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STATE OF SOUTH CAROLINA
In The Supreme Court

S.C. Supreme Court

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

The Honorable James R. Barber, III, Circuit Court Judge

Appellate Case No. 2014-001327

Osiel Narciso,.....Respondent,

v.

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

APPENDIX

ALAN WILSON
Attorney General

ASHLEIGH R. WILSON
Assistant Attorney General
SC Bar No. 100269
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737

ATTORNEY FOR PETITIONER

CARMEN V. GANJEHSANI
Appellate Defender

S. C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, South Carolina 29211-1589
(803) 734-1230

ATTORNEY FOR RESPONDENT

INDEX

INDEX	i
2007 PCR APPLICATION	1
RETURN.....	10
SCDC RECORDS.....	15
BEAUFORT COUNTY CLERK'S RECORDS.....	17
FIRST PCR HEARING TRANSCRIPT (8-26-08).....	22
CONSENT ORDER GRANTING BELATED DIRECT APPEAL	27
AMENDED BRIEF OF PETITIONER	29
BRIEF OF RESPONDENT	38
SUPREME COURT OPINION	47
REMITTITUR	58
PETITIONER'S BRIEF IN SUPPORT OF FINDING PCR WAIVER INVAILD.....	59
STATE'S HEARING EXHIBIT 1	63
SECOND PCR HEARING TRANSCRIPT (2-20-14)	92
ORDER GRANTING NEW PCR HEARING.....	136
NOTICE OF APPEAL.....	142

FORM 5

STATE OF SOUTH CAROLINA)

COUNTY OF BEAUFORT)

IN THE COURT OF COMMON PLEAS

Osiel Gómez Narciso, #319935)

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

v.)

State of South Carolina)

APPLICATION FOR

POST CONVICTION RELIEF

INSTRUCTIONS B READ CAREFULLY

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

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

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

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

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

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

- iv. N/A
- (c) the disposition thereof:
- i. N/A
- ii. N/A
- iii. N/A
- iv. N/A
- (d) the date of each such disposition:
- i. N/A
- ii. N/A
- iii. N/A
- iv. N/A
- (e) if known, citations of any written opinions or order entered pursuant to each such disposition:
- i. N/A
- ii. N/A
- iii. N/A
- iv. N/A
14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?
- No.
15. If you answered "yes" to (14) identify:
- (a) which grounds have been presented:
- i. N/A
- ii. N/A
- iii. N/A
- (b) the proceedings in which each ground was raised:
- i. N/A
- ii. N/A
- iii. N/A

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

(a) This is the only venue in which Petitioner has sought
 (b) relief. Petitioner was barred from filing appeal due
 (c) to ineffective assistance of counsel.

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

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

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

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

i. Donald C. Colongeli, Esq.
P.O. Box 6658; Hilton Head Island, S.C. 29938

ii. _____

iii. _____

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

i. Trial.

ii. _____

iii. _____

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

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

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

No.

Revised 3/2003

STATE OF SOUTH CAROLINA)

County of Beaufort)

VERIFICATION

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

Osiel Narciso

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

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

My Commission Expires: 8 28 2011

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

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

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

Osiel Narciso
Applicant

SWORN or affirmed to and subscribed before me this

27 day of July, 2007
Jorge L. Young
Notary Public

My Commission Expires: 8-28-2011

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

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

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

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

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

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

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

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

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

STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

IN THE COURT OF COMMON PLEAS

2007-CP-07-2195

Osiel Gomez Narciso, # 319935,

Applicant,

v.

RETURN

State of South Carolina,

Respondent.

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

I.

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

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

II.

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

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

III.

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

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

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

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

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

IV.

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

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

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

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

V.

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

VI.

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

Respectfully submitted,

HENRY DARGAN McMASTER
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

MATTHEW J. FRIEDMAN
Assistant Attorney General

By: Matthew J. Friedman
ATTORNEYS FOR RESPONDENT

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

5/15, 2008.

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF BEAUFORT

2007-CP-07-2195

Osiel Gomez Narciso, #319935,

Applicant,

v.

AFFIDAVIT OF SERVICE BY MAIL

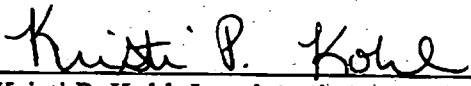
State of South Carolina,

Respondent.

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

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

DATED this 15th day of May, 2008.


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

CMTI330D SCDC OFFENDER MANAGEMENT SYSTEM 12/28/07
OMCOMITA RELEASE DATE SCREEN C041957
SCDC# > 319935 LOC: MCCORMICK
GOMEZ-NARAISO, OSIEL - SCDC CLASSIFICATION... VIOLENT
OFFENDER TYPE...: ADULT-STRAIGHT SENTENCE SEXUAL REGISTRY...: N
SEXUAL PREDATOR...: NOT APP
DNA STATUS...: COMPLETED
GPS REQUIREMENT...: N
CURRENT SENTENCE: 025-00-000 CONSECUTIVE SENTENCE ...: N
025-00-000 CURRENT SENT START DATE: 08/03/2005
PROJECTED COMPLETION DATES
MAXOUT DATE: 10/27/2026 CURRENT EWC ..: 3 F 5
YOA SIX YEAR DATE: / / CURRENT EEC ...: B4
INITIAL PAROLE DATE: 00/00/0000 NEXT PAROLE HEARING DATE: 00/00/0000

TOTAL GT DAYS EARNED: 000000 LABOR CREW/WORK PROG DATE: 99/99/9999
TOTAL EARNED WORK CREDITS ...: 000206 LABOR CREW DISQ REASON:
TOTAL EDUCATION CREDITS: 000049 CATEGORY 4 OR 5 OFFENSE
TOTAL EXTRA EARNED CREDITS ..: 000
TOTAL SERVICE TIME EARNED ...: 000865

PFKEYS: 5:HISTORY OF DATE CHANGES

4-@

1 Sess-1

167.7.50.33

TNET1091

3/11

CLASSIFICATION SUMMARY REPORT DATED 12/28/07

C041957

SCDC# 319935 GOMEZ-NARAISS,OSIEL -
 OFFENDER TYPE.: ADULT-STRAIGHT SENTENCE
 INSTITUTION ... MCCORMICK CORR INST
 SECURITY/CUST.: 3 MINIMUM IN
 CURR INCARC SENT...: 25 YRS 0 MOS 0 DYS
 CENTRAL MONITORING.: NO
 MED CLASS: 3 MED PROB/WORK RESTRICT
 MENTAL CLASS: NMH (NO MENTAL HEALTH TRE
 CURRENT PROGRAM...: NO CURRENT PROGRAM
 AGE...: 29

FBI# 726392EC1

DORM.....: F30145A
 TOBACCO USER....: N
 PROJ MAXOUT DATE: 10/27/2026
 PROJ PAROLE DATE: 00/00/0000
 EWC JOB...: GENERAL WORKER
 EDUC PGM.: NO CURR EDUC PROGRAM
 EWC LEVEL: 3F5 EEC LEVEL: B4
 ASSIGNMENT...: FOOD SERVICE

PREVIOUS NUMBERS:

** NO PREVIOUS NUMBERS **

CURRENT OFFENSES	SENTENCE			COUNTY	SENTENCE			START	V/NV	CAT	INDICT
	YRS	MOS	DYS								
TRAFFICKING IN COCAINE	25	0	0	BEAUFORT	08/03/2005	V	4	056507-1304			

PRIOR COMMITMENTS OVER 90 DAYS:

MISSING PRIORS DATA

DETAINERS (HOLD,WANTED,NOTIFY):

CODE NOT IN TABLE	WANTED	ICE OFFICIAL	CATEG: 4
-------------------	--------	--------------	----------

ESCAPES:

NO ESCAPE HISTORY

CRIMINAL CHARGES:

NO CRIMINAL CHARGES HISTORY

ASSAULTIVE DISCIPLINARIES:

NO ASSAULTIVE DISCIPLINARY HISTORY

NON-ASSAULTIVE DISCIPLINARIES:

NO NON-ASSAULTIVE DISCIPLINARY HISTORY

HISTORY OF MOVEMENTS:

DATE	LOCATION	STATUS	REASON
04/02/07	MCCORMICK	INCARCERATED	ADMINISTRATIVE
02/08/07	KIRKLAND	INCARCERATED	R&E PROCESSING
02/08/07	LIEBER	INCARCERATED	NEW ADMISSION

HISTORY OF EARNED WORK CREDIT ASSIGNMENTS:

JOB	START	END	TERMINATION	JOB
DESCRIPTION	DATE	DATE	REASON	LVL
GENERAL WORKER	04/05/07	00/00/00		3F5

HISTORY OF EARNED EDUCATION CREDITS:

EEC	START	END	TERMINATION
DESCRIPTION	DATE	DATE	REASON
BONUS 4-7 HRS/WK	04/17/07	00/00/00	

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

STATE OF SOUTH CAROLINA

COUNTY OF
STATE

Beaufort

VS. Osiel Naraiso Gomez

IN THE COURT OF GENERAL SESSIONS

AKA:

Race: H

Sex: M

Age:

DOB: 10/15/78

SS#:

Address:

City, State, Zip
Destiny Drive
Blacksburg, GA

DL#

SID#

INDICTMENT/CASE#:

05-GS-07-1304

AW#: H915578

Date of Offense: 8/3/05

S.C. Code §: 44-53-370(EX2)(c)

CDR Code #: 012810

SENTENCE SHEET

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

ATTEST:

Kimberly S. Smith
SolicitorOsiel Naraiso Gomez
Defendant[Signature]
Attorney for DefendantWHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,
for a determinate term of 25 days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years
and/or to pay a fine of \$ _____; provided that upon the service of _____ days/months/years and/or payment of \$ _____ plus costs and
assessments as applicable; the balance is suspended with probation for _____ months/years and subject to South Carolina Department
of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.☐ CONCURRENT or ☐ CONSECUTIVE to sentence on:☒ The Defendant is to be given credit for time served pursuant to S.C. Code §24-13-40 to be calculated and applied by the State
Department of Corrections.☐ The Defendant is to be placed on Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.☐ RESTITUTION: ☐ Heard, ☐ Waived, ☐ Ordered
Total: \$ _____ plus 20% fee: \$ _____

Payment Terms:

☐ set by SCDPPPS

SPECIAL CONDITIONS:

PTUP

_____ days/hours Public Service Employment

Obtain GED

Attend Voc. Rehab. or Job Corp.

May serve W/E beginning _____

Substance Abuse Counseling _____

Random Drug/Alcohol Testing _____

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

pmts. of \$ _____

_____ beginning _____

Other: _____ paid to Public Defender Fund

☐ Appointed PD or appointed other counsel, \$35.13 TP
Requires \$500 be paid to Clerk during probation.

Recipient:

*Fine:

\$14-1-206 (Assessments 107.5%)

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

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

\$56-5-2995 (DUI Assessment)

\$35.13 (Public Def/Prob)

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

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

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

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

3% to County (if paid in installments)

TOTAL

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

Joni Fields

Clerk of Court Deputy Clerk

Court Reporter:

Dianne Rutledge

PRESIDING JUDGE

Judge Code:

Sentence Date:

Howard P. King
2110149Jan 18, 2007

Certified - A True Copy

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

STATE OF SOUTH CAROLINA
COUNTY OF **Beaufort**
STATE

VS.

Oziel Nolaso Gomez

AKA:
Race: **H**
DOB: **10/15/78**
Address:
City, State, Zip
DL#

Sex: **M**
SS#:

Age:

Destiny Drive
Beaufort, SC 29915
SID#

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#:

AW#: **H915578**
Date of Offense: **8/3/05**
S.C. Code §: **44-53-370 (EX2Xc)**
CDR Code #: **012810**

SENTENCE SHEET

In disposition of the said indictment comes now the Defendant who was ☒ CONVICTED OF or ☐ PLEADS
TO: **Trafficking in excess of 100 grams Cocaine**
In violation of **44-53-370** S.C. Code of Laws, bearing CDR Code # **0280**
☐ NON-VIOLENT ☒ VIOLENT ☒ SERIOUS ☐ MOST SERIOUS

The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury.
The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.
ATTEST: **Kimberly Smith** Solicitor

☐ §17-25-45

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,
for a determinate term of **25** days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years
and/or to pay a fine of \$ _____; provided that upon the service of _____ days/months/years and/or payment of \$ _____ plus costs and
assessments as applicable*, the balance is suspended with probation for _____ months/years and subject to South Carolina Department
of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.
☐ CONCURRENT or ☐ CONSECUTIVE to sentence on:
☒ The Defendant is to be given credit for time served pursuant to S.C. Code §24-13-40 to be calculated and applied by the State
Department of Corrections.
☐ The Defendant is to be placed on Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

☐ RESTITUTION: ☐ Heard, ☐ Waived, ☐ Ordered
Total: \$ _____ plus 20% fee: \$ _____
Payment Terms: ☐ set by SCDPPPS

SPECIAL CONDITIONS:
PTUP

Recipient:
*Fine:

\$14-1-208 (Assessments 107.5%)
\$14-1-211(A)(1) (Conv. Surcharge)
\$14-1-211(A)(2) (DUI Surcharge)
\$56-5-2995 (DUI Assessment)
\$35.13 (Public Def/Prob)
\$73.3, 1B TP (Law Enforce. Funding)
\$33.7, 1B TP (Drug Court Surcharge)
\$50-21-114(BUI Breath Test Fee)
\$56-5-2942(J) (Vehicle Assessment
% to County (if paid in installments
TOTAL

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

Obtain GED _____ days/hours Public Service Employment
Attend Voc. Rehab. or Job Corp.
May serve W/E beginning _____
Substance Abuse Counseling _____
Random Drug/Alcohol Testing _____
Fine may be pd. in equal, consecutive weekly/monthly
pmts. of \$ _____ beginning _____
Other: _____ paid to Public Defender Fund

☐ Appointed PD or appointed other counsel, \$35.13 TP
Requires \$500 be paid to Clerk during probation.

