court will not find counsel's performance deficient in failing to pursue defenses based on these newly conjured facts. Counsel cannot be reasonably expected to develop and advise a client of defense strategies wholly inconsistent with the facts provided by the client. Therefore, this Court finds no deficiency in counsel's representation based on this allegation.

Further, this Court finds Applicant has failed to prove resulting prejudice based on this alleged deficiency. During the plea hearing, Applicant agreed to the facts leading to the murder charge as set forth by the solicitor, including his active participation in the murder of Estrada's wife. See Plea Tr. p. 14, lns 10 – 13 ("Mr. Rosas grabs the victim by her face and tried to tape her mouth shut...He held his hand over her face and mouth [a]nd Mr. Estradad...proceeded to

stab the victim."). Based on these facts, Applicant would have been unsuccessful in convincing a reasonable jury to believe he was in fact guilty of merely being present during the commission of this crime. Further, Applicant has failed to sufficiently convince this Court that, had counsel specifically advised Applicant of the ability to request a lesser included or mere presence jury charge at trial, Applicant would have proceeded to trial rather than enter the plea as he did. *See Hill v. Lockhart*, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed. 2d 203 (1985) (*With respect to guilty plea counsel, the Applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial.*) Therefore, this Court finds Applicant also failed to prove he suffered prejudice as a result of counsel's alleged deficiency.

CONCLUSION

Based on all the foregoing, this Court finds and concludes that the Applicant has not established any constitutional violations or deprivations that would require this court to grant his application. Therefore, this application for post conviction relief must be denied and dismissed with prejudice.

Except as discussed above, this Court finds that the Applicant failed to raise all additional allegations raised in his application at the hearing and has, thereby, waived them. A waiver is a voluntary and intentional abandonment or relinquishment of a known right. *Janasik v. Fairway Oaks Villas Horizontal Property Regime*, 307 S.C. 339, 415 S.E.2d 384 (1992). A waiver may be express or implied. "An implied waiver results from acts and conduct of the party against whom the doctrine is invoked from which an intentional relinquishment of a right is reasonably inferable." *Lyles v. BMI, Inc.*, 292 S.C. 153, 158-59, 355 S.E.2d 282 (Ct. App. 1987). The Applicant's failure to address these issue at the hearing indicates a voluntary and intentional

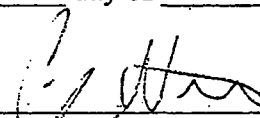
relinquishment of his right to do so. Therefore, any and all remaining allegations are denied and dismissed.

This Court notes Applicant must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCR, provides that if the applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and
2. The Applicant must be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 27th day of March, 2012.


 Clifton B. Newman
 Presiding Judge
 Fifth Judicial Circuit

Columbia, South Carolina.

WITNESSES

Knafelc, KCSD

ARREST WARRANT NUMBER

K253795

ACTION OF GRAND JURY

TRUE BILL

[Signature]
Foreperson of Grand Jury
Date: **AUG 20 2008**

VERDICT

Foreperson of Petit Jury
Date:

DOCKET NO. 2008-GS-28-1448

The State of South Carolina

County of Kershaw

COURT OF GENERAL SESSIONS

August TERM 2008

THE STATE

vs.

JUAN AGUILAR ROSAS

Indictment for

MURDER

SC Code: 16-3-10
CDR Code: 0116
Class: FEL/EXM(V)

After being fully advised as to my legal rights, I hereby waive presentment to the Grand Jury.

Defendant

I hereby appear in my own proper person and plead guilty to the within indictment or to

Defendant

Witness:

C.C.C. PLS. AND G.S.

ATTEST True, Correct & Certified
Copy of Original on File in this
Court

[Signature]
Clerk of Court Kershaw County

STATE OF SOUTH CAROLINA)
)
COUNTY OF KERSHAW

AMENDED INDICTMENT

At a Court of General Sessions, convened on February 17, 2010, the Grand Jurors of Kershaw County present upon their oath:

MURDER

That JAVIER AGUILAR ROSAS did in Kershaw County on June 10, 2008, feloniously, willfully and with malice aforethought, kill one Ada Judith Torruco by means of multiple stab wounds and that the said victim died as a proximate result thereof. All in violation of SC Code of Laws § 16-3-10

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

W. B. Giese
Warren B. Giese, SOLICITOR