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S.C. Supreme Court

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Greenville County

Edward W. Miller, Circuit Court Judge

EFRAIN PEREZ MARTINEZ,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-000292

APPENDIX

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South Carolina Commission on Indigent
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ATTORNEYS FOR RESPONDENT

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STATE OF SOUTH CAROLINA)	
)	IN THE COURT OF GENERAL SESSIONS
COUNTY OF GREENVILLE)	
 The State,)	
)	TRANSCRIPT OF RECORD
-vs-)	2010-GS-23-3706, 2011-GS-23-0004
)	
Efrain Perez Martinez,)	
)	January 12, 2011
Defendant.)	Greenville, South Carolina

B E F O R E:

HONORABLE ROBIN B. STILWELL, JUDGE

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

BRYNA STOKES SEAY, ESQ.
Attorney for the State

NIHAR MANHAR PATEL, ESQ.
Attorney for the Defendant

INTERPRETER

COPY

Margaret A. Woods
Circuit Court Reporter

1 (Whereupon, the interpreter was previously sworn.)

2 THE CLERK: Your Honor, this is Indictment
3 2010-GS-23-3706 Efrain Martinez -- I'm sorry, Efrain Perez
4 Martinez indicted for incest, pleading to the same, there's a
5 true bill; Indictment 2011-GS-23-0004 indicted for criminal
6 sexual conduct with a minor second degree, pleading to the
7 same, it is a waiver.

8 (Whereupon, the defendant was sworn.)

9 THE COURT: Mr. Patel, you've had the opportunity to
10 speak to Mr. Martinez about his constitutional rights and the
11 ramifications of his plea?

12 MR. PATEL: I have, Your Honor.

13 THE COURT: Is it your understanding he understands and
14 appreciates his rights, wants to waive the same and plead
15 guilty today?

16 MR. PATEL: He does, Your Honor, he understands 'em.

17 THE COURT: Okay. And you agree with his decision?

18 MR. PATEL: I do, Your Honor.

19 THE COURT: Okay. Mr. Martinez, you recognize you have a
20 right to a jury trial in this matter?

21 THE INTERPRETER: Yes.

22 THE COURT: And you recognize that if you had a jury
23 trial the State would have the burden of proving you guilty
24 beyond a reasonable doubt to a jury of twelve of your peers.

25 THE INTERPRETER: Yes.

1 THE COURT: And you understand that you would not have
2 the burden of proving yourself innocent, you have a
3 constitutional right to remain silent which means you wouldn't
4 be required to do, say or prove anything to that jury, ya
5 understand?

6 THE INTERPRETER: Yes.

7 THE COURT: And even though you have that right to remain
8 silent, you could if you wanted to testify to the jury and you
9 could present witnesses and evidence, you could make motions
10 before the Court to protect your rights, you could present
11 legal defenses to the charges and you could also cross-examine
12 any of the State's witnesses including those persons who are
13 accusing you of these crimes.

14 THE INTERPRETER: Yes.

15 THE COURT: You also have the right to have -- 004 was
16 that, was that true billed?

17 MS. SEAY: That's the waiver, Your Honor.

18 THE COURT: Okay. You also have a right to have
19 Indictment 2011-0004 presented to a grand jury for a true
20 bill. Do ya understand that right?

21 THE INTERPRETER: Yes.

22 THE COURT: You want to waive all of your rights and
23 plead guilty today?

24 THE INTERPRETER: Yes, sir.

25 THE COURT: Okay. In Indictment 2010-3706 you're

1 pleading guilty to incest. What's the maximum on that?

2 MS. SEAY: Ten years.

3 THE COURT: You realize you can receive up to 10 years
4 incarceration for that offense?

5 THE INTERPRETER: Yes.

6 THE COURT: Okay. And how do you wish to plead to that,
7 sir?

8 THE INTERPRETER: Guilty.

9 THE COURT: In Indictment 2011-0004 you're pleading
10 guilty to criminal sexual conduct with a minor second degree.
11 What's the maximum?

12 MS. SEAY: Twenty years.

13 THE COURT: You recognize that you can receive up to 20
14 additional and consecutive years on that, sir?

15 THE INTERPRETER: Yes.

16 THE COURT: Alright. And you understand that that could
17 be in addition to and consecutive to the 10 that you receive
18 on the other offense for a total of 30 years, sir?

19 THE INTERPRETER: Yes.

20 THE COURT: Do you also understand that this offense is
21 classified as violent and as most serious under the law in the
22 State of South Carolina, you recognize that?

23 THE INTERPRETER: Yes, sir.

24 THE COURT: And you recognize that because it's been
25 classified as violent that it could affect the amount of time

1 or the percentage of time that you do on the charges and it
2 could affect your max out date and any date that you may have
3 for parole eligibility, do you understand that?

4 THE INTERPRETER: Yes.

5 THE COURT: Do you also understand that because it's
6 classified as most serious that if you are convicted at a
7 later date and time of a serious or most serious offense that
8 you could be subject to the State's Two-strikes, Three-strikes
9 law and potentially be subject to a sentence of life without
10 the possibility of parole and you understand that?

11 THE INTERPRETER: Yes.

12 THE COURT: And knowing that, sir, how do you wish to
13 plead?

14 THE INTERPRETER: Guilty.

15 THE COURT: You also understand that by pleading guilty
16 to these offenses that it could affect your illegal status in
17 the United States of America?

18 THE INTERPRETER: Yes, sir.

19 THE COURT: Alright. Has anyone forced, threatened or
20 made you enter into the plea?

21 THE INTERPRETER: No, nobody.

22 THE COURT: Has anyone promised you anything in exchange
23 for your plea?

24 THE INTERPRETER: No, no.

25 THE COURT: Are you pleading guilty of your own free will

1 because you are guilty, sir?

2 THE INTERPRETER: Yes.

3 THE COURT: Are you under the influence of any drugs or
4 alcohol today?

5 THE INTERPRETER: No.

6 THE COURT: And are -- do you suffer from any mental
7 sickness that affects your ability to understand and
8 appreciate what's happening today?

9 THE INTERPRETER: No.

10 THE COURT: Okay. And have you had the opportunity to
11 discuss this matter with Mr. Patel as much as you have needed
12 to?

13 THE INTERPRETER: Yes.

14 THE COURT: Are you satisfied with his services?

15 THE INTERPRETER: Yes.

16 THE COURT: Have you understood all the questions I've
17 asked you today?

18 THE INTERPRETER: Yes.

19 THE COURT: Do you have any questions you'd like to ask
20 me or Mr. Patel regarding your rights of this proceeding
21 before we move on?

22 THE INTERPRETER: No. No, everything is clear.

23 THE COURT: Okay. Alright you have 10 days to appeal my
24 sentence. Okay, Ms. Seay, be happy to hear the facts.

25 MS. SEAY: Thank you, Your Honor, may it please the

1 Court. On March 19th 2010 investigators with the Greenville
2 county sheriff's office were contacted by the Department of
3 Social Services because the 12-year-old victim had discovered
4 that she was pregnant. The victim admitted that this
5 defendant, her father, had been sexually abusing her since she
6 was in the fifth grade and stated that the abuse had happened
7 several times. The victim's mother was present and stated
8 she had been suspicious that the defendant, her husband, had
9 been abusing their daughter. The victim and her sister are in
10 the custody of the Department of Social Services at this time
11 along with the victim's baby. These events occurred within
12 Greenville County.

13 THE COURT: Alright. Mr. Martinez, is that what
14 happened, sir?

15 THE INTERPRETER: Yes.

16 THE COURT: Alright. I do find that there is a
17 substantial factual basis for the plea, it's been entered
18 freely and voluntarily with the advice of counsel with whom
19 Mr. Martinez indicates he's satisfied and I'll accept it. The
20 prior record and recommendation if any?