PRESIDING JUDGE
Judge Code:
Sentence Date:

Howard P. King
Jan 18, 2007

Certified - A True Copy

Elizabeth M. Smith
Clerk of Court
Beaufort County, SC

STATE OF SOUTH CAROLINA)
COUNTY OF BEAUFORT)

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

STATE OF SOUTH CAROLINA,)

Plaintiff,)

v.)

OSIEL NARCISO GOMEZ,)

Defendant.)

VERDICT

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

X Guilty;

OR

 Not Guilty.

Don J. Werner
FOREPERSON

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

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

Certified - A True Copy

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

STATE OF SOUTH CAROLINA)
)
 COUNTY OF BEAUFORT)

INDICTMENT
 2005-GS-07-01304

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

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

=====

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

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

Jan 17, 2006

Indictment amended on the record with consent.

Howard Phing
Presiding Judge

to Grand Jury
Presentment of amended indictment waived.

OSIEL N

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

Randolph M. Mendenhall

SOLICITOR

Certified - A True Copy

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

DOCKET NO.

2005-GS-07-01304

THE STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

RANDOLPH MURDAUGH III., Solicitor

COURT OF GENERAL SESSIONS

08/25/2005 TERM

THE STATE
VS.

NAREISO NAREISO
OSIEL GOMEZ

Indictment for

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

SC Code : 44-53-0370(B) (2) (C)
CDR Code: 0278
Class:

WITNESSES

SGT. ANDRES FLORENCIO

ARREST WARRANT NUMBER

H915578

08/04/2005
ACTION OF GRAND JURY

True Bill

Patricia Cullen

Foreperson of Grand Jury
Date: AUG 25 2005

VERDICT

Foreperson of Petit Jury
Date:

Certified A True Copy
Elizabeth M. Smith - Clerk
Beaufort County, SC

STATE OF SOUTH CAROLINA)
COUNTY OF BEAUFORT)

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT
2007-CP-07-2195

OSEIL GOMEZ NARCISO)

PLAINTIFF,)

VS.)

THE STATE OF)
SOUTH CAROLINA)
DEFENDANT.)

TRANSCRIPT OF RECORD

AUGUST 26, 2008
BEAUFORT, SOUTH CAROLINA

B E F O R E:

THE HONORABLE J. CORDELL MADDOX, JUDGE

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

PHILIP JOHN RIOS, ESQUIRE
ATTORNEY FOR THE PLAINTIFF

MATTHEW J. FRIEDMAN, ESQUIRE
ATTORNEY FOR DEFENDANT

BONNIE H. KELLY
CIRCUIT COURT REPORTER

I N D E X

OPENING/MR. FRIEDMAN 4

CERTIFICATE PAGE 5

1
2
3
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EXHIBITS

NO.

DESCRIPTION

ID/EVIDENCE

NO EXHIBITS WERE MARKED DURING THIS PROCEDURE

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

2 MR. FRIEDMAN: Your Honor, the first one is Osiel
3 Gomez Narcisco.

4 THE COURT: All right.

5 MR. FRIEDMAN: May we approach on this one?

6 THE COURT: Yeah.

7 (Bench conference.)

8 MR. FRIEDMAN: Thank you, Your Honor.

9 THE COURT: Okay. Appreciate it. Thank you.

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11 --- END OF TRANSCRIPT OF RECORD ---

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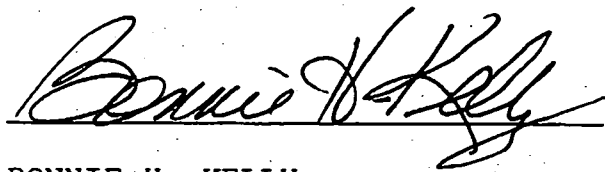
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26

CERTIFICATE

I, THE UNDERSIGNED BONNIE H. KELLY, OFFICIAL COURT REPORTER FOR THE ELEVENTH JUDICIAL CIRCUIT OF THE STATE OF SOUTH CAROLINA, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE, ACCURATE AND COMPLETE TRANSCRIPT OF RECORD OF ALL THE PROCEEDINGS HAD AND EVIDENCE INTRODUCED IN THE HEARING OF THE CAPTIONED CAUSE, RELATIVE TO APPEAL, IN THE CIRCUIT COURT FOR BEAUFORT COUNTY, SOUTH CAROLINA, ON THE 26TH DAY OF AUGUST, 2008.

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



BONNIE H. KELLY

COLUMBIA, SOUTH CAROLINA

SEPTEMBER 26, 2008

STATE OF SOUTH CAROLINA)

COUNTY OF BEAUFORT)

IN THE COURT OF COMMON PLEAS

2007-CP-07-2195

Osiel Gomez Narciso, # 319935,)

Applicant,)

v.)

**CONSENT ORDER GRANTING
BELATED DIRECT APPEAL**

State of South Carolina,)

Respondent.)

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

I.

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

II.

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

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

ELIZABETH
BEAUFORT
COUNTY
CLERK OF COURT
SOUTH CAROLINA

2008 AUG 26 AM 11:19

III.

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

IV.

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

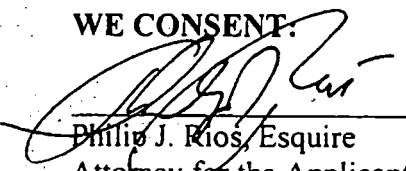
IT IS THEREFORE ORDERED:

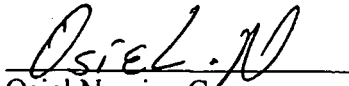
1. That the Applicant be granted a belated direct appeal pursuant to White v. State;
2. That the Applicant has waived his right to raise any other PCR allegations; and
3. The Applicant must be remanded to the custody of the Respondent.

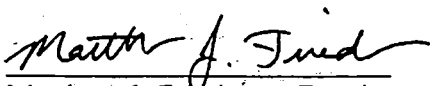
AND IT IS SO ORDERED this 26 day of August, 2008.


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

WE CONSENT:


Philip J. Rios, Esquire
Attorney for the Applicant


Osiel Narciso Gomez
Applicant


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

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Beaufort County

J. Cordell Maddox, Jr., Circuit Court Judge

OSEIL GOMEZ NARCISO,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

AMENDED BRIEF OF PETITIONER

ELIZABETH A. FRANKLIN-BEST
Appellate Defender

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

ATTORNEY FOR PETITIONER.

INDEX

INDEX	1
TABLE OF AUTHORITIES	2
ISSUE PRESENTED	3
STATEMENT	4
ARGUMENT	
Petitioner signed a consent order granting belated direct appeal and “waived his right to raise any other PCR allegations.” Petitioner respectfully asks this Court to remand his case to determine whether that waiver was entered into knowingly and voluntarily	5
CONCLUSION	7

TABLE OF AUTHORITIES

Cases

<u>Gardner v. State</u> , 351 S.C. 407, 570 S.E.2d 184 (2002)	6
<u>Johnson v. Zerbst</u> , 304 U.S. 458, 58 S.Ct. 1019 (1936)	6
<u>Roe v. Flores-Ortega</u> , 528 U.S. 470, 120 S.Ct. 1029 (2000)	5
<u>Spoone v. State</u> , 379 S.C. 138, 665 S.E.2d 605 (2008)	6
<u>White v. State</u> , 263 S.C. 110, 208 S.E.2d 35 (1974)	5

Constitutional Provisions

<i>S.C. Const. art. I, §10</i>	5
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ISSUE PRESENTED

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

STATEMENT

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

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

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

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

ARGUMENT

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

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

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

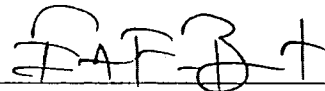
Additionally, the record in this case, aside from his signature on the consent agreement, does not support the conclusion that petitioner entered into the agreement knowingly and voluntarily. Since he was convicted after trial, he received no benefit from entering into the

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

CONCLUSION

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

Respectfully submitted,

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

Elizabeth A. Franklin-Best
Appellate Defender

ATTORNEY FOR PETITIONER.

This 11th day of August, 2011

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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

OSEIL GOMEZ NARCISO,

PETITIONER,

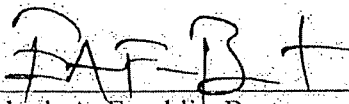
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

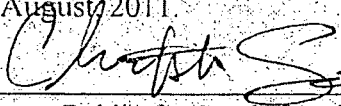
I certify that a true copy of the amended brief of petitioner, in this case has been served on
Matthew J. Friedman, Esquire, this 11th day of August, 2011.



Elizabeth A. Franklin-Best
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 11th day
of August 2011

 (L.S.)

Notary Public for South Carolina
My Commission Expires: May 16, 2021

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Beaufort County

J. Cordell Maddox, Jr., Circuit Court Judge

2007-CP-07-2195

OSIEL GOMEZ NARCISO

Petitioner

STATE OF SOUTH CAROLINA

Respondent

BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

JOHN W. MCINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

MATTHEW J. FRIEDMAN
Assistant Attorney General

P.O. Box 11549
Columbia, SC 29211
(803) 734-3737

ATTORNEYS FOR RESPONDENT

TABLE OF AUTHORITIES

Cases

<u>Cherry v. State</u> , 300 S.C. 115, 386 S.E.2d 624 (1989)	4
<u>Jackson v. State</u> , 329 S.C. 345, 348, 495 S.E.2d 768, 769 (1998).....	4
<u>Skeen v. State</u> , 325 S.C. 210, 481 S.E.2d 129 (1997).....	4
<u>Spoone v. State</u> , 379 S.C. 138, 665 S.E.2d 605 (2008).....	5
<u>White v. State</u> , 263 S.C. 110, 208 S.E.2d 35 (1974).....	2,5,6

INDEX

TABLE OF AUTHORITIES.....	1
ISSUE PRESENTED.....	2
STATEMENT OF THE CASE	3
STANTARD OF REVIEW.....	4
ARGUMENT.....	6
CONCLUSION.....	7

ISSUE PRESENTED

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

STATEMENT OF THE CASE

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

STANDARD OF REVIEW

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

ARGUMENT

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

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

The Consent Order Granting Belated Direct Appeal states as follows:

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

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

any problems communicating with the Petitioner.

Petitioner asserts that a review of the record suggests that he does, in fact, have additional PCR claims that he should be allowed to raise. Respondent contends that the Court should not consider potential PCR allegations that were not raised in the original PCR application. Petitioner's only original allegation was that trial counsel failed to file a notice of appeal after promising to do so, an allegation that was addressed and ruled upon in the consent order. Respondent respectfully submits that Petitioner freely and voluntarily waived his right to raise any PCR issues other than the White v. State issue.

CONCLUSION

For the foregoing reasons, the State respectfully submits that the Court should find that Petitioner freely and voluntarily waived his right to raise additional PCR claims.

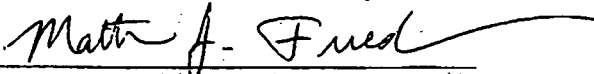
Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

MATTHEW J. FRIEDMAN
Assistant Attorney General


ATTORNEYS FOR RESPONDENT

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

September 12, 2011.

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

Osiel Gomez Narciso, Petitioner,

v.

State of South Carolina, Respondent.

ON WRIT OF CERTIORARI

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

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

AFFIRMED IN PART, REMANDED IN PART

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

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

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

FACTUAL/PROCEDURAL BACKGROUND

On August 3, 2005, the Beaufort County Sherriff's Office (BCSO) conducted a drug investigation focusing on Petitioner. Police believed that Petitioner may have been involved in the sale and distribution of cocaine in the Hilton Head/Bluffton area of Beaufort County. A sheriff's deputy received information that Petitioner might be operating a vehicle in the area with expired license plates and possibly no driver's license. The deputy conducted a traffic stop of Petitioner after confirming that his license plates were indeed expired and suspended. A "back-up officer," arrived on scene shortly thereafter. Police placed Petitioner under arrest for operating the vehicle without a driver's license and removed him from the vehicle. Police then conducted a "K-9" search of the vehicle. The narcotics-detection dog used in the search alerted on drug residue on the vehicle, and police conducted a search of the cargo compartment. Police seized powdered cocaine from the vehicle, and charged Petitioner with knowingly and intentionally possessing a quantity of powder cocaine with a weight in excess of one hundred grams.

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

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

In a petition for writ of certiorari to this Court, Petitioner asserted that the PCR judge properly found that he did not waive his right to a direct appeal, and requested this Court remand his case to determine whether his waiver of any other PCR allegations was entered into knowingly or

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

voluntarily. This Court granted the petition for writ of certiorari as to whether Petitioner knowingly and voluntarily waived his right to direct appeal, dispensed with further briefing on that question, and elected to proceed with further review of the direct appeal issue—the validity of the stop and search. Additionally, this Court granted review of whether Petitioner's waiver of any other PCR allegations was entered into knowingly and voluntarily.

ISSUES PRESENTED

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

STANDARD OF REVIEW

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

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

LAW/ANALYSIS

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

Petitioner argues that the facts presented by police to the circuit court did not rise to the level of "reasonable suspicion," and that he was

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

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

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

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

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

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

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

Newly announced rules of constitutional criminal procedure must apply retroactively to all cases, "pending on direct review or not yet final, with no exception for cases in which a new rule constitutes a 'clear break' with the past." *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987). Petitioner's conviction has not yet become final on direct review. Thus, *Gant* applies retroactively to

this case, and Petitioner may invoke its rule of substantive Fourth Amendment law as a basis for seeking relief. However, our analysis of the instant case is further controlled by the United States Supreme Court's decision in *Davis v. United States*, 131 S.Ct. 2419 (2011).

