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September 26, 2013

VIA US MAIL

Supreme Court of South Carolina
Attention: Daniel Shearouse
Post Office Box 11330
Columbia, SC 29211

RECEIVED

SEP 30 2013

S.C. SUPREME COURT

Re: Jose Luis Guitierrez Hernandez v. State of South Carolina
Case Number: 2011-CP-10-2878

Dear Clerk:

I hope this correspondence finds you doing well. My office was previously appointed to represent Mr. Hernandez in his application for Post-Conviction Relief.

My office received a filed Order of Dismissal on September 23, 2013 from the Charleston County Clerk of Court, and further received a filed Order of Dismissal from the Office of Attorney General on September 25, 2013. My client has instructed me to file a Notice of Intent to Appeal, thus, please find Mr. Hernandez's Notice of Intent to Appeal, Affidavit of Indigency, and Proof of Service to opposing counsel. If you could please file this with the court, I would be most appreciative.

As always, please do not hesitate to contact the numbers listed above should you have any questions or concerns.

With best regards, I remain

Sincerely,

Mark A. Peper

Enclosures as stated.

cc: Jose Hernandez
SC Office of Indigent Defense
SC Office of Attorney General

UNITED STATES OF AMERICA)
STATE OF SOUTH CAROLINA)
)
)
)
)
JOSE LUIS GUITIEREZ HERNANDEZ)
(Inmate Number 326877),)
)
VS.)
)
STATE OF SOUTH CAROLINA)

IN THE SUPREME COURT
FOR THE STATE OF SOUTH CAROLINA
CASE NUMBER: 2012-CP-10-3627

NOTICE OF INTENT TO APPEAL

Jose Luis Guitierrez Hernandez hereby gives notice of his intent to appeal the dismissal of his Post-Conviction Relief in this case. The dismissal was imposed by the Honorable Roger M. Young, Sr. by Order filed on December 6th, 2012. Appointed Counsel for Applicant received said Order of Dismissal on September 23, 2013 via US Mail from the Charleston County Clerk of Court. Further, appointed Counsel for Applicant received said Order on September 25, 2013 via US Mail from the Office of Attorney General for the State of South Carolina.

Respectfully Submitted,



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Appointed Counsel for Applicant

RECEIVED
SEP 30 2013
S.C. SUPREME COURT

September 26, 2013
Charleston, South Carolina

CERTIFICATE OF SERVICE

This is to certify that the undersigned has, this date, served **Appellant Jose Luis Guitierrez Hernandez Notice of Intent to Appeal to Case Number 2011-CP-10-2878** by depositing a true copy hereof, postage prepaid, in the United States mail to the following relevant parties:

Charleston County Clerk of Court 100 Broad Street Charleston, SC 29401	Ashleigh Rayanna Wilson, Esquire Assistant Attorney General P.O. Box 11549 Columbia, SC 29211
Jose Luis Guitierrez Hernandez SCDC Number 326877 Lieber Correction Institute P.O. Box 205 Ridgeville, SC 29472	SC Office of Indigent Defense P.O. Box 11433 Columbia, SC 29211-1433



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This 26 day of September, 2013.

STATE OF SOUTH CAROLINA)
)
 COUNTY OF CHARLESTON)
)
 Jose Luis Guitierrez Hernandez, #326877,)
)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
)
 Respondent.)

IN THE COURT OF COMMON PLEAS
 2011-CP-10-2878

ORDER OF DISMISSAL

FILED
 2012 DEC 27 PM 2:38
 JULIE J. ARMSTRONG
 CLERK OF COURT

This matter comes before the Court by way of an application for post-conviction relief (PCR) dated April 21, 2011. The Respondent made its return on August 23, 2011. An evidentiary hearing on the matter was convened on December 4, 2012 at the Charleston County Courthouse. The Applicant was present at the hearing and represented by Mark Peper, Esquire. Ashleigh R. Wilson, Esquire of the South Carolina Office of the Attorney General represented the Respondent.