21 MS. SEAY: The prior record is in Florida in 1998
22 solicitation of prostitution, 2004 driving under suspension
23 and no registration, he has been deported to Mexico by by the
24 Immigration Services in 2006.. The recommendation is 20 years
25 concurrent and I do have an impact statement that the victim

1 wrote out that I'd like to pass up to the Court, it has been
2 provided to the defense.

3 MR. PATEL: We've we've gotten a copy of that.

4 THE COURT: Okay. Good enough. Thank you.

5 (Whereupon, counsel handed the document to the Court.)

6 (Pause.)

7 THE COURT: Alright, Mr. Patel.

8 MR. PATEL: Judge, just just briefly. Efrain is
9 34-years-old, Judge. He is an illegal, he's from Mexico, he's
10 got a hold on him ---

11 THE COURT: Uh-huh.

12 MR. PATEL: --- so whenever he gets done with whatever
13 significant sentence you give him he's gonna be deported,
14 the -- that proceeding is gonna take effect. He's been in
15 Greenville for approximately 11 years. He's an electrician by
16 trade, that's what he was doing up here, Judge. There's not
17 much that we can say, it's just that this is just a bad, bad
18 case, Your Honor, he understands it and he's here pleading
19 guilty, Your Honor. The State is recommending 20 years, we'd
20 obviously ask that you consider some leniency, somethin' less
21 than that but we obviously leave it to your discretion, Your
22 Honor.

23 THE COURT: Okay. Mr. Martinez, anything you'd like to
24 tell me, sir?

25 THE INTERPRETER: Yes, I just wanna say how sorry I am to

1 everybody here in this courtroom. I'm really sorry and I
2 wanna apologize. I have broken the law at their -- in the
3 State of South Carolina and I just hope that one day my family
4 will forgive me, I I really hope that, that's all.

5 THE COURT: Okay.

6 MR. PATEL: And, Your Honor, he he has been in jail since
7 March 19th 2010.

8 THE COURT: March 19th 2010?

9 MR. PATEL: Yes, sir.

10 MS. SEAY: It's 299 days as of today.

11 THE COURT: Two hundred ninety-nine days. Alright, I'm
12 gonna accept the recommendation. The sentence of the Court on
13 Indictment 2011-0004 is you be committed to the Department of
14 Corrections for 20 years, credit for time served 299 days,
15 concurrent; Indictment 2010-3706 10 years, credit for time
16 served, concurrent, that's 299 days credit. Good luck to ya,
17 sir.

18 MS. SEAY: Thank you, Your Honor.

19 MR. PATEL: Thanks, Judge.

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CERTIFICATE OF REPORTER

I, Margaret A. Woods, Court Reporter in and for the State of South Carolina at Large, hereby certify that I reported the preceding case on January 12, 2011 at the time and place heretofore set forth; and that the foregoing pages numbered from 2 through 9, inclusive, constitute a true and accurate transcription of my stenographic notes of the said proceeding.

I further certify that I am neither attorney nor counsel for, nor related to or employed by any of the parties connected to the action, nor am I financially interested in the action.

May 14, 2011

Margaret A. Woods 6/18/11

Margaret A. Woods, Court Reporter
in and for the State of South Carolina at Large.

FORM 5

STATE OF SOUTH CAROLINA)
County of GREENVILLE)

IN THE COURT OF COMMON PLEAS

2011-CP-23-3813

ERRAIN PEREZ MARTINEZ 344331)
Full name and prison number (if any) of Applicant)

v)
State of South Carolina)

APPLICATION FOR
POST-CONVICTION RELIEF

FILED - CLERK OF COURT
GREENVILLE, S.C.
JAN 2 2011
PM 2:33

INSTRUCTIONS B READ CAREFULLY

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

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

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

1. Place of detention LIEBER CORRECTIONAL INSTITUTION
2. Name and location of Court which imposed sentence GREENVILLE
GENERAL SESSIONS COURT, GREENVILLE, SC
3. Name(s) of co-defendant(s) (if any) _____
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed _____

- (b) _____
- (c) _____

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

- (a) 1-12-11
- (b) 20yrs & 10yres - concurrent credit for 299 days served in pre-trial detention
- (c) _____

6. Check whether a finding of guilty was made:

- (a) after a plea of guilty xx
- (b) after a plea of not guilty _____
- (c) after a plea of nolo contendere _____

7. Did you appeal from the judgment of conviction or the imposition of sentence?
no

8. If you answered Ayes@ to (7), list:

- (a) the name of each Court to which you appealed:
 - i. _____
 - ii. _____
 - iii. _____
- (b) the result in each such Court to which you appealed:
 - i. _____
 - ii. _____
 - iii. _____
- (c) the date of each such result:
 - i. _____
 - ii. _____
 - iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
 - i. _____
 - ii. _____
 - iii. _____

9. If you answered Ano@ to (7), state your reasons for not so appealing:

(b) _____

(c) _____

10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

(a) lack of effective of attorney

(b) _____

(c) _____

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

(a) only had 2 meeting with attorney never reviewed discovery

told he would get 8 or 10 yrs if he plead guilty, never

aware of 2nd until told to sign it just before plea,

signed blank plea form interpreter didn't properly translate

(c) _____

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

(a) any petition in a State Court under South Carolina Law? no

(b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? no

(c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? no

(d) any other petitions, motions or applications in this or any other Court? no

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

(a) the specific nature thereof:

i. _____

ii. _____

iii. _____

iv. _____

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

i. _____

ii. _____

iv. _____

(c) the disposition thereof:

i. _____

ii. _____

iii. _____

iv. _____

(d) the date of each such disposition:

i. _____

ii. _____

iii. _____

iv. _____

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

i. _____

ii. _____

iii. _____

iv. _____

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

no

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

(a) which grounds have been presented:

i. _____

ii. _____

iii. _____

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

i. _____

ii. _____

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) _____
- (b) _____
- (c) _____

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

- (a) your arraignment and plea? xx
- (b) your trial, if any? _____
- (c) your sentencing? xx
- (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? _____
- (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? _____

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

(a) the name and address of each attorney who represented you:

- i. Nihar Manhar Patel
Greenville Public Defender
P.O. Box 10264 F.S
Greenville, SC 29601

- ii. _____
- iii. _____

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

- i. PLea
- ii. _____
- iii. _____

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

New trial

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

no

Revised 3/2003

STATE OF SOUTH CAROLINA)
County of Greenville)

VERIFICATION

I, Richard H. Warder, 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.

Richard H. Warder

SWORN to and subscribed before me this 3rd day of June, 2011.

[Signature] (L.S.)
Notary Public

My Commission Expires: 10-31-13

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	C.A. No. 2011-CP-23-3813
COUNTY OF GREENVILLE)	
)	
Efrain Perez Martinez,)	
S.C.D.C. No. 344331,)	
)	
Applicant,)	
)	RETURN
v.)	
)	
State of South Carolina,)	
)	
Respondent.)	
_____)	

In response to the post-conviction relief application filed June 7, 2011, the Respondent would show this Court:

I.

The Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the Greenville County Clerk of Court's orders of commitment. The Greenville County Grand Jury indicted the Applicant at the December 2010 term of General Sessions for incest (2010-GS-23-03706). The Applicant waived presentment on the charge of second-degree criminal sexual conduct (CSC) with a minor (2011-GS-23-0004). Nihar M. Patel, Esquire represented the Applicant.

On January 12, 2011, the Applicant pled guilty. The Honorable Robin B. Stillwell sentenced the Applicant to concurrent terms of twenty (20) years for second-degree CSC with a minor and ten (10) years for incest. The Applicant did not appeal.

Attached herewith and incorporated herein by reference are the records of the Greenville County Clerk of Court regarding the subject convictions, the Applicant's records from the South Carolina Department of Corrections, and the guilty plea transcript.

II.