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

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

In the instant case, the search incident to arrest violated Petitioner's Fourth Amendment rights pursuant to *Gant*. However, excluding the evidence against Petitioner would not deter police misconduct because the police in this instance conducted a search incident to arrest pursuant to binding appellate precedent. *See id.* at 2426–28. Moreover, exclusion of the evidence in this case would result in severe social costs, including the articulation of an inexplicable and undecipherable message to law enforcement regarding how to conduct a legal search. The protection of the Fourth Amendment can only be realized if the police are acting under a set of

rules which make it possible to reach a correct determination beforehand as to whether an invasion of privacy is justified in the interest of law enforcement. Wayne R. LaFave, "*Case-By-Case Adjudication*" Versus "*Standardized Procedures*": *The Robinson Dilemma*, 1974 Sup. Ct. Rev. 127, 142 (1974).

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

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

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

In order to determine whether a waiver is effective, the court examines the particular facts and circumstances surrounding the case, including the background, experience, and conduct of the accused. *Spoone v. State*, 379 S.C. 138, 143, 665 S.E.2d 605, 607 (2008) (citing *United States v. Broughton-Jones*, 71 F.3d 1143, 1146 (4th Cir. 1995)). Numerous jurisdictions have upheld waivers of post-conviction relief, provided they were knowing and voluntary. *Id.* at 143, 665 S.E.2d at 607. A defendant's

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

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

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

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

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

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

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

The court: All right.

Mr. Friedman: May we approach on this one?

The court: Yeah

(Bench conference)

Mr. Friedman: Thank you, Your Honor.

The court: Okay. Appreciate it. Thank you.

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

The State argues that Petitioner's case is distinguishable from *Spoone* because in that case the issue was "whether the right to appellate review and post-conviction review may be waived by a written plea agreement . . .," and that "[Petitioner] proceeded to trial and was convicted." This is a distinction without a difference. The key issue in *Spoone* and in Petitioner's case is the circumstances surrounding the waiver of the right to appeal PCR allegations. Aside from the consent agreement, the record in this case does not support the conclusion that Petitioner entered into the agreement knowingly and voluntarily. Additionally, the colloquy between the court and the defendant in this case does not clearly establish that Petitioner knowingly and voluntarily waived his right to raise any other PCR allegations. This Court will affirm the PCR court's findings if any evidence of probative value exists in the record. *Terry v. State*, 394 S.C. 62, 66, 714 S.E.2d 326, 328 (2011). However, finding that no such evidence exists in the instant case, we must remand for a determination as to whether Petitioner's waiver was entered into knowingly and voluntarily.

CONCLUSION

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

AFFIRMED IN PART, REMANDED IN PART.

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



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

3031 734-1080

FAX (803) 734-1499

March 30, 2012

REMITTITUR

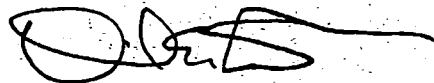
The Honorable Jerri Roseneau
102 Ribaut Road, Rm 208
PO Box 1128
Beaufort, SC 29901

Re: Narciso, Osiel Gomez v. The State – 2007-CP-07-02195

Dear Mrs. Roseneau:

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

Very truly yours,



CLERK

DES/jj

cc: Appellate Defender Elizabeth A. Franklin-Best
Assistant Attorney General Matthew J. Friedman

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF BEAUFORT	)	CASE NO.: 2007CP0702195
	)	
OSEIL GOMEZ NARCISO,	)	
PETITIONER	)	PETITIONER'S BRIEF
V.	)	IN SUPPORT OF FINDING
THE STATE OF SOUTH CAROLINA,	)	PCR WAIVER INVALID
RESPONDENT	)	

This matter is on Remand from the South Carolina Supreme Court (See Exhibit 1).

FACTS

Petitioner was tried and convicted of trafficking cocaine, and sentenced to 25 years in prison. This was Petitioner's first and only felony conviction. His trial lawyer, Donald Colongeli, failed to appeal Petitioner's conviction. Petitioner filed a PCR application, and Phillip Rios was appointed as his PCR lawyer. At the PCR hearing, the Attorney General offered Petitioner the right to an appeal, but only if Petitioner waived all of his PCR rights. Rios recommended Petitioner to sign a Consent Order memorializing this "deal". There was no colloquy or other court record of Petitioner's waiver other than the following:

THE COURT: What's -- what we got this morning?
 MR. FRIEDMAN: Your Honor, the first one is Oseil Gomez Narciso
 THE COURT: All right.
 MR. FRIEDMAN: May we approach on this one?
 THE COURT: Yeah. (Bench conference.)
 MR. FRIEDMAN: Thank you, Your Honor.
 THE COURT: Okay. Appreciate it. Thank you.

--- END OF TRANSCRIPT OF RECORD ---

(See Exhibit 2)

ARGUMENTS

1. *Petitioner's waiver of PCR rights is invalid since it was not established by a complete record.*

A defendant's knowing and voluntary waiver of statutory or constitutional rights must be established by a complete record, and may be accomplished by colloquy

between court and defendant, between court and defendant's counsel, or both. *Brannon v. State*, 345 S.C. 437, 548 S.E. 2d 866 (2001) (See Exhibit 3).

Here there was no colloquy or court record whatsoever, except for the lines quoted in "Facts" above. The Consent Order itself was not put on the record, and there was no mention of the Consent Order put on the record. Although there was an interpreter at the PCR hearing, no one read the Consent Order on the record (in English or Spanish) and there was no translation. The Court did not explain the Consent Order or anything about it to the Petitioner; and in fact there is no evidence that the Court even knew about it.

The "record" in this case is even more nonexistent than that in *Brannon*. In *Brannon*, at least the petitioner advised the PCR court that he wanted his sentence reduced, and the court advised that it did not have authority to do so. In this case, there was no communication whatsoever between the judge and Petitioner.

Since there is no record of a knowing and voluntary waiver in this case, under *Brannon* Petitioner must be allowed to proceed with a PCR application.

2. *Petitioner's Waiver of PCR Rights Was Not Knowing and Intelligent*

A valid waiver of the right to PCR must be knowing, intelligent and voluntary; and in making this determination, a court must examine the particular facts and circumstance surrounding the case, including the background, experience and the conduct of the accused. *Spoone v. State*, 370 S.C. 138, 665 S.E.2d 605 (2008) (See Exhibit 4).

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

Specifically, Petitioner could not read or understand the Consent Order, which was written in English. No one read the Consent Order to Petitioner in Spanish either on or off the record. No one translated the Consent Order into Spanish for Petitioner. There was no translating equipment used in the PCR hearing that allowed Petitioner to hear and understand anything said. Petitioner did not understand anything that happened during the PCR hearing. Rios did nothing to help the situation. Petitioner had no idea what he was signing when he signed the Consent Order, other than that Rios recommended it.

Also, Petitioner was not aware of, nor did Rios advise him of, his right to request a belated appeal. Under *White v. State*, 263 S.C. 110, 208 S.E.2d 35 (1974) (See Exhibit 5), when counsel fails to appeal after being requested to do so by the defendant, the defendant is entitled to request a belated appeal. Even if Petitioner had spoken, read and understood English perfectly, he still would have been under the mistaken belief that he was gaining something beneficial in the "deal" – a belated appeal – when the truth is that Rios should have requested that for Petitioner anyway under *White*. For this reason also, then, Petitioner's waiver was not knowing.

3. *Petitioner's Waiver of PCR Rights Was Not Voluntary*

Even if Petitioner's waiver of PCR rights had been knowing, it was not voluntary. Rather, the waiver was forced on the unknowing Petitioner through two separate and critical instances of inadequate assistance of counsel, coupled with hardball play by the Attorney General.

First, the only reason that a waiver of PCR rights ever became an issue, and became a part of the "deal", was because of Colongeli's failure to appeal the conviction. Had Colongeli properly appealed the conviction, then indisputably Petitioner would have

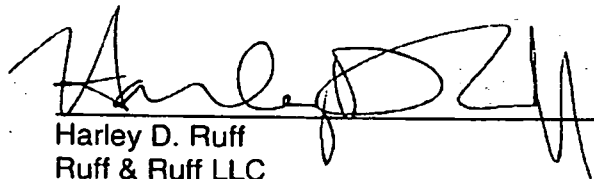
had both his right to appeal and his rights to PCR. No "deal" would have been forced on Petitioner requiring him to waive his PCR rights.

Second, Rios failed to pursue a belated appeal for Petitioner under *White*, or even to advise Petitioner that he had that opportunity. Instead, Rios recommended Petitioner to accept the "deal" as Petitioner's only chance to go back to court regarding his conviction. This got Rios out of the case, but – depending on the outcome of the present action – it may have resulted in a very harmful loss by Petitioner of an important constitutional right.

These failures opened the door for the Attorney General to play hardball with Petitioner, which the Attorney General did, writing up a Consent Order which required Petitioner to waive any and all PCR rights. Consider the question of what Petitioner received in this "deal" in exchange for waiving his PCR rights. He received a right to an appeal. This is a right that he would have had, but for Colongeli's failure. And it is a right that should have been pursued anyway, on a belated basis under *White*, without first giving up his PCR rights. In truth Petitioner received nothing in the "deal" – how can that be voluntary?

CONCLUSION

For the reasons stated above, this Court should hold that Petitioner's waiver of his PCR rights was invalid; and that Petitioner is allowed to proceed with a PCR application.



Harley D. Ruff
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Phone: 843.524.5400
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February 9, 2014

EXHIBIT 1

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

Osiel Gomez Narciso, Petitioner,

v.

State of South Carolina, Respondent.

ON WRIT OF CERTIORARI

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

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

AFFIRMED IN PART, REMANDED IN PART

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

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

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

FACTUAL/PROCEDURAL BACKGROUND

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

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

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

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

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

ISSUES PRESENTED

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

STANDARD OF REVIEW

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

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

LAW/ANALYSIS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The court: All right.

Mr. Friedman: May we approach on this one?

The court: Yeah.

(Bench conference)

Mr. Friedman: Thank you, Your Honor.

The court: Okay. Appreciate it. Thank you.

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

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

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

CONCLUSION

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

AFFIRMED IN PART, REMANDED IN PART.

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

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

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

EXHIBIT 2

STATE OF SOUTH CAROLINA)
COUNTY OF BEAUFORT)

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT
2007-CP-07-2195

OSEIL GOMEZ NARCISO)

PLAINTIFF,)

VS.)

THE STATE OF)
SOUTH CAROLINA)
DEFENDANT.)

TRANSCRIPT OF RECORD

AUGUST 26, 2008
BEAUFORT, SOUTH CAROLINA

B E F O R E:

THE HONORABLE J. CORDELL MADDOX, JUDGE

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

PHILIP JOHN RIOS, ESQUIRE
ATTORNEY FOR THE PLAINTIFF

MATTHEW J. FRIEDMAN, ESQUIRE
ATTORNEY FOR DEFENDANT

BONNIE H. KELLY
CIRCUIT COURT REPORTER

I N D E X

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2	OPENING/MR. FRIEDMAN	4
3	CERTIFICATE PAGE	5

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EXHIBITS

NO.

DESCRIPTION

ID/EVIDENCE

NO EXHIBITS WERE MARKED DURING THIS PROCEDURE

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

2 MR. FRIEDMAN: Your Honor, the first one is Osiel
3 Gomez Narcisco.

4 THE COURT: All right.

5 MR. FRIEDMAN: May we approach on this one?

6 THE COURT: Yeah.

7 (Bench conference.)

8 MR. FRIEDMAN: Thank you, Your Honor.

9 THE COURT: Okay. Appreciate it. Thank you.

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--- END OF TRANSCRIPT OF RECORD ---

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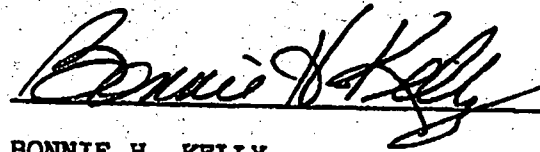
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1 CERTIFICATE

2
3 I, THE UNDERSIGNED BONNIE H. KELLY, OFFICIAL
4 COURT REPORTER FOR THE ELEVENTH JUDICIAL CIRCUIT OF
5 THE STATE OF SOUTH CAROLINA, DO HEREBY CERTIFY THAT
6 THE FOREGOING IS A TRUE, ACCURATE AND COMPLETE
7 TRANSCRIPT OF RECORD OF ALL THE PROCEEDINGS HAD AND
8 EVIDENCE INTRODUCED IN THE HEARING OF THE CAPTIONED
9 CAUSE, RELATIVE TO APPEAL, IN THE CIRCUIT COURT FOR
10 BEAUFORT COUNTY, SOUTH CAROLINA, ON THE 26TH DAY OF
11 AUGUST, 2008.

12 I DO FURTHER CERTIFY THAT I AM NEITHER OF KIN,
13 COUNSEL, NOR INTEREST IN ANY PARTY HERETO.
14

15 
16

17 BONNIE H. KELLY
18

19 COLUMBIA, SOUTH CAROLINA

20 SEPTEMBER 26, 2008

EXHIBIT 3

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

John Brannon, Petitioner,

v.

State of South Carolina, Respondent.

ON WRIT OF CERTIORARI

Appeal From Spartanburg County
Donald W. Beatty, Post-Conviction Judge

Opinion No. 25309
Submitted May 24, 2001 - Filed June 25, 2001

REMANDED

Joseph L. Savitz, III, of South Carolina Office of Appellate
Defense, of Columbia, for petitioner.

Attorney General Charles M. Condon, Chief Deputy
Attorney General John W. McIntosh, Assistant Deputy
Attorney General Allen Bullard, all of Columbia, and
Assistant Attorney General Kathleen Hodges, of
Greenville, for respondent.

JUSTICE WALLER: We granted a writ of certiorari to review the denial of Post-Conviction Relief (PCR) to Petitioner, John Brannon. We remand for an evidentiary hearing to ascertain whether Brannon knowingly and voluntarily withdrew his PCR application.

FACTS

Brannon pled guilty to armed robbery in 1994 and was sentenced to 21 years. He filed for PCR claiming, *inter alia*, he should have received a more lenient sentence. When Brannon advised the PCR court he wanted his sentence reduced, the court advised it did not have authority to do so; counsel then indicated Brannon wished to withdraw his PCR application. The motion was granted without further discussion.