The Applicant testified at the hearing, along with Andrew Grimes, Esquire. The Court had before it the trial transcript, the Charleston County Clerk of Court records, and the Applicant's records from the South Carolina Department of Corrections, the Applicant's application, the Respondent's return, and the appellate records.

PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Charleston County Clerk of Court. The Applicant was indicted at the January 2007 term of the Charleston County Grand Jury for trafficking cocaine 200-400 grams (2007-GS-10-0056) and possession with intent to distribute within

proximity of a school (2007-GS-10-0057). He was represented by Andrew Grimes, Esquire, and Ben Lewis, Esquire.

The Applicant proceeded to trial on March 3-4, 2008, after which the jury found him guilty of trafficking cocaine.¹ The Applicant was sentenced by the Honorable R. Markley Dennis to 25 years.

A notice of appeal was filed on the Applicant's behalf at the South Carolina Court of Appeals. Tricia A. Blanchette, Esquire, perfected the appeal. The South Carolina Court of Appeals affirmed the Applicant's convictions and sentences. State v. Hernandez, Op. No. 2011-UP-032 (S.C. Ct. App. filed January 26, 2011). The Remittitur was issued on April 29, 2011.

ALLEGATIONS

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

1. Ineffective Assistance of Counsel
 - a. Failure to advise Applicant of plea offer in a timely manner.
 - b. Failure to properly prepare and investigate.
 - c. Failure to properly raise an entrapment argument.
2. Ineffective Assistance of Appellate Counsel
 - a. Appellate counsel raised an issue that was not preserved for appellate review.

At the hearing, Applicant proceeding solely on the allegations listed in his post-conviction relief application.

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.

¹ The Applicant was PWID Cocaine within proximity of a school was *nolle prossed* after the jury found the Applicant guilty of the trafficking cocaine charge.



Set forth below are the relevant findings of fact and conclusion of law as required by S.C. Code Ann. Sec. 17-27-80 (2003).

Summary of the Testimony

The Applicant was present at the hearing and testified that he met with trial counsel three times prior to trial. He testified that he listened to the tape of the phone call he made to the confidential informant and watched a video of the controlled buy with trial counsel prior to trial. The Applicant gave conflicting testimony about his ability to speak English. First, the Applicant testified that he is able to communicate properly in English. Shortly thereafter, he testified that he does not speak good English and as a result did not understand the initial plea offer when it was conveyed to him by trial counsel. He then testified that he told the Court prior to his trial that he did not need an interpreter and that he could speak English.

The Applicant testified that the State initially extended an offer to plead to 15 years, but that he refused the offer because he did not understand and thought the plea offer was for 50 years instead of 15. The Applicant testified that it was his decision to turn down the second plea offer of 18 years because trial counsel told him he would have to serve his time day for day and admit committing the crime.

The Applicant testified that he gave trial counsel the name of his boss as a potential witness. He testified that he wanted his boss present to show that he was making good money and did not need to sell drugs. The Applicant testified that counsel explained the elements of the crimes he was charged with. He testified further that he explained his version of the facts to trial counsel. The Applicant testified that his attorney explained to him that entrapment was his defense and that he had a good case. The Applicant testified that trial counsel did not tell him he

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could be deported if he was convicted. Lastly, the Applicant testified that he did not think that trial counsel was ready for trial and that there were no Spanish people on his jury.

Andrew Grimes, Esquire, the Applicant's trial counsel, testified that he has been practicing law since 1995 and the majority of his practice has been in criminal law. He testified that he was appointed to represent the Applicant in December 2006. Counsel testified that prior to trial, he met with the Applicant at least 10 times.

He testified that the Applicant's previous attorney filed Brady and Rule 5 motions on the Applicant's behalf and that he filed a Motion to Compel on the Applicant's behalf in January 2010. Counsel testified that he reviewed the discovery with the Applicant. Counsel specifically recalled reviewing the video of the controlled buy with the Applicant.