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

1. Ineffective assistance of counsel.
 - a. “[O]nly had 2 meeting with attorney never reviewed discovery told he would get 8 or 10 yrs if he plead guilty, never aware of 2nd until told to sign it just before plea, signed blank plea form interpreter didn’t properly translate.”

III.

The Respondent asserts the Applicant’s allegation that his attorney was ineffective is without merit. The Respondent asserts the Applicant’s attorney rendered effective assistance well within the standard of “reasonableness within professional norms” for a defense attorney.

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 on as having produced a just result.” Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 2064 (1984); Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume counsel “rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” Strickland, 466 U.S. at 690, 104 S. Ct. at 2066. The Applicant must overcome this presumption in order to receive relief. See Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel.

First, the applicant must prove counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under prevailing professional norms." Cherry v. State, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688, 104 S. Ct. at 2065). 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. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984)).

The Respondent submits the Applicant cannot satisfy either requirement of the Strickland v. Washington test. However, the allegation of ineffective assistance of counsel probably raises questions of fact that cannot be conclusively refuted by the record. The Respondent requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 265, 305 S.E.2d 247, 248 (1983) (citing Norman v. State, 276 S.C. 278, 277 S.E.2d 707 (1981)).

IV.

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

V.

WHEREFORE, having made its Return, the Respondent requests that a hearing be held on the issues raised in the application.

Respectfully submitted,

ALAN WILSON
Attorney General


JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

KAREN C. RATIGAN
Assistant Attorney General

P.O. Box 11549
Columbia, S.C. 29211

By:


Attorneys for Respondent

Nov.
~~October~~ 1, 2011

2011CP2303813

Afrain Perez

(AMEND to PCR)

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WICKENSINGER
2012 APR -2 AM 10:04

According to Law in the year 1992 Applicant charges for ARM ROBBERY INDICTMENT # 92-BS-40 13545 Attempted ARM ROBBERY 92-BS-40 13546 WAS NOT list AS MOST SERIOUS OFFENSE TO BE USE ENHANCED APPLICANT 2002 CONVICTION OF ARM ROBBERY AND THIS ENHANCED THIS PERJUDICE THE APPLICANT TO A FAIR TRIAL

Due to the 1992 charges for Attempted ARM ROBBERY AND ARM ROBBERY WAS NOT list MOST SERIOUS OFFENSE UNDER S.C. CODE LAW 1976 & 1985 SESSION THROUGH THE 1992 SESSION OF GENERAL ASSEMBLY CHAPTER 116-1-10 AND S.C. 17-25-45 SEC SUBSECTION B NO PART OF THE SENTENCES PRESCRIBED IN ITEM SHALL BE SUSPENDED BUT PERSONS SENTENCED THERE UNDER SHALL BE SUSPENDED BUT PERSONS SENTENCED THERE UNDER SHALL BE ELIGIBLE FOR PAROLE AS PROVIDED BY LAW

A MOST OFFENSE 17-25-45 ACCORDING TO STATUTE DID NOT GO INTO EFFECT UNTIL THE YEAR OF 1995 ACT NO 83 § 62 PROVIDED THAT THE 1995 AMENDMENT TO THIS SECTION APPLIES PROSPECTIVELY TO ALL CRIMES COMMITTED ON OR AFTER THE ACTS EFFECTIVE DATE OF JAN 1, 1996

FOR THE PURPOSE OF THIS SECTION ONLY A CONVICTION SHALL BE CONSIDER ONLY IF THE DATE OF THE COMMISSION OF THE SECOND CRIME OCCURED SUBSEQUENT TO THE IMPOSITION OF THE SENTENCE FOR THE FIRST OFFENSE A CONVICTION SHALL BE CONVICTION ONLY IF THE DATE OF THE COMMISSION OF THE THIRD CRIME OCCURED SUBSEQUENT TO THE IMPOSITION OF THE SENTENCE FOR THE SECOND OFFENSE CONVICTION TOTALING MORE THAN THREE SHALL BE DETERMINED AS THE RECORDS SHOWS. 1992 ATTEMPT ARM ROBBERY AND ARM ROBBERY S.C. CODE 16-11-330 1976 & 1985 SESSION THROUGH THE 1992 SESSION OF GENERAL ASSEMBLY. APPLICANT WAS NOT ELIGIBLE FOR MANDATORY LIFE WITHOUT POSSIBILITY OF PAROLE UNDER SENTENCING UNDER RECIDIVIST STATUTE BASED UPON HIS JUVENILE ADJUDICATION OF DELINQUENCY FOR VOLUNTARY MANSLAUGHTER. JUVENILE AD WERE NOT INCLUDED

Fareta v. CAL. Amend to PCR

1. Sixth and Fourteenth Amendments of Federal Constitution guarantee that person brought to trial in any state or federal court be afforded right to assistance of counsel before he can be validly convicted and punished by imprisonment U.S.C.A. Const.

Sixth Amendment rights of accused in all criminal prosecutions to be informed of nature and cause of accusation to be confronted with witnesses against him to have compulsory process for obtaining witnesses in his favor and to have assistance of counsel for his defense are part of the due process of law that is guaranteed by Fourteenth Amendment to defendants in the criminal courts of state U.S.C.A. Const.

~~Sixth Amendment rights of accused in all criminal prosecutions to be informed of nature and cause of accusation to be confronted with~~

Sixth Amendment right to notice confrontation and compulsory process taken together guarantee that criminal charge may be answered in manner now considered fundamental to fair administration of American justice through calling and interrogation of favorable witnesses cross examination of adverse witness and orderly introduction of evidence in short, sixth amendment constitutionalizes right in an adversary criminal trial to make defense as we know it. U.S.C.A. Const.

It is accused NOT counsel who must be informed of nature and cause of accusation who must be confronted with witness against him and who must be accorded compulsory process for obtaining witnesses in his favor U.S.C.A. Const. Amend. 6.

MARTINEZ AT the lounge fifteen minutes prior to the conclusion of the rape may have been important.

PRIOR to TRIAL MARTINEZ advised counsel that a friend named TONY WILSON had seen him leaving the lounge at exactly 1:45 A.M. counsel did NOT however SUBPOENA WILSON AS WITNESS

THE sole issue we address is whether counsel WAS ineffective in failing to SUBPOENA WILSON AS WITNESS

TO establish a claim of ineffective assistance of counsel the defendant must show that counsel representation fell below an objective standard of REASONABLENESS AND THAT BUT FOR counsel errors there is a REASONABLE probability the result would have been different. A REASONABLE probability is a probability sufficient to undermine confidence in the outcome. *Strickland v Washington*

Here, by counsel's own admission the testimony of Wilson may have made the difference in obtaining an acquittal. We find ineffective assistance. Reverse and Remanded.

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

IN THE COURT OF COMMON PLEAS

EFRAIN PEREZ MARTINEZ,)
)
 APPLICANT,)
)
 -VS-)
)
 STATE OF SOUTH CAROLINA,)
)
 RESPONDENT.)
 _____)

2011-CP-23-03813

TRANSCRIPT OF RECORD

DECEMBER 20, 2012
GREENVILLE, SOUTH CAROLINA

BEFORE:

THE HONORABLE EDWARD W. MILLER

APPEARANCES:

ATTORNEY FOR APPLICANT:

RICHARD H. WARDER, ESQUIRE

ATTORNEY FOR RESPONDENT:

KAREN C. RATIGAN
ASSISTANT ATTORNEY GENERAL

SUSAN W. HUDGINS
CIRCUIT COURT REPORTER

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EXHIBITS

NO DESCRIPTION ID EVIDENCE

(No Exhibits Were Presented During This Hearing)

1 **THE COURT:** Yes, ma'am.

2 **MS. RATIGAN:** Thank you, Your Honor. May it please the
3 Court. This is the case of Efrain Martinez versus the State
4 of South Carolina. Mr. Martinez -- actually, the docket
5 number is 2011-CP-23-3813.