A written order was subsequently filed which, rather than simply permitting withdrawal of Brannon's application, dismissed the application with prejudice. Although the order of dismissal indicates Brannon

ISSUE

Did the PCR court err in dismissing Brannon's PCR application with prejudice without an inquiry to determine whether the withdrawal was knowing and voluntary?

DISCUSSION

The burden is on the applicant in a post-conviction proceeding to prove the allegations in his application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). An appellate court must affirm the PCR court's decision when its findings are supported by any evidence of probative value. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). However, an appellate court will not affirm the decision when it is not supported by any probative evidence. Holland v. State, 322 S.C. 111, 470 S.E.2d 378 (1996).

Here, there is no evidence supporting the PCR court's ruling that the withdrawal of Brannon's PCR application was knowing and voluntary. Contrary to the language in the PCR court's order, there was no inquiry conducted to ascertain the voluntariness of the withdrawal, nor was Brannon advised his withdrawal would result in a dismissal with prejudice.

A defendant's knowing and voluntary waiver of statutory or constitutional rights must be established by a complete record, and may be accomplished by colloquy between court and defendant, between court and defendant's counsel, or both. Roddy v. State, 339 S.C. 29, 528 S.E.2d 418 (2000); State v. Ray, 310 S.C. 431, 437, 427 S.E.2d 171, 174 (1993); Whitehead v. State, 310 S.C. 532, 426 S.E.2d 315 (1992) (PCR judge must, if a hearing is held, either appoint counsel for indigent defendants or obtain a knowing, voluntary waiver thereof); Carter v. State, 293 S.C. 528, 326 S.E.2d 20 (1987) (where PCR applicant is represented by his trial counsel at PCR, court must obtain a waiver of claims of ineffective assistance on the record).

We find the PCR court erred in failing to ascertain the voluntariness of Brannon's withdrawal prior to dismissing his application with prejudice. Roddy, supra. Accordingly, as there is no evidence supporting the PCR court's ruling, we remand for an evidentiary hearing on the matter. If his withdrawal was not knowing and voluntary, then Brannon may proceed with his PCR application. ⁽¹⁾

TOAL, C.J., MOORE, BURNETT and PLEICONES, JJ., concur.

1. We have consistently held a PCR applicant is entitled to one full bite at the apple. Odom v. State, 337 S.C. 256, 523 S.E.2d 753 (1999); Gamble v. State, 298 S.C. 176, 178, 379 S.E.2d 118, 119 (1989); Carter v. State, 293 S.C. 528, 362 S.E.2d 20 (1987); Case v. State, 277 S.C. 474, 289 S.E.2d 413 (1982).

EXHIBIT 4

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**Spoone v. State, 665 SE 2d 605 - SC: Supreme Court
2008****379 S.C. 138 (2008)
665 S.E.2d 605****James William SPOONE, Petitioner,
v.
STATE of South Carolina, Respondent.****No. 26529.****Supreme Court of South Carolina.****Submitted June 26, 2008.****Decided August 11, 2008.****Rehearing Denied September 4, 2008.**

139 *139 Appellate Defender Robert M. Pachak, of South Carolina Commission on Indigent Defense, Division of Appellate Defense, of Columbia, for Petitioner.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Sailey W. Elliott, and Assistant Attorney General Karen Ratigan, all of Columbia, for Respondent.

Justice WALLER:

In this post-conviction relief (PCR) case, we granted certiorari to review the PCR court's order of dismissal. We affirm.

FACTS

140 Pursuant to a written plea agreement, petitioner James William Spooner pled guilty to murder, first degree burglary, and possession of a weapon during the commission of a violent crime. Prior to the guilty plea, the State issued a notice of its *140 intent to seek the death penalty. In accord with the plea agreement, the trial court sentenced petitioner to life without parole for the murder and a consecutive life term for the burglary.^[1]

The plea agreement expressly stated the following:

[Petitioner] agrees to waive any and all appeals, PCR applications, federal habeas petitions and any and all other methods of review of this guilty plea and sentence.

The agreement further stated that its "purpose and intent" was for petitioner to live the remainder of his natural life in prison without the possibility of parole. In addition, the State agreed to withdraw the notice of intent to seek the death penalty, but upon breach of the agreement by petitioner, the plea would be nullified and the State could once again pursue the death penalty.

At the plea hearing, petitioner stated he was 46 years old, had a ninth grade education, and worked as a pipe welder.^[2] The trial court referenced the written plea agreement which was

made an exhibit to the proceeding. Petitioner acknowledged that he had gone over the agreement with his attorneys and signed it. The following colloquy then occurred:

Trial Court: Just so there's no question about the agreement. You are pleading guilty to ... murder, ... possession [of a weapon], ... burglary first degree. Do you agree that you will waive all appeals, PCR applications, federal habeas corpus petitions and any other methods of review of your guilty plea and sentence today? Is that part of your agreement?

Petitioner: Yes, sir.

141

Petitioner also responded affirmatively when the trial court asked if he understood that a request for either judicial review *141 or early release would constitute a breach of the agreement. Finally, the trial court again asked petitioner about this term of his guilty plea:

Trial Court: Do you understand that you have given up all of your rights as to appeal and to have this case further considered?

Petitioner: Yes, sir.

The trial court found petitioner's decision to plead guilty was "freely, voluntarily, knowingly and intelligently made with the advice and counsel of attorneys with whom the defendant says he is satisfied."

After petitioner filed the instant action for PCR, the State moved for dismissal based on the written plea agreement. After a brief hearing, the PCR court granted the State's motion. In the order of dismissal, the PCR court noted the plea transcript reflected that: (1) the plea agreement was thoroughly explained to petitioner, and (2) petitioner's decision to enter the agreement was knowing and voluntary.

ISSUE

Did the PCR court err in enforcing the written plea agreement wherein petitioner waived his rights to direct appeal, PCR, and habeas corpus relief?

DISCUSSION

Petitioner concedes that under federal law, a waiver of the right to collateral review is permitted where the circumstances surrounding the waiver show it is knowing and intelligent. Petitioner argues, however, that the waiver here was not knowing and intelligent because there was no discussion at the plea proceeding about the extent of his understanding of the waiver. Thus, petitioner contends this matter should be remanded to the PCR court for a merits hearing on his ineffective assistance of counsel claims.^[3]

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*142 The issue of whether the right to appellate and post-conviction review may be waived by a written plea agreement has not been addressed by South Carolina state courts.

Regarding plea bargains generally, this Court has recognized and followed federal precedent. See, e.g., *State v. Thrift*, 312 S.C. 282, 292, 440 S.E.2d 341, 347 (1994) (discussing *Santobello v. New York*, 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971) and *United States v. Ringling*, 988 F.2d 504 (4th Cir.1993)). The *Thrift* Court explained that "a plea bargain rests on contractual principles," and therefore, "each party should receive the benefit of the bargain." *Id.*; accord *State v. Dingle*, 376 S.C. 643, 651-52, 659 S.E.2d 101, 106 (2008) (finding defendant received the benefit of his plea bargain).

As to a plea agreement containing a waiver of direct appeal rights, the Fourth Circuit has stated "[I]t is clear that a defendant may, in a valid plea agreement, waive [a federal statutory] right of

appeal, just as more fundamental rights such as the right to counsel and the right to a jury trial may be waived." United States v. Wessells, 938 F.2d 165, 167 (4th Cir.1991) (citations omitted).^[4] Regarding a waiver of the right to collateral review, the Fourth Circuit has held there is "no reason to distinguish the enforceability of a waiver of direct-appeal rights from a waiver of collateral-attack rights" in a plea agreement. United States v. Lemaster, 403 F.3d 216, 220 (4th Cir.2005) (citation and internal quotation marks omitted).

However, such a waiver will be held effective only if it is knowing and voluntary. Wessells, 938 F.2d at 167; Lemaster, 403 F.3d at 220; see also United States v. Teeter, 257 F.3d 14, 24 (1st Cir.2001) ("The baseline for any waiver of rights is that the defendant enter into it knowingly and voluntarily."). The requirement that the waiver be knowing and voluntary is used by all the federal circuits, albeit with some variations. See generally Derek Teeter, Comment, *A Contracts Analysis of Waivers of the Right to Appeal in Criminal Plea Bargains*, 53 U. Kan. L.Rev. 727 (2005).

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*143 To determine whether a waiver is effective in the Fourth Circuit, the court examines the particular facts and circumstances surrounding the case, including the background, experience and conduct of the accused. United States v. Brumfield-Jones, 71 F.3d 1143, 1146 (4th Cir.1995). In addition, the court will evaluate whether "the issue sought to be appealed falls within the scope of the waiver." United States v. Cohen, 459 F.3d 490, 494 (4th Cir.2006), cert. denied ___ U.S. ___, 127 S.Ct. 1169, 168 L.Ed.2d 997 (2007).

In addition to federal court precedent, numerous state jurisdictions have upheld waivers of appellate rights and/or post-conviction relief, provided they were knowing, intelligent and voluntary. See, e.g., People v. Vargas, 13 Cal.App.4th 1653, 17 Cal.Rptr.2d 445, 449 (1993) ("an express waiver of the right of appeal made pursuant to a negotiated plea agreement is valid provided defendant's waiver is knowing, intelligent and voluntary"); Stahl v. State, 972 So.2d 1013, 1015 (Fla.Dist.Ct. App.2008) (a defendant can waive his right to collateral attack when the waiver is expressly stated in the plea agreement and it is knowingly and voluntarily made); Allen v. Thomas, 265 Ga. 518, 458 S.E.2d 107, 108 (1995) ("a waiver of a right to appeal or to seek post-conviction relief must be knowing, intelligent and voluntary"); Jackson v. State, 241 S.W.3d 831, 833 (Mo.Ct.App.2007) ("A movant can waive his right to seek post-conviction relief in return for a reduced sentence if the record clearly demonstrates that the movant was properly informed of his rights and that the waiver was made knowingly, voluntarily, and intelligently."); People v. Seaborn, 74 N.Y.2d 1, 543 N.Y.S.2d 968, 541 N.E.2d 1022, 1028 (1989) (waiver of appellate rights is enforceable if it is voluntary, knowing and intelligent; to make this determination, "all the relevant facts and circumstances surrounding the waiver, including the nature and terms of the agreement and the age, experience and background of the accused" must be considered).

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Looking at the particular facts and circumstances of the instant case, including: (1) the background, experience and conduct of the accused, (2) the text of the plea agreement, and (3) the transcript of the plea hearing, we find petitioner's waiver was voluntarily, knowingly, and intelligently made. Although petitioner only has a ninth grade education, the text "144 of the written plea agreement was straightforward. Furthermore, the plea colloquy shows that the trial court specifically asked petitioner about the waiver both in the language of the plea agreement, as well as in plain language. Petitioner was represented by two attorneys at the trial level. Both lawyers attended the plea hearing and both signed the written plea agreement, along with petitioner himself.

Accordingly, we hold the PCR court correctly enforced the waiver and dismissed petitioner's PCR application.^[5]

AFFIRMED.

TOAL, C.J., MOORE, PLECONES and BEATTY, JJ., concur.

[1] No sentence was imposed for the weapons charge. See S.C.Code Ann. § 16-23-480(A) (2003) (mandatory

five-year sentence "does not apply in cases where the death penalty or a life sentence without parole is imposed for the violent crime").

[2] Petitioner also stated he had been married, but the murder victim was his estranged wife. According to the facts recited at the plea hearing, petitioner went into his wife's son's house with a shotgun, found his wife hiding in the bathroom, and shot her three times. When arrested four hours later, he admitted the shooting to police.

[3] In petitioner's PCR application, he alleges ineffective assistance of trial counsel based on counsel's failure "to do a proper investigation of the facts and law of the case."

[4] Accord United States v. Tester, 257 F.3d 14, 22 (1st Cir. 2001) ("Since the Supreme Court repeatedly has ruled that a defendant may waive constitutional rights as part of a plea agreement, it follows logically that a defendant ought to be able to waive rights that are purely creatures of statute.") (citations omitted).

[5] Petitioner argues the Fourth Circuit's opinion in *Wessells* supports his argument. In *Wessells*, the defendant had waived the right to directly appeal the sentence. The court found the waiver was unenforceable, however, because the plea court did not question the defendant "specifically concerning the waiver provision of the plea agreement" and the defendant "himself gave no indication of the degree to which he understood the waiver's import." *Wessells*, 938 F.2d at 168. In this case, however, the trial court did specifically question petitioner about the waiver provision more than one time and in more than one manner. Therefore, *Wessells* is clearly distinguishable.

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EXHIBIT 5

263 S.C. 110 (1974)

208 S.E.2d 35

David Allen WHITE, Appellant,
v.
The STATE of South Carolina, Respondent.

19881

Supreme Court of South Carolina.

August 28, 1974.

*111 Levy S. Alford, Esq., of York, for Appellant.

*112 Messrs. Daniel R. McLeod, Atty. Gen., Emmet H. Clair, and Stephen T. Savitz, Asst. Attys. Gen., of Columbia, for Respondent.

*113 August 28, 1974.

BUSSEY, Justice:

On November 23, 1970 the appellant, White, was convicted of burglary in the General Sessions Court of York County and sentenced to a term of 20 years. The burglary with which he was charged occurred in the town of Fort Mill on the night of November 14, 1970. The defendant did not appeal from his conviction and sentence, but subsequently filed a petition for post-conviction relief and the instant appeal is from an order denying such relief following a full evidentiary hearing which was held on June 21, 1973.

Briefly the facts of the case are as follows. At approximately midnight of Saturday, November 14, 1970, the residence of Mr. & Mrs. George Ackerman, in the town of Fort Mill, was burglarized. Mrs. Ackerman awoke at about 12:15 a. m. and saw the burglar standing in the doorway of her bedroom. There was no light burning in the bedroom, but a light was burning in the hall behind the burglar so that she was able to see not his face, but his size and build and also had an opportunity to observe his manner of walking. When she realized that the person in the doorway was an intruder she screamed and the burglar fled.