Counsel testified that he discussed with the Applicant the elements of the charges against him and what the State was required to prove. He testified that he discussed the Applicant's version of the facts with him prior to trial. Counsel also testified that he discussed a possible entrapment defense with the Applicant and the two types of entrapment that they could argue at trial. He testified that Applicant did not give him any leads or potential witnesses to investigate. Counsel testified that his investigation mainly involved uncovering the identity of the confidential informant. He testified that he was able to discover the identity of the confidential informant prior to trial and surprise the State with the information. He also testified that he investigated the background of the undercover officer, but that he did not find anything that he could impeach the officer with on cross-examination.

Counsel testified further that he discussed both plea offers with the Applicant and that the Applicant rejected both. He testified that the Applicant wanted a plea deal in the 10-15 year range. He testified that it was the Applicant's decision to proceed to trial. Counsel testified that

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he did not discuss a lesser-included offense with the Applicant because he thought with the weight of the drugs that it was undisputed that the requirements for a trafficking charge were met. Counsel also testified that he did not recall using any of his strikes during the jury selection process. He testified that it is his general practice to inform the client of the juror's background prior to selection.

Counsel testified that he thought that the entrapment issue was properly preserved for appeal. Counsel also testified that there was some difficulty communicating with the Applicant, but that the majority of it resulted from the Applicant's frustration and not the language barrier. He testified that he felt the Applicant understood the plea offers. He testified that did not specifically recall a discussion about deportation consequences, but that he recalled discussing the Applicant's status in the context of a bond because of a potential ICE hold. Lastly, counsel testified that he did not object to the Court response to the second note from the jury during their deliberation.

Ineffective Assistance of Counsel

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

For the 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). In order to prove prejudice, an applicant must show "there is a reasonable probability that, but for counsel's unprofessional errors, the



result of the proceeding would have been different.” Cherry v. State, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625 (1989). “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).

This Court finds the Applicant’s testimony is not credible, while also finding trial counsel’s testimony is credible. This Court further finds trial counsel adequately conferred with the Applicant, conducted a proper investigation, and was thoroughly competent in his representation.

This Court finds that the Applicant failed to meet his burden of proving that trial counsel did not fully investigate his case and was not prepared for trial. “[C]riminal defense attorneys have a duty to undertake a reasonable investigation, which at a minimum includes interviewing potential witnesses and making an independent investigation of the facts and circumstances of the case.” Walker v. State, 397 S.C. 226, 235, 723 S.E.2d 610, 615 (Ct. App. 2012). Failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to result. Porter v. State, 368 S.C. 378, 385-86, 629 S.E.2d 353, 357 (2006) (citing Moorehead v. State, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998)). In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel’s judgments.” Wiggins v. Smith, 539 U.S. 510, 521-22, 123 S. Ct. 2527, 2535, 156 L. Ed. 2d 471 (2003).

This Court finds that trial counsel thoroughly investigated the charges against the Applicant prior to trial. Counsel gave credible testimony that he investigated both the confidential informant and the undercover officer involved in the controlled buy. Counsel

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testified further that as a result of his investigation he was able to discover the identity of the confidential information prior to trial. This Court finds that counsel undertook a reasonable investigation of the facts and circumstances of the case. This Court finds that trial counsel was not deficient for failing to seek out the Applicant's boss prior to trial. This Court finds that the Applicant failed to show what information would have resulted from trial counsel contacting his former boss and that the information discovered would have been beneficial to the Applicant at trial. This Court finds that this allegation is without merit and trial counsel was not deficient for failure to investigate.

This Court finds that the Applicant failed to meet his burden of proving trial counsel did not advise him of the plea offer in a timely manner. During plea negotiations defendants are "entitled to the effective assistance of competent counsel." Lafler v. Cooper, 132 S. Ct. 1376, 1384, 182 L. Ed. 2d 398 (2012) (citing McMann v. Richardson, 397 U.S. 759, 771, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970)). If a plea bargain has been offered, a defendant has the right to effective assistance of counsel in considering whether to accept it. Id. In the context of pleas a defendant must show the outcome of the plea process would have been different with competent advice. Id.