6 Mr. Martinez was indicted for incest. He then waived
7 presentment on an additional charge of second degree
8 criminal sexual conduct with a minor. He was represented on
9 these charges by Mr. Patel.

10 On January 12th of 2011 he pled guilty before Judge
11 Stilwell. He received concurrent sentences of twenty years
12 for second degree CSC with a minor and ten years for incest.
13 He did not file an appeal.

14 The State's ready to proceed. I've asked Mr. Warder if
15 he believes his client needs an interpreter, and he states
16 he does not.

17 **THE COURT:** Okay.

18 **MR. WARDER:** Come on around, and they'll swear you in.

19 **Efrain Martinez,** being
20 duly sworn testified as follows:

21 **MADAME CLERK:** Thank you. You may be seated. Please
22 state your full name for the record.

23 **MR. MARTINEZ:** Say again.

24 **MADAME CLERK:** State your full name for the record.

25 **THE COURT:** What's your name?

EFRAIN MARTINEZ - DIRECT EXAMINATION BY MR. WARDER

5

1 MR. WARDER: Say your name.

2 MR. MARTINEZ: Oh, name. Efrain Martinez Perez.

3 Direct Examination by Mr. Warder:

4 Q. Efrain, we want to start off -- I want to talk to you a
5 little bit about your ability to speak the English language.

6 Now, you've been in prison for how long?

7 A. About two year.

8 Q. Okay. And you communicate solely in the prison in
9 English?

10 A. No, not all the time. Sometime in Spanish. We have
11 some people Hispanic.

12 Q. Okay. You can speak good English now?

13 A. A little bit. Not so much.

14 Q. What?

15 A. A little bit.

16 THE COURT: A little bit. Not so much.

17 Q. We've always talked in English, haven't we?

18 A. Okay.

19 Q. Can -- can you proceed in English?

20 A. Yeah.

21 Q. I mean, do you think -- do you understand this
22 proceeding here and ---

23 A. Yeah, yeah.

24 Q. --- can you hear us all okay?

25 A. Yes, sir.

EFRAIN MARTINEZ - DIRECT EXAMINATION BY MR. WARDER

1 Q. You understand the words we're all saying?

2 A. Yes, sir.

3 Q. Okay. Now, I might -- I don't know what the Judge
4 would do, say you could get you an interpreter. That would
5 just put off your hearing. Do you want to go forward in
6 English?

7 A. Yeah, yeah.

8 Q. Okay. And you understand enough that -- and I'm
9 comfortable you understand if you're comfortable.

10 A. Yeah, I understand what you're talking about, you know.
11 But sometimes it's a little bit ---

12 Q. Okay.

13 A. Some part I don't understand, but I understand what you
14 saying.

15 Q. If anytime during this proceeding you don't understand
16 something, will you ask us to clarify it?

17 A. Okay.

18 Q. Now, do you speak better English now than you did back
19 in January of 2011?

20 A. No. I didn't speak a little bit English when I came
21 the first time over here in the court in January 12, I don't
22 remember what day.

23 Q. Okay. Do you -- my question is do you speak better
24 English than when you went to court ---

25 A. Yes, sir.

EFRAIN MARTINEZ - DIRECT EXAMINATION BY MR. WARDER

7

1 Q. --- and pled guilty?

2 A. Yes, sir.

3 Q. Okay. Is that 'cause you spent two years in prison
4 with mainly people speaking English?

5 A. Yeah. I've been to school and all that.

6 Q. Now, I want to talk about your background a little bit
7 with working with the English language. You came to the
8 country when?

9 A. 1998.

10 Q. Okay. And when I say you came in, you walked in
11 through Phoenix, is that right?

12 A. Yeah, I walked.

13 Q. Okay. And you lived in Phoenix a while ---

14 A. Three months.

15 Q. Okay. And then -- and then your brother made
16 arrangements to bring you to Greenville?

17 A. My uncle.

18 Q. Your uncle, ---

19 A. Yeah.

20 Q. --- I'm sorry. And when did you get to Greenville?

21 A. In Greenville, I come over here in April 26th, April
22 26th in 1998 -- '99.

23 Q. Okay. And did you hold jobs when you were here in
24 Greenville?

25 A. Yeah. I worked in Metromont.

EFRAIN MARTINEZ - DIRECT EXAMINATION BY MR. WARDER

1 Q. Okay.

2 A. In the concrete.

3 Q. Metromont Concrete?

4 A. Yeah.

5 Q. And at Metromont Concrete did you have to speak English
6 or did you have somebody that spoke Spanish?

7 A. Yeah. My supervisor, he speaks Spanish.

8 Q. Okay. And you worked ten years there with ---

9 A. I worked for Johnson Electric Company.

10 Q. Okay. And at Johnson Electric Company, they spoke
11 English, your supervisors ---

12 A. Yes.

13 Q. And you had some fellow employees that spoke Spanish
14 that ---

15 A. Yes.

16 Q. --- could help you? Okay. And had you -- had you ever
17 been to court before?

18 A. No. It's all in the, what, last two year? Come over
19 here the first time to court.

20 Q. Okay. The first time to court was in January of 19 --
21 of 2011?

22 A. Yes.

23 Q. Okay. Now, your lawyer was Mr. Patel?

24 A. Yes.

25 Q. How long have you had Mr. Patel as a lawyer?

EFRAIN MARTINEZ - DIRECT EXAMINATION BY MR. WARDER

9

1 A. How long I see him?

2 Q. Yeah. How long did you have him as a lawyer was the
3 question.

4 A. About seven months, I think.

5 Q. Okay. Did you speak with him?

6 A. Yeah, but I see -- he go see me in the jail about three
7 -- two or three times.

8 Q. Well, let's talk about that. Okay. The first time you
9 saw him was where?

10 A. The first time? I saw him on video when he gave me the
11 bonds.

12 Q. Okay. You saw him on the TV screen?

13 A. Yeah.

14 Q. Had he ever come talk to you or talk to you before you
15 saw him on the TV screen?

16 A. No.

17 Q. Okay. Was there -- when was the next occasion you saw
18 him?

19 A. He was -- I saw him again about, I think, three months
20 later when he give me the bonds. When he find a bond -- I
21 think it take him ninety days when he find a bond.

22 Q. Okay. He got a second bond hearing because of the
23 passage of time?

24 A. Yeah.

25 Q. And once again you saw him on the TV screen?

EFRAIN MARTINEZ - DIRECT EXAMINATION BY MR. WARDER

10

1 A. Yes.

2 Q. And did he come talk to you before that hearing?

3 A. No.

4 Q. Okay. Now, that's the last time you saw him on TV,
5 wasn't it?

6 A. Yes.

7 Q. Okay. He came and personally talked to you?

8 A. Yes, sir. He -- I don't remember exactly, but he go
9 see me in the jail about two times, two times or three
10 times.

11 Q. Okay. Two times he came and talked to you in the jail?

12 A. Yeah.

13 Q. And tell me about the first time.

14 A. The first time, when I see him on the first place, I
15 ask him about my case, but he not tell me so much. Only I
16 ask -- I ask of him about how -- how he see about my case or
17 what you -- what he think about my case.

18 He tell me that you plead guilty -- you going to plead
19 guilty? I think the prosecutor, he'll give you twelve year.
20 This is telling me the first time when I see him the first
21 place.

22 And the second time when I see him was when he told me
23 that I have a court, I have a court -- he tell me you have
24 court next week. But the prosecutor tell me you going to
25 plead guilty, he'll give me ten year. And this he tell me.

EFRAIN MARTINEZ - DIRECT EXAMINATION BY MR. WARDER

11

1 But when he come over here, I see him again over here
2 in the cell right here. But, okay, I signed the paper,
3 right? I signed the paper.