The police were promptly notified and an investigation commenced. At 5:00 a. m. White was arrested at his home as a suspect, a warrant for his arrest having been obtained by the officers. In his possession at the time of his arrest was a billfold, belonging to Mrs. Ackerman and taken from her purse in the course of the burglary. At approximately 7:00 a. m. on Sunday morning, November 15, 1970, Mrs. Ackerman viewed the defendant in a one to one confrontation at the police station in Fort Mill, but was unable to positively identify him. He was asked to walk in the presence of Mrs. Ackerman, who could only say that he was "the right height, the same build and he walked the same." She stated, and *114 later testified, that she felt like he was the burglar but that she could not positively or definitely identify him.

Defendant's first three questions on appeal are predicated on the contention that the trial court erred in allowing testimony as to the pre-trial confrontation between Mrs. Ackerman and the defendant and that there was error in denying post-conviction relief on such ground. At the trial, before permitting Mrs. Ackerman to testify as to anything that would tend to identify the defendant as the burglar, the trial judge conducted an extensive hearing concerning the admissibility of evidence as to the pre-trial confrontation and/or the results thereof. Such hearing was conducted out of the presence of the jury. Mrs. Ackerman, both police officers who were present at the confrontation, and the defendant were examined and cross-examined at length as to circumstances of the confrontation and whether or not the defendant had knowingly and voluntarily relinquished his right to the presence of counsel and voluntarily submitted to the confrontation. As to the voluntariness of his submission of the confrontation, the record shows that he, himself, testified that he wanted to go out there and prove he was

not the one who went into the "woman's house." While he denied that he was advised of his right to the presence of counsel* at the confrontation, there was abundant evidence to the contrary. Both the trial judge and the judge who held the post-conviction hearing found, as a fact, that he was fully advised of all of his rights and that he had knowingly and voluntarily waived his rights and had voluntarily submitted to the confrontation.

White contended at the post-conviction hearing, but not at the trial, that the confrontation was unnecessarily suggestive and conducive to mistaken identification and thus in violation of his constitutional rights. He testified, *inter alia*, at the post-conviction hearing that Mrs. Ackerman's indefinite and uncertain identification of him was made only after suggestions by police officers that he was in fact the burglar. It is quite significant, we think, that *115 the defendant, when testifying out of the presence of the jury at his trial, made no mention or claim whatever as to any suggestive or factual statements made by police officers or other circumstances suggestive of an identification of defendant as the burglar by Mrs. Ackerman. He was given full opportunity at the trial to bring out anything which might have rendered evidence resulting from the confrontation inadmissible. His belated contention, made at the post-conviction hearing, that there were in fact improper suggestions and statements by the police officers, was obviously not accorded any credibility or weight by the hearing judge, although he did not pass specifically thereupon. We perceive no error in denying defendant relief on this asserted ground. Mrs. Ackerman was unable to positively identify defendant as the burglar and this in itself tends to refute any argument that she did identify him as a result of suggestions by the police officers. She testified only as to the similarities of certain physical characteristics of the burglar in her home and those of the defendant. *Cf. State v. Hicks*, 257 S.C. 279, 185 S.E. (2d) 746.

Finally, it is argued in connection with the pre-trial confrontation that he was not permitted to make a telephone call prior to such and that such was a denial of his constitutional rights; that only by making a telephone call could he contact an attorney, or reach his family, who could aid him in doing so. There is no merit in this contention for more than one reason; such was not relied upon as a ground in his petition for post-conviction relief. But, even if the issue were properly before us the trial record refutes his claim. There was abundant evidence that he was fully advised by the officers of all of his constitutional rights and also advised that he had a right to make a telephone call or calls. The trial court found, supported by abundant evidence, that the defendant had been fully advised of his rights and had waived such and voluntarily submitted to the confrontation, a factual finding which was later reaffirmed by the judge at the post-conviction hearing.

*116 Defendant's next contention challenges the admissibility into evidence of Mrs. Ackerman's light blue billfold taken from her purse in the course of the burglary and found, according to the State's evidence, in one of the defendant's trouser pockets at the time of his arrest pursuant to a warrant. At the trial a hearing was held out of the presence of the jury as to the circumstances attendant upon the seizure of this billfold and His Honor found, and held, that it was obtained as a result of a search incident to a lawful arrest. Indeed there was no evidence offered from which a contrary inference could be drawn.

In the post-conviction proceeding defendant took a position not asserted at the trial. He contended and testified that the billfold was in fact planted upon him by the officers. He takes the alternative and inconsistent position that the billfold was the fruit of an unlawful search made in violation of his rights under the Fourth Amendment of the Constitution. The defendant at the time of his arrest was in the home of his great-aunt, referred to as his grandmother, one Hattie White age 77 years with whom defendant apparently was temporarily visiting, he being on parole and in Fort Mill in violation of his parole. When he first became a suspect in this case, during the early morning hours of November 15, 1970, police officers went to the home of Hattie White, but defendant was not then there. She promised to call the police if he came in, which she did. Police officers returned at 4:00 a. m. and interrogated, but did not at that time arrest the defendant. In the course of the interrogation, according to the officers, there was seen in his hand a light blue object which later developed to be the billfold stolen from Mrs. Ackerman.

Introduced at the post-conviction hearing, by consent, was an affidavit from Hattie White, who was physically unable to be present, it being stipulated that her testimony would be in accordance with the affidavit if present. In brief, her pertinent testimony is to the effect that she saw no billfold or other light blue object in the defendant's hand when *117 the officers were there at 4:00 a. m. and that one or more of the officers went into defendant's bedroom and handled his clothing giving rise to the inference that they at least had the opportunity to discover or to plant the billfold at that time. She did not testify that

they did either. The testimony of the officers at the trial is in sharp conflict with that of Hattie White as to what occurred at 4:00 a. m., and of course, in sharp conflict with the defendant's present contention that the billfold was planted upon him. His contention as to the possible violation of his Fourth Amendment rights seems to be solely predicated on the possible inference from the testimony of Hattie White that the officers were in his bedroom, without permission, at 4:00 a. m. and then discovered the billfold in an unlawful search of his clothing.

The hearing judge recognized that there were conflicts in the testimony but found and concluded, just as the trial judge did that, in fact, the billfold was seized as an incident, or result, of a lawful arrest pursuant to an arrest warrant properly served upon the defendant; and accordingly that the billfold was properly introduced into evidence. Such finding of fact is abundantly supported by competent evidence and is, of course, under the well settled rule binding upon us.

Finally, the defendant contends that the hearing judge should have ordered a new trial on the ground that defendant did not knowingly and intelligently waive the right to appeal from his conviction and sentence. Admittedly the defendant's trial counsel did not consult with or advise the defendant as to his right to so appeal. His trial counsel, who is not his present counsel, testified at the post-conviction hearing that he had not advised the defendant of his right to appeal because of the defendant's prior record, he felt certain that he knew his rights thereabout and additionally he was convinced there was no meritorious ground of appeal.

The defendant, in November, 1964, pled guilty to the offense of peeping tom and received a sentence of 18 months. *118 On May 22, 1967 he pled guilty to the offense of burglary committed in the town of Fort Mill and was sentenced to a term of nine years. On June 17, 1970 he was granted a parole by the State Parole Board. At the time of the burglary in the instant case he was supposedly living and working in Columbia and actually in Fort Mill in violation of his parole. Although the defendant testified that he was unaware of his right to appeal, his record would suggest that his trial counsel had a reasonable basis for assuming that, in fact, he did know.

While the defendant may not have been fully aware of all of his rights as an indigent or the steps necessary to perfect an appeal, it is indeed incredible that he, a recent inmate of the Central Corrections Institution in Columbia for several years, was totally unaware of his right to appeal. Although there was a reasonable basis for trial counsel's conclusion or assumption that the Defendant was fully aware of his appeal rights, counsel should not have rested upon that assumption. He should have made certain that the defendant was fully aware of his rights and in the absence of an intelligent waiver by the defendant either pursued an appeal in his behalf or else, if deemed appropriate by counsel, complied with the procedure set forth in *Anders v. State of California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L. Ed. (2d) 493.

The hearing judge who had before him and considered the trial record concurred in the conclusion of defendant's trial counsel that there was no meritorious ground of appeal, but citing the decisions of the United States Fourth Circuit Court of Appeals in *Nelson v. Peyton*, 415 F. (2d) 1154 and *Shiffett v. Commonwealth of Virginia*, 447 F. (2d) 50, concluded that the defendant did not knowingly and intelligently waive his right to appeal. As a result of such conclusion the court directed his present counsel to attempt to secure for the defendant a belated appeal to his Court from his conviction and sentence. Defendant contends that the court instead should have either *119 granted him "a new trial or the immediate right to a full appeal." We know of no authority for the hearing judge granting defendant a full right of appeal and he cites none. Neither are we cited, nor aware of, any authority for the hearing judge granting the defendant a new trial on this ground, at least in the absence of any showing of prejudice to the defendant. The hearing judge in effect concluded that there was none.

As to a belated appeal to this Court from the conviction and sentence, which counsel was directed to attempt, it is well settled that in the absence of a notice of appeal having been given and timely served this Court has no jurisdiction over such an appeal. *State v. Wright*, 228 S.C. 432, 90 S.E. (2d) 492, Code Section 7-405, 3 West's South Carolina Digest, Appeal and Error Key 425-430. While this Court is without jurisdiction to entertain such an appeal, here as in the *Wright* case this Court, in connection with the appeal which is properly before us, has fully reviewed the trial record and our review thereof has led to the conclusion that there was no reversible error in the trial and that there was not an arguably meritorious ground of appeal, even if notice of intention to appeal had been timely served so as to confer jurisdiction upon this Court. We deem all

2/8/2014

White v. State, 208 S.E.2d 35, 283 S.C. 110 - CourtListener.com

appellant's exceptions to be without merit and the judgment below is accordingly

Affirmed.

MOSS, C.J., and LEWIS, BRAILSFORD and LITTLEJOHN, JJ., concur.

Yes No

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

YES
ON

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

ON

My attorney, Philip J. Riös, has reviewed with me the terms of the Consent Order and the legal consequences of those terms (through the assistance of translator Rocio-Maria-Riley) and I understand the terms and am in agreement with them

ON

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

ON

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

ON

ON

Yes ~~No~~ I have been informed and advised by my attorney, Philip J. Rios, about my PCR application, the legal meaning of its substantive content, the standard for relief in PCR cases, and the waiver of issues and all other matters arising out of my PCR application.

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

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

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

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

Yes

ON

I am satisfied with my attorney, Philip J. Rias,
and the representation that he has provided me

Osiel M

Osiel Narciso Gomez

1 STATE OF SOUTH CAROLINA

COURT OF COMMON PLEAS

2 COUNTY OF BEAUFORT

CASE NO. 2007-CP-2195

3 OSIEL GOMEZ NARCISO)

4 vs.)

TRANSCRIPT OF RECORD

5 STATE OF SOUTH CAROLINA)

6
7 FEBRUARY 20, 2014
8 BEAUFORT, SC

9
10 B E F O R E:

11 HONORABLE JAMES R. BARBER, III

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

13 CAROL C. RUFF, ESQUIRE
14 HARLEY D. RUFF, ESQUIRE
Attorneys for the Applicant

15 ASHLEIGH R. WILSON, ESQUIRE
16 Attorney for State of South Carolina

17 BRITT HUNT
Certified Interpreter

18
19 Ruth L. Mott, RPR, CRR
20 Official Court Reporter
21
22
23
24
25

I N D E X

	WITNESS	DIRECT	CROSS	REDIRECT	RECROSS
1					
2					
3	REBECCA MCCANN				
4	MS. RUFF	9		13	
5	MS. WILSON		12		
6	DONALD COLONGELI				
7	MS. RUFF	14			
8	PHILLIP RIOS				
9	MS. RUFF	16		29	
10	MS. WILSON		23		31
11	REBECCA MCCANN (REBUTTAL)				
12	MS. RUFF	32			
13	OSIEL NARCISO GOMEZ				
14	MS. RUFF	34			
15	MS. WILSON		37		
16	CERTIFICATE OF REPORTER	44			

E X H I B I T S

	NO.	DESCRIPTION	ID	EVD
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18	S-1	CHECKLIST	25	26
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1 MS. WILSON: May it please the Court, Your Honor,
2 Ashleigh Wilson for the State of South Carolina. This is
3 Osiel Narciso versus State of South Carolina, Docket No.
4 2007-CP-07-2195. Mr. Narciso was indicted in August 2005 by
5 the Beaufort County Grand Jury for trafficking in cocaine.
6 He went to trial January 16th through the 18th, 2007 and was
7 sentenced to 25 years. Mr. Narciso originally filed an
8 application for post-conviction relief on August 1st, 2007.
9 The State filed its return on May 15, 2008. He came to court
10 for an evidentiary hearing, and at that evidentiary hearing
11 he entered into a consent agreement with the State to grant
12 him a belated appeal, and he was represented by Mr. Phil Rios
13 on that PCR. On appeal the appellate court addressed his
14 direct appeal issues and also whether or not he freely and
15 voluntarily waived any other allegations, PCR allegations
16 that he could have raised at the PCR hearing, and the
17 appellate court remanded it for a hearing to determine
18 whether, when Mr. Narciso signed the consent order at that
19 PCR hearing, he knew that he was waiving his right to raise
20 any other PCR allegations, so that's what we're here today to
21 determine.

22 THE COURT: Wait a minute. He filed a PCR.

23 MS. WILSON: Yes, Your Honor.

24 THE COURT: And part of the basis of the PCR is that his
25 attorney had not pursued an appeal. Everybody agreed that he

1 could pursue the appeal. And you're saying at that time he
2 waived any rights to a PCR?

3 MS. WILSON: Well, he entered into a consent order with
4 the State, and there should be a copy in your packet of the
5 actual consent order. If not, I can give you a copy. But
6 anyway, as a part of agreeing -- he agreed to enter into a
7 consent order with the State granting him a belated appeal,
8 and as a part of the consent order he waived his right to
9 pursue any other PCR allegations.