This Court finds that trial counsel properly advised the Applicant of the substance of all plea offers from the State. This Court finds further that the Applicant knowingly, intelligently, and voluntarily rejected all plea offers and decided to proceed to trial. Both counsel and the Applicant testified that trial counsel advised the Applicant of two plea offers prior to trial. The Applicant alleges that he rejected the initial plea offer of 15 years because he thought trial counsel said the offer was to plead to 50 years. This Court finds that counsel gave credible testimony that the Applicant understood the terms of the plea offers and knew that the initial plea

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offer was for 15 years and not 50 years. The Applicant testified that he chose not to accept the plea offers because he did not want to serve a sentence day for day and because he did not want to admit that he was guilty. This Court finds that based on this testimony even if the Applicant misunderstood his discussions with trial counsel, he provided no evidence that he would have accepted the plea offer had he understood the offer to be 15 years. The Applicant's lack of evidence on this issue is further supported by the Applicant's rejection of the second plea offer of 18 years. This Court finds that the language barrier that the Applicant alleges affected his communication with counsel had no effect on the Applicant's decision to reject all plea offers and proceed to trial. This Court finds this allegation is without merit and trial counsel properly conveyed the State's plea offers to the Applicant.

This Court finds that the Applicant failed to meet his burden of proving trial counsel did not properly raise an entrapment argument. This Court finds that the record reflects that the entrapment defense was properly presented to the jury at the Applicant's trial. Trial counsel presented the jury with the Applicant's entrapment defense during both his opening and closing arguments and the jury was given an instruction on entrapment by the trial judge. Trial counsel gave credible testimony that he discussed an entrapment defense with the Applicant prior to trial and that the defense was presented to the jury at trial. Counsel testified further he felt that any issues regarding the entrapment defense was properly preserved for appeal.

This Court finds that an entrapment defense was properly presented to the jury and available for their consideration at trial. This Court finds further that there is no evidence that the proper preservation of the issue for appeal would have changed the outcome of the trial. This Court finds this allegation is without merit and trial counsel properly raised an entrapment argument at trial.

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

Ineffective Assistance of Appellate Counsel

A defendant is entitled to effective assistance of appellate counsel. Tisdale v. State, 357 S.C. 474, 476, 594 S.E.2d 166, 167 (2004) (citing Southerland v. State, 337 S.C. 610, 615, 524 S.E.2d 833, 836 (1999)). Generally, in analyzing a claim of ineffective assistance of appellate counsel, South Carolina applies the Strickland test just as it would when analyzing a claim of ineffective assistance of trial counsel. Bennett v. State, 383 S.C. 303, 309, 680 S.E.2d 273, 276 (2009). Thus, in this case, we ask 1) whether appellate counsel's performance was deficient, and 2) whether Respondent was prejudiced by appellate counsel's deficient performance. Id.

Although appellate counsel is required to provide effective assistance of counsel, "appellate counsel is *not* required to raise every nonfrivolous issue that is presented by the record." Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523, 526 (1990) (citing Jones v. Barnes, 463 U.S. 745, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983) (emphasis supplied)). "For judges to second-guess reasonable professional judgments and impose on ... counsel a duty to raise every 'colorable' claim suggested by a client would dissuade the very goal of vigorous and effective advocacy...." Id. To prove prejudice, the applicant must show that, but for counsel's errors, there

is a reasonable probability he would have prevailed on appeal. Anderson v. State, 354 S.C. 431, 434, 581 S.E.2d 834, 835 (2003).

The Court finds that appellate counsel was not ineffective for appealing an issue that was not preserved for review. This Court finds that the Applicant presented no evidence that appellate counsel was deficient or that but for counsel's errors there is a reasonable probability he would have prevailed on appeal. This Court finds that this allegation is without merit.