4 When he put me -- the other -- the other -- I don't
5 remember what his name, the other public defender, he seen
6 me over here on the side of the room, right here in the
7 elevator. He tell me, I'm sorry, Mr. Martinez. Mr. Patel
8 say that you have the other charges. He never seen these
9 charges, but these charges, he carry ten year. All of the
10 charges he give you ten year for both case. Only you need
11 to put your initial and you need to sign.

12 Q. Okay.

13 A. And I do -- I do what all that he tell me.

14 Q. Now I've talked to you about your ability to speak
15 English. How is your ability to read English?

16 A. I can read a little bit.

17 Q. Okay. How was your ability to read back in January,
18 2011?

19 A. Oh, no, I can't read nothing.

20 Q. Okay. And so in -- but you've learned some since
21 you've been in prison?

22 A. Yeah.

23 Q. Okay. You thought you agreed to two charges that would
24 carry ten years?

25 A. I plead guilty for when he tell me to sign the paper,

EFRAIN MARTINEZ - DIRECT EXAMINATION BY MR. WARDER

12

1 right, to plead guilty by -- he tell me the one charge. The
2 other -- well, I told you the other public defender, he tell
3 me, I don't remember what his name, for him to speak in
4 Spanish, he talked to me and he say Mr. Patel say you have
5 the other charges, but this charge, it carry ten year.

6 Well, how did he give me ten year for both case?

7 Q. Okay.

8 A. Yeah.

9 Q. Now, they told you you have to plead guilty. Have they
10 gave you the discovery? Have they went over all the stuff
11 with you?

12 A. No.

13 Q. Have they took the papers down and the statements of
14 the ---

15 A. No, I don't have nothing.

16 Q. Okay. Did you know what you were supposed to ---

17 A. No.

18 Q. --- give them?

19 A. The only paper was sitting in the jail was for the DSS.

20 Q. Okay. And that was an order relating to your kids?

21 A. Yeah.

22 Q. And there was -- you never saw any legal paper that
23 told about your case ---

24 A. No, sir.

25 Q. Police reports?

EFRAIN MARTINEZ - DIRECT EXAMINATION BY MR. WARDER

13

1 A. No, sir.

2 Q. Did you believe you had to plead guilty?

3 A. I plead guilty, but by him telling me, right? He tell
4 me. I was asking him what is the better? He said you going
5 to plead guilty. This is better for you. You no plead
6 guilty, he taking you into trial next week. But I tell you,
7 you lose this case, he'll give you thirty-five year.

8 Okay. You tell me what I do. He say, plead guilty.
9 He give me -- he giving you ten year. He giving you ten
10 year. But he giving me ten year, but he gave me ten year
11 for the other charges too.

12 Q. Okay. And you ended up receiving a sentence of much
13 larger than that, is that right?

14 A. Yeah.

15 Q. When you went in the courtroom you knew you were
16 pleading to two charges, is that right?

17 A. Yes.

18 Q. And you thought that it had been worked out -- well,
19 somehow you were going to receive ten years on each one?

20 A. No.

21 Q. Okay. How was it? What did you think was going to
22 happen? Or what had you been told was going to happen?

23 A. What he told me? By him telling me -- by I tell you.
24 By he said -- by I plead, you know, I plead guilty, but he
25 tell me he gave me ten year, this I plead guilty.

EFRAIN MARTINEZ - DIRECT EXAMINATION BY MR. WARDER

1 Q. So you thought you'd have a total sentence of ten
2 years?

3 A. Yes, sir. But I never -- I never -- but I never
4 worried what he tell me again. The other -- the other
5 public defender, I don't know what his name is, but he speak
6 in Spanish. I think Mike or Mike. I don't know what his
7 name. He tell me the other charge.

8 Q. Did he ever talk to you about the difference between
9 violent and non-violent charges?

10 A. No.

11 Q. Ever talk to you about the difference between serious
12 and non-serious ---

13 A. Yeah.

14 Q. --- charges?

15 A. Yes.

16 Q. Okay. Did you think you were pleading to serious or
17 non-serious charges?

18 A. Well, I -- in this time, I don't know, you know. I
19 never know the law or the stuff around it, I don't know. I
20 know the law, but I don't know was it serious or not.

21 Q. Do you know what the difference between serious and
22 non-serious charges are?

23 A. Yeah, but now I know they say my case is serious, you
24 know.

25 Q. Okay. Did you know at that time the difference between

EFRAIN MARTINEZ - DIRECT EXAMINATION BY MR. WARDER

15

1 serious and ---

2 A. No.

3 Q. You know now from being in prison what ---

4 A. Yes.

5 Q. Okay. Would you -- would you have pled guilty if you
6 knew you were getting more than ten years?

7 A. No.

8 Q. Did you know that you were going to be on electronic
9 monitoring for ---

10 A. No. Never told me nothing of it.

11 Q. And did he tell you about the sexual registry?

12 A. No.

13 Q. Now, you filed your own addendum to the PCR. You filed
14 some additional grounds that you wanted considered?

15 A. Yeah.

16 Q. Okay. Can you explain them to the Court? I'll kind of
17 go through them with you.

18 A. When I pulled out this paper, PCR, right, about why he
19 didn't do my time concurrent this time, you know, for the
20 both charge, the both charges? Why he give me separate?
21 Why he no give me ten year concurrent? I saw the -- a lot
22 of people in the prison, he got the same charge, he got it
23 concurrent.

24 Q. Okay. You raise all them issues in your addendum to
25 your PCR hearing? Is that right?

EFRAIN MARTINEZ - DIRECT EXAMINATION BY MR. WARDER

1 (Pause)

2 Q. Is that yours?

3 A. No. I never write on this paper.

4 Q. Did somebody write it for you?

5 A. No. I don't know. But I never write this paper.

6 Q. I'm going to -- do you know what this addendum, your
7 PCR says?

8 A. No.

9 **THE COURT:** Mr. Warder, was this filed ---

10 Q. Do you know what the paper ---

11 **THE COURT:** Mr. Warder, was this filed in April of
12 2012?

13 **MR. WARDER:** Yes.

14 **THE COURT:** This is referring to armed robbery and
15 burglary, first. I don't think ...

16 **MR. WARDER:** Well, it made no sense to me, but if you
17 wanted to consider it with the PCR, you want to tell him
18 that ---

19 **THE COURT:** Well, do you have a copy of that, Ms.
20 Ratigan?

21 **MS. RATIGAN:** Yes, Your Honor.

22 **THE COURT:** Can you make heads or tails of it?

23 **MS. RATIGAN:** I think it's a different Martinez that at
24 some point on -- I don't even know what page it is. It says
25 petitioner, Laville (phonetics) Martinez, was convicted ---

EFRAIN MARTINEZ - DIRECT EXAMINATION BY MR. WARDER

1 THE COURT: Right.

2 MS. RATIGAN: --- of first degree burglary and first
3 degree CSC. So I think it's ---

4 THE COURT: That's on the third page ---

5 MS. RATIGAN: Yeah.

6 THE COURT: --- at the bottom paragraph. I don't think
7 this is the same ---

8 MR. WARDER: The Clerk of Court sent it to me. And I
9 ---

10 THE COURT: I don't think it's the same.

11 MR. WARDER: If I was supposed to cover it, I wanted
12 Your Honor to have it before you. But if it's completely
13 ---

14 THE COURT: Well, it's written -- the return envelope
15 is from Mr. Lamont Outmer (phonetics).

16 Q. Do you know that gentleman?

17 A. No.

18 Q. You didn't have him do any legal work or anything for
19 you?

20 A. (Negative nod). I don't know who this person ---

21 THE COURT: I'm not going to consider that document
22 because it's not this case.

23 Q. Okay. I want you to answer any questions the State
24 might have.

25 MS. RATIGAN: I don't have any questions for Mr.

NIHAR PATEL - DIRECT EXAMINATION BY MS. RATIGAN

18

1 Martinez.

2 **THE COURT:** Okay. You may step down.