10 THE COURT: What do you mean any other PCR allegations?

11 MS. WILSON: Any other issues he could have raised
12 during that PCR. Because him entering into a consent order
13 with the State for a belated appeal, he waived his other PCR
14 allegations. It's my understanding he didn't have any other
15 allegations. That was just the language in the consent
16 order. And so when he pursued it on appeal, the appellate
17 court also reviewed the issue of whether or not he waived any
18 other allegations he could have raised or he knew he was
19 waiving that when he entered into the --

20 THE COURT: They remanded it back to this court to
21 determine whether he in fact waived any PCR --

22 MS. WILSON: Any other allegations, yes, Your Honor.

23 THE COURT: Other than the appeal.

24 MS. WILSON: Yes, Your Honor.

25 THE COURT: All right.

1 MS. WILSON: He's here today represented by Attorneys
2 Carol and Harley Ruff, so here we're ready to proceed.

3 THE COURT: Let me ask you this -- is it Mr. Narciso,
4 how do you pronounce it, Narciso?

5 MS. RUFF: Narciso.

6 THE COURT: Does he understand what's being said so far?

7 THE APPLICANT: (Through interpreter) Yes.

8 THE COURT: Okay. You're Ms. Ruff?

9 MS. RUFF: I'm Carol Ruff, my husband is Harley Ruff,
10 and we're here on behalf of Mr. Narciso. We filed a brief
11 recently, and I wanted to be sure that you had received our
12 brief. The consent order -- the remand from the South
13 Carolina Supreme Court is in that brief.

14 THE COURT: I don't see any brief in the package.

15 MS. RUFF: May I approach?

16 THE COURT: Yes, ma'am.

17 MS. RUFF: I have the consent order as well if you'd
18 like to look at it.

19 My argument is that -- we have two arguments, Your
20 Honor, the petitioner's waiver is invalid since it was not
21 established by a complete record as required by the Brannon
22 case, and the petitioner's waiver was not knowing and
23 voluntary and therefore is invalid. Our first argument is
24 based on the 2001 Brannon case, a petitioner's knowing and
25 voluntary waiver of a statutory or constitutional right must

1 be established by a complete record and may be accomplished
2 by colloquy between court and petitioner, between court and
3 petitioner's counsel or both.

4 THE COURT: Wait a minute. Slow down a little bit.
5 Back up.

6 MS. RUFF: Okay. There are a couple legal arguments why
7 my client should not have had to choose between waiving his
8 PCR rights and getting a direct appeal. The facts are that
9 this man went to trial, he was convicted, he received a
10 mandatory 25-year sentence for a first-time felony conviction
11 on a drug charge, trafficking. When he went to ask his
12 attorney, Don Colongeli, his trial attorney for an appeal,
13 Don Colongeli said he would file the appeal and failed to do
14 so timely, so my client was left without recourse for an
15 appeal. And, as you know, White versus State, and then
16 there's also United States --

17 THE COURT: Right.

18 MS. RUFF: -- court case Flores versus -- Roe versus
19 Flores Gomez Ortega also says that under those circumstances
20 a defendant may have an automatic direct appeal. They're
21 entitled to that appeal, okay, so when the South Carolina
22 Attorney General came to the hearing, they offered a prepared
23 consent order that waived any and all other PCR claims that
24 this man could have had in exchange for his entitled right
25 that he already had to a direct appeal, so it was kind of a

1 bait and switch. It was a deal that didn't make sense. My
2 client gave up his PCR rights in order to get what he was
3 already entitled to, a direct appeal. It's right here in the
4 consent order. The Brannon case -- there are a couple of
5 reasons why we think you should find legally and factually
6 that this man is entitled to his PCR rights, his claims. The
7 Brannon case states, and Justice Toal mentioned it --

8 THE COURT: Hold on. Let me stop you there. Do you all
9 agree with the factual recitation?

10 MS. WILSON: Well, Your Honor, it's very common in PCR
11 for it to be brought to the state's attention that an
12 attorney did not file an appeal and they admit that, so
13 instead of going forward on the issue in court we enter into
14 consent agreements all the time about waiver of the --

15 THE COURT: I understand that, but it seems sort of
16 drastic that you never have the right to then pursue your PCR
17 application.

18 MS. WILSON: Well, Your Honor, that's not always the
19 case. If the applicant has other issues that they want to
20 proceed on, we proceed on those issues and then we also enter
21 into a consent agreement as far as a belated appeal. In this
22 case, Your Honor, it's the state's understanding that Mr.
23 Narciso didn't have any other issues he wanted to raise.
24 I'll present testimony from his PCR attorney, he didn't want
25 to amend his application. The only allegation raised in his

1 application was failure for his counsel to -- failure to file
2 an appeal. Mr. Rios will testify to the Court that he talked
3 to him about the waiver of any other allegations and asked
4 him did he want to present any other allegations to the Court
5 and that was not the case.

6 MS. RUFF: That is in fact not the case. Our client has
7 several PCR allegations that he has, as you can imagine. His
8 attorney didn't even file his appeal, so there are plenty of
9 claims of ineffective assistance of counsel, not just the
10 failure to file an appeal, that our client could go forward
11 on.

12 MS. WILSON: Your Honor --

13 THE COURT: So you all agree with what she says, you're
14 just saying that he didn't set out any other grounds other
15 than his right to a direct appeal that was not pursued.

16 MS. WILSON: Right and that he didn't want to present
17 any other grounds.

18 MS. RUFF: I must say that under the law in South
19 Carolina in order for him to have actually waived that he
20 would have had to do a waiver much like you just did
21 excellently this morning with the previous man.

22 THE COURT: That will get you nowhere.

23 MS. RUFF: There is nothing at all on the record, and
24 it's actually -- you have a copy of the transcript in our
25 brief. There is nothing on the record that indicates that he

1 knowingly and voluntarily waived this PCR right.

2 MS. WILSON: Your Honor, it's obvious, we have the court
3 record, that's why the Court remanded it and we're here
4 today, to put it all on the record, the waiver.

5 MS. RUFF: But the waiver is invalid without a complete
6 record.

7 THE COURT: I'm going to listen to what they say. I
8 have some real, real concerns about this kind of effort on
9 the part of the Attorney General's Office.

10 MS. RUFF: Thank you, Your Honor.

11 THE COURT: We'll listen to what they say. Maybe
12 they'll convince me that my concerns are not valid.

13 MS. RUFF: Thank you. My first witness is the
14 interpreter from the original hearing, Mrs. Rebecca McCann.

15 REBECCA MCCANN,
16 being first duly sworn, testified as follows:

17 DIRECT EXAMINATION BY MS. RUFF:

18 Q. Good morning. Thank you for being here.

19 A. Good morning.

20 Q. Could you again state your name for the Court?

21 A. Rebecca D. McCann.

22 Q. Could you please tell us your occupation?

23 A. I am a retired educator, but I am also an interpreter
24 and translator.

25 Q. Could you tell us what your background is and your

1 experience?

2 A. Yes, I hold a B.A. and a master's degree in Spanish. I
3 was an instructor in Spanish for 37 years in the field of
4 education and coauthored a grammar textbook. From 2005 until
5 the present I have been an approved, qualified interpreter by
6 the South Carolina Court Administration, and from 2007 until
7 the present I -- I'm sorry, in 2007 I successfully --

8 THE COURT: Are her qualifications in issue?

9 MS. RUFF: Will you acknowledge that she's an expert?

10 MS. WILSON: Sure.

11 Q. I do want to ask you the difference between an
12 interpreter and a translator. Which one are you?

13 A. I am an interpreter when I come to court. An
14 interpreter interprets the words spoken. A translator
15 translates from written text.

16 Q. And so you are an interpreter of the spoken work,
17 correct?

18 A. Yes, yes, I am.

19 Q. Now, were you at the hearing on August 26th, 2008, where
20 you represented -- or where you were interpreting for
21 Narciso, Mr. Narciso?

22 A. Yes, I was.

23 Q. At that time there was a consent order that was signed
24 by our client. Were you able to see that consent order
25 before it was signed?

1 A. I have to say that I do not remember.

2 MS. RUFF: Okay. I'd like to admit this into evidence
3 as a consent order that was signed by our client that I want
4 to see if the interpreter had read beforehand and translated.

5 THE COURT: It's part of the record.

6 MS. RUFF: Can I hand it up to the client?

7 THE COURT: Sure. The witness.

8 Q. Ms. McCann, did you ever see this consent order before
9 the hearing?

10 A. I do not remember.

11 Q. Did you go visit the client, Mr. Narciso, in the jail
12 the night before the hearing?

13 A. No, I did not.

14 Q. Did you see him before the day of the hearing?

15 A. No, I did not.

16 Q. Did you translate this document you're holding, the
17 consent order, in written Spanish for Mr. Narciso?

18 A. I have no memory of that.

19 Q. Do you recall sight translating it, reading it in
20 Spanish to him?

21 A. I do not recall.

22 Q. Do you have any records of the work that you did during
23 that day?

24 A. Every time I come to interpret for a client I do make a
25 note in my steno book, and I do have his name written down, I

1 have his lawyer's name written down, I have some vocabulary
2 that I knew that I would need to have fresh in my mind that
3 day. So I do have those notes, and I have the date and the
4 time.

5 Q. Did Attorney Rios translate the document for Mr. Narciso
6 in your presence, do you remember any of that?

7 A. I do not remember.

8 Q. Did Attorney Rios speak Spanish to you?

9 A. No, he did not. We spoke to one another in English.

10 Q. Did anyone that you saw translate the document you're
11 holding in Spanish for our client?

12 A. I have no recollection of that.

13 Q. Do you think the petitioner would have been better
14 served with a written translation of the document and someone
15 with written translation background?

16 A. I cannot speak to that.

17 MS. RUFF: Okay. I think that's all I have.

18 THE COURT: Anything?

19 CROSS-EXAMINATION BY MS. WILSON:

20 Q. Ms. McCann, it's your testimony today that you don't
21 recall reviewing any documents with Mr. Narciso; is that
22 correct?

23 A. That's correct.

24 Q. And do you recall about what time you met with Mr. Rios
25 and Mr. Narciso, is it indicated in your record?

1 A. I have -- in my notes I have jotted down 8:45. I think
2 that was the time that I had agreed to be here at the
3 courthouse.

4 Q. And simply because you don't recall doing it, that
5 doesn't mean that you for sure didn't do it; is that correct?

6 A. That's correct.

7 Q. And can you read Spanish and translate that language?

8 A. Yes, I can.

9 Q. While you were translating -- so do you recall
10 translating the court proceedings for Mr. Narciso?

11 A. This was in 2008, and these books are full of the
12 different cases that I have done, so I'm sorry I -- I cannot
13 recall that.

14 MS. WILSON: Okay. Thank you.

15 MS. RUFF: I have just a few more follow-up questions.

16 REDIRECT EXAMINATION BY MS. RUFF:

17 Q. Ms. McCann, had you done a lot of work for this hearing
18 during the hearing, would you have put voluminous notes down?

19 A. Voluminous notes I rarely do, but I do take note of the
20 time, the date, the time spent, vocabulary words that I need.
21 That's normally the type of notes that I take on these cases.

22 MS. RUFF: Okay. Thank you very much.

23 THE COURT: Thank you, ma'am, you may step down. You
24 are free to leave if you want to.

25 THE WITNESS: Thank you.

1 MS. RUFF: My next witness is the trial attorney, Donald
2 Colongeli.

3 DONALD COLONGELI,
4 being first duly sworn, testified as follows:

5 DIRECT EXAMINATION BY MS. RUFF:

6 Q. Mr. Colongeli, can you state your name for the Court?

7 A. Sure, Don Colongeli.

8 Q. And your occupation?

9 A. I'm an attorney here in Beaufort County.

10 Q. Did you represent Mr. Narciso in his criminal trial?

11 A. Yes, I did.

12 Q. What was the outcome of that trial?

13 A. He was found guilty, received a 25-year sentence.

14 Q. Did you appeal his conviction?

15 A. I did appeal but it was not timely.

16 Q. Did you take any other action after filing an untimely
17 appeal to represent Mr. Narciso?

18 A. I did everything I could to try to correct my error as
19 far as I believe State v. White, but obviously it was an
20 error on my part, and I took full responsibility for that.

21 Q. Sure.

22 A. I did whatever I could, but obviously at that point I
23 don't think there was much I could do.

24 Q. Were you present at the PCR hearing?

25 A. I was present and that's what's confusing to me, there

1 were at least one or two prior hearings or attempts to have
2 hearings for Mr. Narciso Gomez after that trial. I don't
3 recall -- I think one was postponed, and then I remember
4 another one, I believe it was the Assistant Attorney General
5 Friedman, I believe it was him, but we had come up with an
6 arrangement where basically we signed a consent order that he
7 would be given a right to appeal based on the error.

8 Q. Okay.

9 A. So we'd come to some sort of an agreement that we
10 basically did off the record, something was signed, I believe
11 Judge Maddox was presiding that week, and we thought it was
12 over at that point.