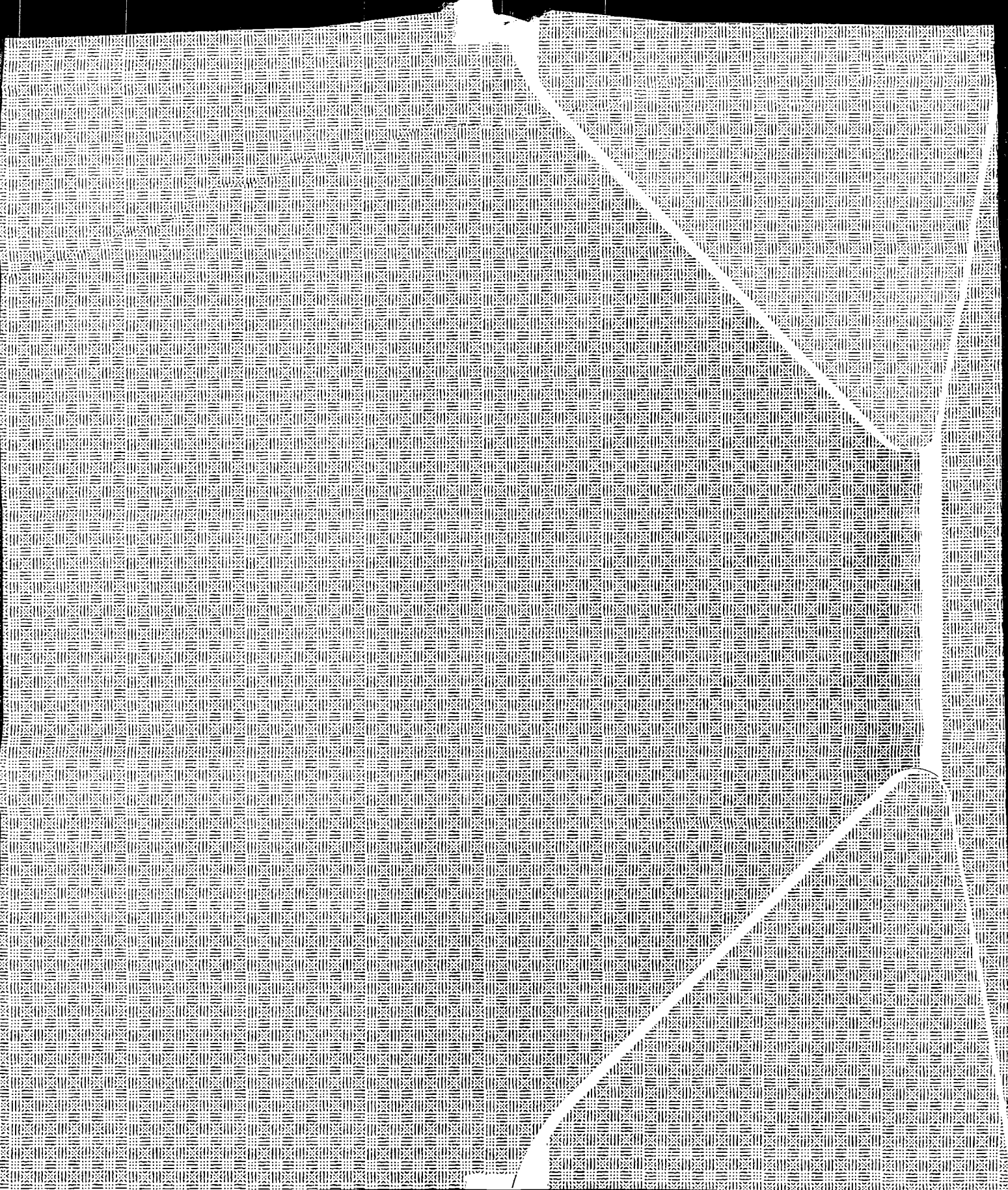
Accordingly, this Court finds the Applicant failed to prove the first prong of the Strickland test- that appellate counsel failed to render reasonably effective assistance under prevailing professional norms. The Applicant failed to present specific and compelling evidence that appellate counsel committed either errors or omissions in their representation of the Applicant. This Court also finds the Applicant has failed to prove the second prong of Strickland- that he was prejudiced by appellate 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 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 forgoing, this Court finds and concludes the Applicant has not established any constitutional violations or deprivations before or during his trial and sentencing



STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

AFFIDAVIT OF INDIGENCY

Case Name JOSE LUIS GUTIERREZ HERNANDEZ V. STATE OF SOUTH CAROLINA

Criminal Case No. 2011-CP-10-2878 (PCR)
2007-GS-10-0056

Current Address: Lieber Correctional Institute

Are you incarcerated? X Yes (If "Yes") Where? Lieber Correctional
_____ No

What were you convicted of? Trafficking cocaine 200-400 grams

What was your sentence? 25 years

In what county was this hearing held? Charleston

Presiding Judge's name? Markley Dennis

Date of hearing? 3/4/2008

Are you appealing from a trial, guilty plea or from a post-conviction relief hearing? PCR

Were you represented by a court-appointed attorney, public defender, , or retained counsel?
Public Defender

Name of attorney/public defender? Andrew Grimes

If retained, how much did you pay for attorney fees? \$ _____

If you still owe money to your attorney, how much? \$ _____

1. Are you presently employed? Yes _____ No X

a. If "yes," state the amount of your salary or wages per month, and give the name and address of your employer. _____

b. If "no," state the name and address of last employment, date of termination of employment, and amount of your salary or wages per month. _____

2. List by name, age and relationship to you, any persons who are dependent upon you for support. Indicate beside each how much you contribute toward their support. _____

3. Have you received within the past twelve months any money from any of the following sources?

a. Business, profession or form of self-employment?
Yes _____ No

b. Rent payments, interest or dividends?
Yes _____ No

c. Pensions, annuities or life insurance payments?
Yes _____ No

d. Gifts or inheritance?
Yes _____ No

e. Any other sources?
Yes _____ No

If the answer to any of the above is "yes," describe each source of money and state the amount received from each during the past twelve months. _____

4. Do you own cash, or do you have any money in a checking or savings account?
Yes _____ No

If the answer is "yes," state the total amount of the cash owned. \$ _____

5. Do you own any real estate, stocks, bonds, notes or other valuable property (excluding ordinary household furnishings and clothing)? Yes _____ No _____

If the answer is "yes," describe the property and state the appropriate value of the items owned. _____

6. What kind of motor vehicle do you own? _____

Is it paid for? Yes _____ No
If not, what are the monthly payments? \$ _____

7. How much do you owe (on liens, mortgages, other encumbrances or debts)? NONE

I do solemnly swear that the account by me delivered into this Court does contain a true and full account of all my real and personal estate, debts, credits and effects whatsoever without exception, which I, or any person in trust for me, have or at the time of my possession had, or am, or was, in respect, entitled to, in possession, remainder or reversion and that I have not at any time since charges were made against me or before, directly or time since charges were made against me or before, directly or indirectly sold, leased, assigned or otherwise disposed of or made over, in trust for myself or otherwise, other than is mentioned herein.

I understand that the State shall file a claim against me in an amount equal to the cost for representation, but that such claim shall not constitute a lien against my property, unless, the claim is reduced to judgment by the Order of the Court after giving me at least thirty days' notice.

Under penalty of perjury, I certify that the information give by me on this affidavit is true and correct, and I understand that I will be subject to civil and/or criminal penalties if I knowingly furnish false information.

I am financially unable to employ counsel.

This 23 day of January, 2013

Jose Luis Gutierrez Hernandez
Defendant

I understand that I am entitled to at least thirty days' notice before a claim against me may be reduced to judgment, and I do hereby waive the right to such notice.

This 23 day of January, 2013.

Jose Luis Gutierrez Hernandez
Defendant

SUBSCRIBED AND SWORN to before
me this 23RD day of January, 2013.

Sylvia Jones
NOTARY PUBLIC FOR SOUTH CAROLINA

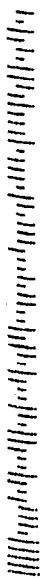
My commission Expires: 1/24/2018











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 Postage	 B64561.09 US POSTAGE FIRST-CLASS 062S0007610546 29407 \$0.460