3 **MR. WARDER:** Your Honor, that would be the Petitioner's
4 case.

5 **THE COURT:** Okay.

6 **MS. RATIGAN:** The State would now call Mr. Patel.

7 **Nihar Patel**, being duly
8 sworn testified as follows:

9 **MADAME CLERK:** Please state your full name for the
10 record.

11 **MR. PATEL:** It's Nihar Patel.

12 Direct Examination by Ms. Ratigan:

13 Q. Mr. Patel, do you recall representing Mr. Martinez on
14 these charges?

15 A. I do.

16 Q. And were you appointed through the Public Defender's
17 Office?

18 A. I was.

19 Q. You filed the usual discovery motions?

20 A. I did.

21 Q. Did you receive those materials?

22 A. I did.

23 Q. Did you receive any laboratory results as part of those
24 materials?

25 A. I did. There was a paternity test from LabCorp,

NIHAR PATEL - DIRECT EXAMINATION BY MS. RATIGAN

19

1 Laboratory Corporations of America.

2 Q. And what did it indicate?

3 A. That the probability of the defendant being the father
4 of the victim's child was ninety-nine point nine nine
5 (99.99) percent.

6 Q. And did you review all the discovery materials
7 including the paternity test with your client?

8 A. I did. I never gave him a copy of the discovery
9 because he was incarcerated. This case did deal with a
10 minor child. So there was names and sensitive information
11 in the discovery. So I never actually gave him a copy of
12 it.

13 The discovery itself was not -- other than his -- other
14 than the rap sheet-- other than the NCIC there was only
15 three pages of actual police report. So there was only
16 three pages of actual discovery, a police report.

17 We then got a chance to view the forensic interview,
18 which was a disk that the Solicitor's Office kept. So I
19 viewed it at the Solicitor's Office. We never got a copy of
20 the disk.

21 And then there was also one page printout of the
22 forensic interview that was held with the minor child. So
23 there wasn't a whole lot of discovery actually in this case
24 other than that and the paternity results.

25 Q. But you reviewed all these materials with Mr. Martinez?

NIHAR PATEL - DIRECT EXAMINATION BY MS. RATIGAN

20

1 A. I did.

2 Q. And when you would have these meetings with him did you
3 have an interpreter with you?

4 A. I did. I used -- I never -- I never got a court
5 appointed interpreter. I used Michael Cullinan, who is
6 fluent in Spanish. He's an -- he was an attorney at the
7 Public Defender's Office while I was there.

8 I can't -- cannot tell you how many times I met with
9 Mr. Martinez. I don't believe it was a whole lot. Maybe --
10 maybe three, four times prior to him pleading guilty. But
11 as I said, there wasn't a whole lot to go over when it came
12 to the discovery. It was the police reports and the -- and
13 the lab results.

14 Q. But you always had Mr. Cullinan with you when you would
15 go talk to him?

16 A. Yes.

17 Q. Was there really any realistic expectation of taking
18 the case to trial or was it always going to plead?

19 A. After the paternity results came back, I didn't see any
20 realistic chance.

21 Q. Did the State ever make any kind of a plea offer to
22 you?

23 A. Yes. He was originally charged with CSC with a minor,
24 first degree, which is reduced down to second degree, which
25 that is what he pled to, second degree, and pled to the

NIHAR PATEL - DIRECT EXAMINATION BY MS. RATIGAN

21

1 incest as well.

2 Q. And did -- did that offer come with an offer of years,
3 do you recall?

4 A. The offer was for the -- for the twenty years.

5 Q. And did you take this offer to Mr. Martinez and discuss
6 it with him?

7 A. I did.

8 Q. Specifically you told him the State was going to
9 recommend a twenty year sentence?

10 A. That was the State's recommendation. I told him that
11 we would obviously ask for less than the twenty years.

12 Q. Did you make any recommendation to him as to whether or
13 not he should take the offer?

14 A. Based on the lab results, the reduction in charge, I
15 advised him that it would probably be wise to take the --
16 take the plea offer.

17 Q. Did you ever tell him that the State was going to
18 recommend a ten year sentence?

19 A. No, I did not.

20 Q. And the State never did make any kind of offer along
21 those lines?

22 A. No. Like I said, the only offer the State made was the
23 reduction from first degree to second degree.

24 Q. And you always knew that he faced these two separate
25 charges?

NIHAR PATEL - CROSS EXAMINATION BY MR. WARDER

22

1 A. Yes. That's what -- when the file came to my office he
2 was charged with -- there was two charges, the incest and
3 CSC with a minor, first degree.

4 MS. RATIGAN: That's all I have, Your Honor.

5 THE COURT: Cross.

6 **Cross Examination by Mr. Warder:**

7 Q. Did you ever show the disk to Mr. Martinez?

8 A. I did not.

9 Q. Did you ever go over the discovery material with him?

10 A. Yes.

11 Q. The three pages?

12 A. Yes. And by go over, I had Mr. Cullinan just read the
13 -- the incident report, the three pages.

14 Q. Did you ever go over the probability, and how DNA tests
15 work, and what they were matching and how that process went
16 about?

17 A. I can't remember if I got into details of how -- I know
18 I went over the results with him. I don't have anything in
19 my notes where I sat down and went through the -- the
20 procedures that the line would go through and whatnot.

21 Q. He says that there were two visits in person. Would
22 that be accurate in your recollection?

23 A. As I said earlier, I didn't meet with him much. I
24 would -- I would probably say either two to three times down
25 at the detention center and then when they would bring him

NIHAR PATEL - CROSS EXAMINATION BY MR. WARDER

23

1 over here to plea -- I believe they brought him more than
2 once to try to attempt to plea.

3 Q. And when you say attempt to plea, would that mean he
4 would not want to plea? Is that why they were only
5 attempts?

6 A. No, just brought over here. Either he didn't get
7 reached or he didn't want to plea at that time. I don't
8 have it in my notes, but I think they brought him over more
9 than -- on more than one occasion.

10 Q. If he didn't want to plea, was he maintaining his
11 innocence?

12 A. Like I said, I don't recall that that was the reason
13 why he was sent back or not. I do believe that he was
14 brought more than one time.

15 Q. When you met with him over here did you have an
16 interpreter here too?

17 A. I would use Michael Cullinan in my office. We actually
18 had a court appointed interpreter for the actual plea. It
19 wasn't Mr. Cullinan.

20 Q. Okay. In your experience could he communicate without
21 the interpreter?

22 A. No.

23 Q. Okay.

24 A. And I believe there was actually an attempt made by my
25 investigator when we first got the case to try to get him up

NIHAR PATEL - CROSS EXAMINATION BY MR. WARDER

1 on the video screen to let him know that we were
2 representing him, and she couldn't communicate with him at
3 that point, at that time either. So ...

4 Q. But you would agree there was very little contact?

5 A. There was little contact with him, I agree with that.

6 **MR. WARDER:** That's all I have, Your Honor.

7 **MS. RATIGAN:** I don't have anything further, Your
8 Honor.

9 **THE COURT:** Okay. Thank you.

10 **MS. RATIGAN:** The State would rest at this time, Judge.

11 **THE COURT:** All right. Anything in reply?

12 **MR. WARDER:** No, sir.

13 **THE COURT:** All right. Well, I'm going to deny the
14 petition unless you, I mean, you've got some magic formula
15 that would -- that I can't see.

16 **MR. WARDER:** No, sir, I just represented a person that
17 from all the testimony he had very poor language skills and
18 no background to have an understanding of the proceeding and
19 that that's why he thought he was going to get ten years at
20 the time he pled guilty.

21 **THE COURT:** Well, he had an interpreter at the plea.
22 The State said they were recommending twenty years. Never
23 raised the issue at that time.

24 I'm going to find Mr. Patel's testimony to be credible.
25 And I'm going to find that Mr. Martinez has not carried his

1 burden of proof and deny the petition. I'd ask the State to
2 prepare an order reflecting that.