13 Q. Now, if you had appealed timely, would Narciso have
14 retained his PCR rights as well as his appellate rights?

15 A. In my opinion, yes.

16 MS. RUFF: Thank you. That's all I have.

17 THE COURT: Anything?

18 MS. WILSON: Nothing from the State.

19 THE COURT: Let me ask you this question, did you
20 represent him on that first PCR?

21 THE WITNESS: No, sir.

22 THE COURT: You didn't handle that --

23 THE WITNESS: No, sir.

24 THE COURT: -- on the basis that the appeal was not
25 timely.

1 THE WITNESS: No, sir.

2 THE COURT: Thank you.

3 MS. WILSON: Your Honor, Phillip Rios is the one who
4 represented him on that PCR, and he's my next witness.

5 THE COURT: All right.

6 PHILLIP RIOS,
7 being first duly sworn, testified as follows:

8 DIRECT EXAMINATION BY MS. RUFF:

9 Q. Can you please state your name for the record?

10 A. Sure. My name is Phillip Rios, R-I-O-S.

11 Q. Mr. Rios, what's your occupation?

12 A. I am an attorney.

13 Q. Are you a criminal attorney?

14 A. Yes, ma'am, as well as civil litigator.

15 Q. Do you speak Spanish?

16 A. No, I do not.

17 Q. Did you represent Mr. Narciso?

18 A. Yes, I did.

19 Q. Can you explain that representation?

20 A. Certainly. I received the appointment, I believe it was
21 I want to say January of 2008, and that was to petition for
22 PCR application, and in the petition the grievance raised
23 against trial counsel was failure to file an appeal. At that
24 point I sent correspondence to Mr. Narciso, and eventually
25 when I was able to obtain the trial transcript I sent

1 subsequent communication through a letter and probably -- I
2 want to say at least four letters I sent to Mr. Narciso, and
3 each of those letters were typed in English as well as
4 translated and written -- typewritten in Spanish as well
5 through the -- through a paralegal at our office who was
6 bilingual. When I say at our office, I worked for the law
7 firm of Minor, Haight & Arundell at the time. I'm no longer
8 with that firm but was with them for about five years.

9 Q. Let's get to the deal that you make for Mr. Narciso at
10 the PCR hearing with the South Carolina Attorney General
11 where he waived his PCR rights in exchange for a right he had
12 for the direct appeal to the State Supreme Court. Did you
13 know about that deal before the hearing on the 26th?

14 A. If I may, and I want to answer the question, it wasn't
15 for exchange, you know, that's not how it was couched to Mr.
16 Narciso. That was part of the consent order, but in coming
17 to our meeting of the minds, that is, between myself, his
18 attorney, and my client, it wasn't you get this for this, so
19 I can't answer that question.

20 Q. I guess my question is when did you know about the deal
21 that was cut?

22 A. I want to say a couple weeks before. But again, that
23 deal wasn't --

24 Q. Were you able to communicate that deal --

25 MS. WILSON: Objection, Your Honor. Can she please let

1 the witness finish answering the question?

2 MS. RUFF: He's not answering my question so --

3 THE WITNESS: Yes, I can answer the question.

4 Q. Okay. So did you communicate that deal to the client,
5 to Mr. Narciso?

6 A. Well, it wasn't a deal, and I'm not being argumentative,
7 until I met with him at the detention center probably around
8 7:30 in the morning.

9 Q. Did you have an interpreter with you that day?

10 A. Yes, ma'am.

11 Q. Ms. McCann.

12 A. Yes, ma'am.

13 Q. So you met him right at 7:30 before his hearing. What
14 time was his hearing?

15 A. I believe it was 7:30. I recall calling the detention
16 center to meet with him as early as possible before the
17 hearing. I believe it was a 9:00 hearing, so I met with him
18 I know at least an hour before, and then subsequently we went
19 up in the courtroom with Ms. McCann present as well.

20 Q. So you did not go to the correctional --

21 A. No, I did not.

22 Q. -- correctional facility.

23 A. That is correct.

24 Q. And again, did you explain the deal to your client in
25 advance when you had the notice from the South Carolina

1 attorney what the consent order was going to be, did you
2 explain that to him two weeks prior? You said you had that
3 information two weeks prior. Did you communicate that to
4 your client?

5 A. No, because, again, that wasn't -- I wanted to speak
6 with him directly, but no, I did not.

7 Q. All right. Do you know Mr. Narciso's rights under White
8 versus State, are you familiar with that case?

9 A. Yes, ma'am.

10 Q. Are you familiar with the United States Supreme Court
11 case of Roe versus Flores Ortega?

12 A. Not offhand. I'm sure I have seen it, but today I can't
13 recall it.

14 Q. Would you agree that those cases basically entitle a
15 client defendant in Mr. Narciso's position to a direct
16 appeal?

17 A. That is correct.

18 Q. Why then was it necessary to give up any and all other
19 PCR claims that Mr. Narciso would have had against his
20 attorney?

21 A. Certainly it wasn't necessary. It was part of the
22 consent order. There were no other grievances raised in Mr.
23 Narciso's petition. Furthermore, I sent correspondence --

24 Q. Let me ask you --

25 A. -- informing my client if he wanted me to modify the

1 petition or amend the petition and raise other allegations.

2 THE COURT: Let him finish.

3 THE WITNESS: I know there's at least two correspondence
4 where I asked for that or asked my client if he wishes to
5 raise other allegations, and then I believe the third time
6 when I met him we also discussed the, you know, viability or
7 his right to amend the petition, and again there were no
8 other grievances raised or alleged by Mr. Narciso at that
9 point, so therefore I wasn't -- I didn't want to amend just
10 for the sake of amending if there were no other allegations.
11 However, I did look at the transcript, and I have to say I
12 don't recall it in entirety, but if there were any arguments,
13 they were very thin and I felt certainly not -- not enough to
14 meet the standard of a PCR. But the discussions, however,
15 were not about other allegations with my client, I would say
16 the majority of them.

17 Q. Do you think it benefited your client to give up rights
18 that he didn't need to give up in order to get a right that
19 he was entitled to to the direct appeal, do you think that
20 benefited your client?

21 A. Again, I think what he petitioned the Court for is what
22 we were able to obtain in the PCR application through the
23 consent order. I believe, if I may, that in hindsight maybe
24 I should have insisted in open record, you know, that he's
25 waiving the right. The Court didn't require it, Attorney

1 General's office didn't require it, I didn't insist; however,
2 he was, I believe, brought up to the courtroom. The
3 interpreter, Ms. McCann, was present in the courtroom as well
4 as prior to that, so I don't like to create an ambiguity or a
5 specter of ambiguity on any level. I've been practicing for
6 several years. I try to come to a meeting of the minds with
7 my client always before anything's signed or entered, and I
8 believe that's what was done and that's why we went forward.

9 Q. Was there translating equipment present at this hearing
10 where, like there is today, he understands what everyone is
11 saying, what everyone is adding to the conversation?

12 A. I don't recall seeing any such technology. There may
13 have been but again --

14 Q. Well, you hired the interpreter, so you would have had
15 the equipment with the person you hired.

16 THE COURT: You're talking about for the hearing?

17 MS. RUFF: Yes, for the PCR hearing.

18 THE COURT: Apparently, I read the transcript, there's
19 nothing in there so why would -- that's not an issue in the
20 case. Nothing was put on the record. No inquiry was made by
21 anybody.

22 MS. RUFF: Right.

23 THE COURT: Do you have any document that indicates that
24 you went through and advised your client that he would be
25 waiving this right forever, that he's only given one

1 application for PCR, that it could affect his rights in the
2 future on any habeas matter?

3 THE WITNESS: Yes.

4 THE COURT: Have you got something in your file that
5 indicates all that?

6 THE WITNESS: Yes, sir, Your Honor.

7 THE COURT: All right.

8 THE WITNESS: The consent order we went over. I recall
9 Ms. McCann going over that document because it's handwritten
10 because I did it at the detention center and as well as going
11 over the consent order and that's -- I appreciate her not
12 being able to recall but I do recall that.

13 Q. Now, Ms. McCann stated that she was not at the detention
14 center. You're saying that she was there and she translated
15 there?

16 A. Yes, ma'am.

17 Q. Did you raise the issue of ineffective assistance of
18 counsel at the PCR hearing?

19 A. No, ma'am.

20 Q. Why didn't you?

21 A. Again, there was a consent order. I spoke with my
22 client, asked him if there were any other allegations he
23 wished to raise, he wished to amend the petition, and there
24 were no others, therefore I did not raise that, and I didn't
25 see that as a viable issue.

1 Q. But is it correct that he could have preserved his PCR
2 rights and gotten the direct appeal without having to waive
3 his PCR rights? Is that correct, could you have done that
4 for him at that PCR hearing?

5 A. I think it's a semantical issue at this point. There
6 were no other PCR allegations other than the failure to file
7 an appeal.

8 Q. But had there been any other were you prepared to --

9 A. Oh, absolutely and I tried to find others and, again,
10 the ambiguity here or the specter of ambiguity is it wasn't
11 made in open court, the waiver of those rights.

12 Q. Nothing was put on the record.

13 A. That's correct. But I do have --

14 MS. RUFF: That's all I have.

15 THE WITNESS: Thank you.

16 CROSS-EXAMINATION BY MS. WILSON:

17 Q. Mr. Rios, it's clear that you represented Mr. Narciso in
18 this PCR application; is that correct?

19 A. That is correct.

20 Q. And when you met with Mr. Narciso up to this hearing
21 that was held did you have a translator present?

22 A. Yes, ma'am, I did.

23 Q. Was a translator present at all the meetings?

24 A. Yes. There was one meeting.

25 Q. And was that Ms. McCann?

1 A. Yes, ma'am.

2 Q. And it's your testimony that she was also present at the
3 PCR hearing, well, the proceeding that was held.

4 A. Yes.

5 MS. RUFF: I'm going to object, Your Honor. Ms. McCann
6 has already stated she was not a translator, she was only an
7 interpreter of the spoken word.

8 MS. WILSON: Your Honor, I'm sorry for using the wrong
9 language.

10 Q. Mr. Rios, did you have an interpreter present while in
11 your one meeting with Mr. Narciso and --

12 THE COURT: I understand all that. Let's not make an
13 issue out of something that's not an issue, okay?

14 Q. Did you feel like you were effectively able to
15 communicate with Mr. Narciso having Ms. McCann present?

16 A. Yes, I did.

17 Q. And did you discuss with Mr. Narciso his PCR application
18 prior to the proceeding?

19 A. Yes, yes.

20 Q. And what did your discussions entail?

21 A. Well, the scope of our discussions were regarding the
22 appeal issue, and we went through a statement or a checklist,
23 you know, regarding what that meant if we were going to
24 consent to the consent order.

25 Q. Okay.

1 A. I do recall lastly, or during that meeting prior to the
2 hearing at the detention center, discussion of amending the
3 application once again or not.

4 Q. Okay.

5 A. And there were no other allegations made at that point.

6 MS. WILSON: Your Honor, may I approach?

7 THE COURT: You may.

8 (State's Exhibit 1 marked for identification.)

9 MS. WILSON: Your Honor, may I approach the witness?

10 THE COURT: Yes.

11 Q. Now, Mr. Rios, is the document I handed you a copy of
12 the checklist that you reviewed with Mr. Narciso?

13 A. Yes, ma'am.

14 Q. And do you recall when that document was -- did you
15 draft that document?

16 A. I did.

17 Q. And do you recall when you reviewed that with Mr.
18 Narciso?

19 A. Yes, it was the day of the hearing, I want to say
20 between 7:30 and 8:30 a.m., and I believe the hearing -- I'm
21 not sure of the date. I don't recall the date of the
22 hearing. Late summer.

23 Q. And can you explain to the Court how you went through
24 that with Mr. Narciso?

25 A. Yes, I drafted it, and each provision I went through,

1 and Ms. McCann translated it, each provision, and had Mr.
2 Narciso initial the yes column or the no column on every
3 page, there's three pages, initial the first two pages and
4 signature the last page.

5 Q. And can you publish for the --

6 Well, Your Honor, State would like to enter that into
7 evidence as State Exhibit 1.

8 THE COURT: Any objection?

9 MS. RUFF: No.

10 MS. WILSON: Thank you.

11 THE COURT: So admitted.

12 (State's Exhibit 1 received into evidence.)

13 Q. Can you publish for the Court the provisions that you
14 reviewed with Mr. Narciso?

15 A. Certainly. No. 1 --

16 THE COURT: Are you going to have him read it to me?

17 MS. WILSON: Or he can just summarize it, Your Honor.
18 He can review it.

19 THE COURT: Summarize it. I can look at it.

20 THE WITNESS: Very good. Well, basically the provisions
21 are what I would go through with a client that was entering a
22 guilty plea before the Court, much like the colloquy between
23 Judge Barber and the previous client, the first hearing
24 today, meaning am I not -- am I under the influence of any
25 alcohol or drugs or anything that would impair my ability to

1 make decisions concerning the PCR application and hearing
2 today, and initial yes or no. The other provision I think at
3 issue today is, I understand that I am forever waiving my
4 right to raise any other allegations of ineffective
5 assistance of counsel against Mr. Colongeli and waiving my
6 rights in agreeing to a belated appeal. I understand that
7 although Mr. Rios has offered to amend the application and
8 raise other allegations, I am unwilling to raise new
9 allegations. That's the gist of it. There may be other
10 probative --

11 THE COURT: Can I see it?

12 THE WITNESS: Yes, sir, Your Honor.

13 Q. Now, it's your testimony today that Mr. Narciso didn't
14 want to amend his application or raise any other allegations;
15 is that correct?

16 A. That is correct.

17 Q. And you explained to him that the State was agreeing to
18 give him a belated appeal; is that correct?

19 A. That is correct.

20 Q. And the consent order that was signed with the State,
21 did you review that consent order with Mr. Narciso?

22 A. Yes, I did, and to my recollection Ms. McCann was
23 present for that as well as that was presented along with
24 this checklist, and the checklist is handwritten, I don't
25 think anyone asked any questions about that, but there was no

1 presumption what was going to happen that day. Although we
2 did have an agreement with the State, I still hadn't
3 confirmed that with my client or had not come to that meeting
4 of the minds.

5 Q. Did Mr. Narciso seem to understand the contents of the
6 checklist you were reviewing with him as well as the consent
7 order?

8 A. I believe so, yes.

9 Q. Also, when you talked to Mr. Narciso, did he understand
10 that he wouldn't be able to file another application after
11 this one?

12 A. I believe so, yes.

13 Q. And you testified that you corresponded with Mr. Narciso
14 in English and Spanish; is that correct?

15 A. Yes, ma'am.

16 Q. Also, Mr. Rios, you testified that the consent order
17 giving Mr. Narciso a belated appeal wasn't in exchange for
18 waiving his PCR application. Is that still your belief?