3 **MS. RATIGAN:** I will do so, Your Honor. Thank you.

4 **THE COURT:** All right. Thank you very much.

5 (Whereupon court was in recess at 3:20 pm)

6 (Whereupon court resumed at 3:22 pm)

7 **THE COURT:** For the record, in the case of Efrain
8 Martinez, that's 2011-3813, I just want to note for the
9 record that Mr. Martinez, while he spoke and understood the
10 English language, his accent was -- made it very difficult
11 at times to understand precisely the words he was using.
12 And I would like the record to reflect that.

13 (Hearing Ended at 3:23 pm)

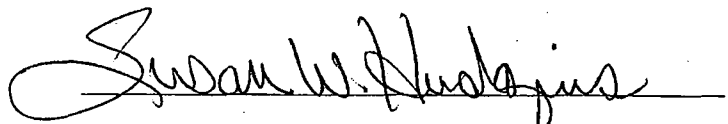
14 (End of Requested Transcript of Record)

1 Certificate of Reporter

2 I, The undersigned, Susan W. Hudgins, Official Court
3 Reporter for the Thirteenth Judicial Circuit of the State of
4 South Carolina, do hereby certify that the foregoing is a
5 true, accurate, and complete transcript of record of all the
6 proceedings had and evidence introduced in the trial/hearing
7 of the captioned case, relative to appeal, in the Circuit
8 Court for Greenville County, South Carolina, on the 20th day
9 of December 2012.

10 I do further certify that I am neither of kin, counsel,
11 nor interest to any party hereto.

12 March 27, 2013

13
14 

15 Circuit Court Reporter

STATE OF SOUTH CAROLINA)
)
 COUNTY OF GREENVILLE)
)
 Efrain Perez Martinez,)
 S.C.D.C. No. 344331,)
)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
)
 Respondent.)

IN THE COURT OF COMMON PLEAS
 C.A. No. 2011-CP-23-3813

ORDER OF DISMISSAL

FILED CLERK OF COURT
 GREENVILLE CO. S.C.
 PAUL B. WICKENSIMMER
 2013 JAN 22 P 1:33

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed June 7, 2011. The Respondent made its return on November 1, 2011. An evidentiary hearing was convened on December 20, 2012 at the Greenville County Courthouse. The Applicant was present and represented by Richard H. Warder, Esquire. Karen C. Ratigan, Esquire of the South Carolina Office of the Attorney General represented the Respondent.

The Applicant testified on his own behalf at the PCR hearing. Also testifying was the Applicant's plea counsel, Nihar M. Patel, Esquire. The Court had before it the transcript of the guilty plea hearing, the records of the Greenville County Clerk of Court, the Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, and the Respondent's return.

PROCEDURAL HISTORY

The Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Greenville County Clerk of Court. The Applicant was indicted at the December 2010 term of the Greenville County Grand Jury for incest (2010-GS-23-03706) and the Applicant waived presentment on the charge of second-degree criminal sexual conduct

(CSC) with a minor (2011-GS-23-0004). He was represented by Nihar M. Patel, Esquire.

On January 12, 2011, the Applicant pled guilty. The Honorable Robin B. Stillwell sentenced the Applicant to concurrent terms of twenty (20) years for second-degree CSC with a minor and ten (10) years for incest. The Applicant did not appeal.

ALLEGATIONS

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

1. Ineffective assistance of counsel.
 - a. “[O]nly had 2 meeting with attorney never reviewed discovery told he would get 8 or 10 yrs if he plead guilty, never aware of 2nd until told to sign it just before plea, signed blank plea form interpreter didn’t properly translate.”

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 and arguments presented at the PCR hearing. This Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their credibility. This Court has weighed the testimony accordingly. Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80 (2003).

Ineffective Assistance of Counsel

The Applicant alleges he received ineffective assistance of counsel. In a PCR action, “[t]he burden of proof is on the applicant to prove his allegations by a preponderance of the evidence.” Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002).

For an applicant to be granted PCR as a result of ineffective assistance of counsel, he must show both: (1) that his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by his counsel’s ineffective

performance. See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006). When there has been a guilty plea, the applicant must prove that counsel's representation was below the standard of reasonableness and that, but for counsel's unprofessional errors, there is a reasonable probability that he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 58-59, 106 S. Ct. 366, 370 (1985); Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001).

The Applicant stated he spoke "a little English" around the time of the guilty plea hearing. The Applicant stated he had two meetings with plea counsel for bond hearings and two in-person meetings. The Applicant stated they did not review the State's evidence. The Applicant stated plea counsel told him to plead guilty at their first meeting and that he could receive a twelve year sentence. The Applicant stated plea counsel told him at their second meeting that he would receive a ten year sentence if he pled guilty the following week. The Applicant stated he met with another public defender at the courthouse on the day of his plea hearing and this attorney told him – in Spanish – that the judge would give him a ten year sentence. The Applicant stated he would not have pled guilty if he thought he could receive more than ten years. The Applicant stated plea counsel never told him about the Sex Offender Registry or eventual electronic monitoring.

Plea counsel testified he filed discovery motions, received those materials from the State, and reviewed all of the evidence (except for the CD of the child's forensic interview) with the Applicant. Plea counsel testified the paternity test indicated a 99.99% probability the Applicant was the father of the victim's child. Plea counsel testified he always brought a Spanish-speaking public defender with him to the three or four meetings he had with the Applicant but that they used a court-appointed interpreter at the guilty plea hearing. Plea counsel testified that, once

they received the results of the paternity test, there was no chance to win the case at trial. Plea counsel testified there was never a ten year plea offer from the State and he never told the Applicant he would receive a ten year sentence. Plea counsel testified the recommendation from the State was for a twenty year sentence and that he reviewed this with the Applicant and recommended he accept it.

Regarding the Applicant's claims of ineffective assistance of counsel, this Court finds the Applicant has failed to meet his burden of proof. This Court finds the Applicant's testimony is not credible, while also finding plea counsel's testimony is credible. This Court further finds plea counsel adequately conferred with the Applicant, conducted a proper investigation, and was thoroughly competent in his representation.

A Spanish language interpreter was used at the guilty plea hearing. (Plea transcript, p.2). The Applicant admitted to the plea judge that the facts recited by the solicitor were true. (Plea transcript, p.7). The Applicant also told the plea judge that he understood the trial rights he was waiving in pleading guilty, was satisfied with counsel, and had not been coerced in any way. (Plea transcript, pp.2-3; p.5; p.6).

This Court finds the Applicant failed to meet his burden of proving plea counsel did not properly meet with him to review his case. Plea counsel testified they had several meetings – always with a Spanish-speaking attorney in attendance to translate – in which they reviewed the discovery materials and discussed the case. Plea counsel testified, however, there was not much discovery in the case and the defense case became much more difficult when they received the result of the paternity test. This Court finds plea counsel's testimony is credible. This Court notes the Applicant did not register any complaints about plea counsel when he pled guilty. Rather, he stated he was satisfied with plea counsel's representation. (Plea transcript, p.6).

Further, the Applicant has failed to articulate how the outcome of his case would have been different if he had more time to discuss the case with plea counsel. See, e.g., Skeen v. State, 325 S.C. 210, 481 S.E.2d 129 (1997) (holding applicant not entitled to relief where no evidence presented at PCR hearing to show how additional preparation would have had any possible effect on the result at trial).

This Court finds the Applicant failed to meet his burden of proving plea counsel did not properly advise him of the sentence he could receive. The Applicant stated both plea counsel and another public defender told him that he would receive a ten year sentence if he pled guilty. Plea counsel testified there was never a ten year offer, he never told the Applicant he would receive a ten year sentence, and he reviewed the State's recommendation of a twenty year sentence with the Applicant. This Court finds plea counsel's testimony is more credible. This Court further notes the plea judge advised the Applicant of the maximum sentences he could receive on these charges – and that he could receive a maximum sentence of thirty years – and the Applicant stated he understood. (Plea transcript, p.4). The State also announced the recommendation was for a twenty year sentence and the Applicant did not object. (Plea transcript, p.7). This Court further finds that, given the facts of this case, it is simply not believable either than an attorney would say there was a ten year plea offer or that a reasonable defendant would believe he would only receive a ten year sentence.

This Court finds the Applicant failed to meet his burden of proving plea counsel should have advised him about the future consequence of the Sex Offender Registry (and the electronic monitoring requirement). This Court notes that, as these are collateral consequences of the Applicant's guilty pleas, counsel was not required to discuss them with the Applicant. See Williams v. State, 378 S.C. 511, 662 S.E.2d 615 (Ct. App. 2008).

Accordingly, this Court finds the Applicant has failed to prove the first prong of the Strickland test – that plea counsel failed to render reasonably effective assistance under prevailing professional norms. The Applicant failed to present specific and compelling evidence that plea counsel committed either errors or omissions in his representation of the Applicant. This Court also finds the Applicant has failed to prove the second prong of Strickland – that he was prejudiced by plea counsel’s performance.

This Court concludes the Applicant has not met his burden of proving counsel failed to render reasonably effective assistance. See Frasier v. State, 351 S.C. at 389, 570 S.E.2d at 174.

All Other Allegations

As to any and all allegations that were raised in the application or at the hearing in this matter and not specifically addressed in this Order, this Court finds the Applicant failed to present any evidence regarding such allegations. Accordingly, this Court finds the Applicant waived such allegations and failed to meet his burden of proof regarding them. Therefore, they are hereby denied and dismissed.

CONCLUSION

Based on all the foregoing, this Court finds and concludes the Applicant has not established any constitutional violations or deprivations before or during his guilty plea and sentencing proceedings. Counsel was not deficient in any manner and the Applicant was not prejudiced by counsel’s representation. Therefore, this PCR application must be denied and dismissed with prejudice.

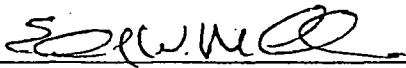
This Court advises the Applicant that he must file a notice of intent to appeal within thirty (30) days from the receipt of this Order if he wants to secure appropriate appellate review. His attention is also directed to Rules 203, 206, and 243 of the South Carolina Appellate Court Rules

for the appropriate procedures to follow after notice of intent to appeal has been timely filed.

IT IS THEREFORE ORDERED:

1. That the application for post-conviction relief be denied and dismissed with prejudice; and
2. That the Applicant be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 10th day of January, 2013.


Edward W. Miller
Presiding Judge
Thirteenth Judicial Circuit

Greenville, South Carolina.

WITNESSES

Cheryl Cromartie

cc

Greenville County Sheriff's Office

3/19/2010

DOCKET NO. 201 JS-23-
BSD

003706

The State of South Carolina

County of Greenville

COURT OF GENERAL SESSIONS

December TERM 2010

THE STATE

vs.

EFRAIN PEREZ-MARTINEZ

a.k.a

EFRAIN MARTINEZ

ARREST WARRANT NUMBER

M179639

ACTION OF GRAND JURY

TRUE BILL

Ann S. Edwards

FOREMAN GRAND JURY

Foreperson of Grand Jury

VERDICT

0090

Indictment for

INCEST

VIOLATION § 16-15-0020

Foreperson of Petit Jury

Date:

RECEIVED

MAY 14 2010

Clerk of Court
Greenville County

ARREST WARRANT

M-179639 5531

STATE OF SOUTH CAROLINA
County/ Municipality of Greenville 3-22-10

THE STATE 10-44505

against
ERAIN Perez-Martinez AKA ERAIN Martinez

Greenville, SC 29611

Age: M Race: H Height: 5 5 Weight: 200

State: SC DL #: Agency ORI #: SC0230000

seating Agency: Greenville County Sheriff's Office

Securing Officer: Cheryl Cromatic - 0086

Arrest: Sex / Incest

Arrest Code: 0090

Arrest/Ordinance Sec: 16-15-0020

Warrant is CERTIFIED FOR SERVICE in the County/ Municipality of

To be arrested and brought before me to be at with according to the law. (L.S.)

Signature of Judge

RETURN

copy of this arrest warrant was delivered to incident ERAIN PEREZ - MARTINEZ 3-18-10

Signature of Constable Law Enforcement Officer
61141 E-52

FURN WARRANT TO:

Greenville General Sessions



ORIGINAL ORIGINAL

STATE OF SOUTH CAROLINA
County/ Municipality of Greenville

Personally appeared before me the affiant Cheryl Cromatic

being duly sworn deposes and says that defendant Ezebian Perez-Martinez did within this county and state on or about 01/01/2009 violate the criminal laws of the state of South Carolina (or ordinance of County/ Municipality of Greenville in the following particulars:

DESCRIPTION OF OFFENSE Sex / Incest

Perez

I further state that there is probable cause to believe that the defendant named above did commit the crime set forth and that probable cause is based on the following facts:

Affiant has a statement from a 12 year old female implicating the defendant in the above named offense. The victim states between the dates of 1/1/09 - 2/20/10 the defendant her father had penile/vaginal intercourse with her on numerous occasions. Affiant has confirmed the biological relationship between the victim and defendant from victims mother Ortenca Garcia-Castillo. These incidents occurred in Greenville County.

Signature of Affiant
Cheryl Cromatic

STATE OF SOUTH CAROLINA
County/ Municipality of Greenville

Affiant's Address

Affiant's Telephone

ARREST WARRANT

TO ANY LAW ENFORCEMENT OFFICER OF THIS STATE OR MUNICIPALITY OR ANY CONSTABLE OF THIS COUNTY:

on or about 1/1/2009 defendant Ezebian Perez-Martinez did violate the criminal laws of the State of South Carolina (or ordinance of Greenville) as set forth below:

DESCRIPTION OF OFFENSE: Sex / Incest

Having found probable cause and the above affiant having sworn before me, you are empowered and directed to arrest the said defendant and bring him or her before me forthwith to be dealt with according to law. A copy of this Arrest Warrant shall be delivered to the defendant at the time of its execution, or as soon thereafter as is practicable. Sworn to and subscribed before me on 03/19/2010

Signature of Issuing Judge
(L.S.)

Judge Code: 5031

Judge's Address

Judge's Telephone

Issuing Court: Magistrate Municipal Circuit

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S. A. 2007
SCSA 518

19 WITNESSES

I Cromatie

ville County Sheriffs Office

010

DOCKET NO. 2014-GS-23-00047K

The State of South Carolina

County of Greenville

COURT OF GENERAL SESSIONS

TERM 2011

ARREST WARRANT NUMBER

M179638

(Reference)

ACTION OF GRAND JURY

erson of Grand Jury

VERDICT

erson of Petit Jury

EFRAIN PEREZ MARTINEZ
AKA
EFRAIN MARTINEZ PEREZ

THE STATE

vs.

Indictment for
0396

CRIMINAL SEXUAL CONDUCT WITH A MINOR
2ND DEGREE (11-14)

VIOLATION § 16-03-0655(B)(1)

ENTERED
ACCT


STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)

INDICTMENT FOR
CRIMINAL SEXUAL CONDUCT WITH A MINOR 2ND DEGREE
(11-14)

At a Court of General Sessions, convened on

the Grand Jurors of Greenville

County present upon their oath:

That EFRAIN PEREZ MARTINEZ AKA EFRAIN MARTINEZ PEREZ did in Greenville County,
between the 1st day of January, 2009 and 20th day of February, 2010, commit a sexual battery on 
who was fourteen years of age or less but who was at least eleven years of age. This is in violation of
§ 16-3-655(B)(1) [formerly § 16-3-655(2)] of the South Carolina Code of Laws (1976) as amended.

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