19 A. Yes, ma'am.

20 Q. He was simply offered a belated appeal and he chose to
21 waive other PCR application; is that correct?

22 A. Yes, ma'am.

23 Q. And did Mr. Narciso want to raise ineffective assistance
24 of counsel?

25 A. No.

1 MS. WILSON: Thank you.

2 THE COURT: Anything?

3 MS. RUFF: Yes, Your Honor.

4 REDIRECT EXAMINATION BY MS. RUFF:

5 Q. Mr. Rios, did you write up all of that yourself?

6 A. Yes, ma'am.

7 Q. Did you do it at 7:00 in the morning when you were
8 meeting with your client?

9 A. Yes, ma'am.

10 Q. You stated that you didn't really have a meeting of the
11 minds with your client even though you knew about the
12 agreement two weeks before. You didn't have time to type up,
13 get written translation of this agreement within those two
14 weeks so that you could serve your client in his language?

15 A. Well, again, I want to answer the question. I don't
16 recall my testimony today stating that we did not have a
17 meeting of the minds. I recall my testimony today that we
18 had not agreed or hadn't confirmed the consent order with my
19 client because I hadn't met with him yet, so therefore that's
20 what I was seeking when I met with him at the detention
21 center, at which time we came to a meeting of the minds of
22 how we wished to proceed. Answering your question as for
23 having time, I don't recall whether I had time or not. I
24 recall drafting it on the spot with the translator present
25 and going over each provision of the checklist, that's what I

1 recall, such that I could confirm and have handwritten -- a
2 handwritten document that we did have a confirmation of what
3 we were doing today such that my client knew what we were
4 doing that day and hence that's where -- that's the product
5 of that conversation.

6 Q. Did you have the consent order with you when you were in
7 the jail talking to your client at 7:00 in the morning?

8 A. Yes, ma'am.

9 Q. You had the consent order with you?

10 A. Yes, ma'am, I did.

11 Q. And you had had it two weeks before?

12 A. I don't recall having it two weeks before, no. I do
13 recall discussions with the Attorney General's Office that
14 they had discussed, I believe, the case with Mr. Colongeli
15 and that's the way they offered to proceed. I do recall
16 that.

17 Q. Okay. Now, you're a criminal lawyer, an expert in this
18 field, so did you suggest to the client that perhaps he
19 should preserve his PCR rights?

20 A. I don't recall that conversation.

21 Q. Did you suggest to the defendant that he could have had
22 additional ineffective assistance of counsel claims?

23 A. No. I asked him if he had any other grievances. I
24 couldn't find any legal arguments in the transcript to make.
25 Another attorney might be able to find some. I could not. I

1 thought his best arguments were on appeal. I really did.
2 There were errors of law that I thought were there and the
3 errors of jury instruction, I think if I recall right.

4 Q. Since another attorney could have found something, do
5 you think it would have been wise to preserve his PCR rights
6 when you didn't need to give them up under these conditions?

7 A. Again, I don't know if another attorney would find any,
8 there may be but...

9 THE COURT: All right. Anything further?

10 MS. RUFF: That will be it. Thank you.

11 MS. WILSON: One question briefly, Your Honor.

12 RE-CROSS-EXAMINATION BY MS. WILSON:

13 Q. You would agree that it was Mr. Narciso's choice to
14 decide what allegations to pursue at PCR; is that correct?

15 A. Yes, coupled with the fact that I needed to look at the
16 transcript.

17 Q. And he chose --

18 THE COURT: I thought you said one question.

19 MS. WILSON: Thank you, Your Honor.

20 THE COURT: You may step down.

21 THE WITNESS: Thank you, Judge.

22 MS. RUFF: Your Honor, could I have a copy of that
23 document? We've never seen that checklist.

24 MS. WILSON: We can get a copy at the end.

25 THE COURT: You all didn't review the file of the --

1 MS. RUFF: I did not have that. I'm sorry. I should
2 have subpoenaed his documents, but I did not do that.

3 THE COURT: They let you see the file. We'll get you a
4 copy.

5 MS. RUFF: The interpreter -- I would like to see if she
6 has any recollection of that document. She doesn't recall
7 going to the jail.

8 THE COURT: We'll allow you -- you should have gotten
9 their file and reviewed the file.

10 MS. RUFF: Correct.

11 THE COURT: You didn't do it. But we'll allow you to
12 call her back up at some point. Do you have any other
13 witnesses?

14 MS. RUFF: I have my client.

15 THE COURT: Do you want to call the interpreter at this
16 point?

17 MS. RUFF: Yes, please.

18 THE COURT: Limited.

19 MS. RUFF: Yes, please, very limited, just to the
20 document.

21 THE COURT: Ma'am, I'll remind you, you're still under
22 oath. All right. Proceed.

23 REBECCA MCCANN (REBUTTAL),
24 being previously duly sworn, testified as follows:
25 DIRECT EXAMINATION ON REBUTTAL BY MS. RUFF:

1 Q. Ma'am, I'm going to present you with this document. I'd
2 like to know if you've ever seen it before.

3 A. I do not recall.

4 Q. Would you have put anything in your steno pad had you
5 have --

6 A. No.

7 Q. Do you remember interpreting or translating it? Do you
8 remember anything about it?

9 A. No, I do not. I know that routinely for cases I do
10 translate a checklist.

11 Q. Is the checklist that you translate usually typed?

12 A. Normally it is typed.

13 Q. Okay. Do you recall anything out of the ordinary with a
14 lawyer writing down a checklist by hand?

15 A. No, I do not recall.

16 Q. Is that something you would have recalled, someone
17 furiously working in front of you at 7:00 in the morning
18 before a hearing at 9:00 in the morning?

19 THE COURT: She doesn't recall.

20 THE WITNESS: I don't recall.

21 MS. RUFF: Thank you very much.

22 THE COURT: Anything you want to ask?

23 MS. WILSON: Nothing from the State.

24 THE COURT: All right. Call your client.

25 (BRITT HUNT was sworn as the Spanish interpreter.)

1 OSIEL NARCISO GOMEZ,
2 being first duly sworn, testified as follows:

3 DIRECT EXAMINATION BY MS. RUFF:

4 Q. Mr. Narciso, can you please state your name for the
5 Court?

6 A. Osiel Narciso Gomez.

7 Q. Where were you born?

8 A. In Mexico.

9 Q. Where did you grow up?

10 A. Mexico.

11 Q. In?

12 A. In Mexico.

13 Q. I beg your pardon. When did you move to the United
14 States?

15 A. In 1996.

16 Q. How old were you then?

17 A. Around 19.

18 Q. Where did you go to school?

19 A. I didn't have any school.

20 Q. Can you speak English?

21 A. No.

22 Q. Have you ever been taught to speak English?

23 A. No.

24 Q. Are you able to read English?

25 A. No.

1 Q. Have you ever been taught to read English?

2 A. No.

3 Q. Do you remember the PCR hearing in 2008?

4 A. Yes.

5 Q. Do you remember the deal that was made between your
6 attorney and the South Carolina Attorney General's Office?

7 A. Yes.

8 Q. When did you learn of the consent order?

9 A. Which order?

10 Q. The consent order. It's in evidence.

11 May I hand him the consent order so he can see it?

12 A. When I saw my attorney.

13 Q. Is that the morning of your hearing?

14 A. Yes.

15 Q. Is he able to read that -- are you able to read that?

16 A. No.

17 Q. Did anyone read it to you --

18 A. No.

19 Q. -- in English?

20 A. No.

21 Q. Did they read it to you in Spanish?

22 A. No.

23 Q. Did anyone translate it into written Spanish for you?

24 A. No.

25 Q. Did anyone translate it into spoken Spanish, sight

1 translate it for you?

2 A. No.

3 Q. At the PCR hearing did you have any translating
4 equipment like you do today where you can understand what is
5 being said by everyone?

6 A. In which hearing?

7 Q. The PCR hearing.

8 A. No.

9 MS. RUFF: I'd like to show him the checklist as well.

10 May I approach?

11 Q. When did you first see this document?

12 A. I haven't looked at it.

13 Q. Can you read that? It's in English.

14 A. No.

15 Q. Is that your signature?

16 A. Yes.

17 Q. Do you see any initials next to anything?

18 A. Yes.

19 Q. Are those your initials?

20 A. Yes.

21 Q. Did your attorney explain this document to you?

22 A. I don't remember.

23 Q. Were you able to read this document when he showed it to
24 you?

25 A. No.

1 Q. Was anyone present to translate that document for you?

2 A. I believe a lady.

3 Q. Was it put in written Spanish for you?

4 A. No.

5 Q. Did you want your trial lawyer to appeal your conviction
6 for you?

7 A. Which attorney?

8 Q. Mr. Colongeli.

9 A. Yes.

10 Q. Do you understand why you had to give up your PCR rights
11 in order to get a direct appeal?

12 A. No.

13 Q. Did anyone explain that to you?

14 A. No.

15 Q. Do you think that signing the consent order was the only
16 way for you to go back to court?

17 A. Yes.

18 Q. Is that what you were told?

19 A. Yes.

20 MS. RUFF: I think that's all. Thank you.

21 CROSS-EXAMINATION BY MS. WILSON:

22 Q. Mr. Narciso, you filed the application for
23 post-conviction relief; is that correct?

24 A. Yes.

25 Q. And did you complete the form?

1 A. Someone filled out the form, not me.

2 Q. And in your application for post-conviction relief did
3 you allege that your attorney, Mr. Colongeli, did not file an
4 appeal?

5 THE INTERPRETER: I'm sorry. Could the interpreter have
6 a repetition of the question?

7 MS. WILSON: Sure. In his application for
8 post-conviction relief did he allege that his attorney did
9 not file an appeal.

10 THE WITNESS: Yes.

11 Q. And were you represented by Mr. Rios on your
12 post-conviction relief application?

13 A. Yes.

14 Q. And when you met with Mr. Rios, did you have an
15 interpreter?

16 A. Yes.

17 Q. And did you understand your talks with Mr. Rios with the
18 interpreter?

19 A. We didn't speak much.

20 Q. Did you speak with Mr. Rios about the allegations you
21 wanted to raise in your application?

22 A. No, no one asked me about that either.

23 Q. Mr. Narciso, did you correspond with Mr. Rios by mail?

24 A. He sent me letters.

25 MS. WILSON: Beg the Court's indulgence.

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

3 A. No.

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

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

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

8 A. No.

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

11 A. Yes.

12 Q. And you signed the document?

13 A. Yes.

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

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

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

18 A. No.

19 Q. Did you sign the consent order?

20 A. Yes.

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

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

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

1 A. I don't remember.

2 MS. WILSON: Thank you.

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

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

5 THE COURT: Anything from the State?

6 MS. WILSON: Nothing from the State.

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

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

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

24 THE COURT: Is that in the brief?

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

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

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

6 MS. RUFF: Yes, you do.

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

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

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

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

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

1 ground to raise.

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

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

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

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

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

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

1 discussions took place. All right. Anything else?

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

17 THE COURT: All right.

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

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

24 (Recess held.)

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

1 CERTIFICATE OF REPORTER
2 STATE OF SOUTH CAROLINA
3 COUNTY OF BEAUFORT
4

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

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

16 July 19, 2014
17

18 /S/ Ruth L. Mott
19 Official Court Reporter
20
21
22
23
24
25

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2007CP0702195

Osiel Gomez Narciso

South Carolina State Of

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

Attorney for: ☐ Plaintiff ☐ Defendant
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit);
☐ Rule 43(k), SCRPC (Settled); ☐ Other: _____
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j) SCRPC; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order; (formal order to follow) ☐ Statement of Judgment by the Court:

Order

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.
Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

s/ J. R. Barber, III
Circuit Court Judge

6/5/2014

Judge Code

Date

For Clerk of Court Office Use Only

This judgment was entered on **June 27, 2014**, and a copy mailed first class or placed in the appropriate attorney's box on **July 8, 2014**, to attorneys of record or to parties (when appearing pro se) as follows:

Osiel Gomez Narciso #319935 McCormick Corr. Inst. F3A-
192 386 Redemption Way McCormick, SC 29899
Harley Delleney Ruff 17 Professional Village Cir. Beaufort,
SC 29907

Ashleigh Rayanna Wilson PO Box 11549 Columbia, SC
29211

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Melissa Kilby

Court Reporter

Jerri Ann Roseneau - Clerk of Court**ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.**

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

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

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

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

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

FINDINGS OF FACT

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

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

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

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

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

THE COURT: All right.

MR. FRIEDMAN: May we approach on this one?

THE COURT: Yeah. (Bench conference.)

MR. FRIEDMAN: Thank you, Your Honor.

THE COURT: Okay. Appreciate it. Thank you.

--- END OF TRANSCRIPT OF RECORD ---

(See Exhibit 1)

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

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

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

CONCLUSIONS OF LAW

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

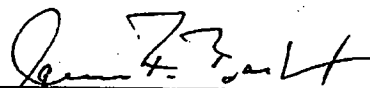
2. A valid waiver of the right to PCR must be knowing, intelligent and voluntary; and in making this determination, a court must examine the particular facts and circumstance surrounding the case, including the background, experience and the conduct of the accused. *Spoone v. State*, 370 S.C. 138, 665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

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

IT IS THEREFORE ORDERED that:

1. The Petitioner's purported waiver of his PCR rights in the Consent Order is hereby declared null, void and of no effect;
2. The Petitioner's request to bring a PCR application is hereby granted; and
3. Counsel may seek reimbursement from the Office of Indigent Defense for their time and expenses pursuant to standard policy.

AND IT IS SO ORDERED.



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

Beaufort, South Carolina

~~Sub E~~
April 5, 2014



ALAN WILSON
ATTORNEY GENERAL

June 18, 2014

The Honorable Daniel E. Shearouse
Clerk of the South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

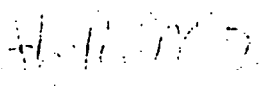
Re: Osiel Narciso, Respondent v. State, Petitioner
Case No. 2007-CP-07-2195

Dear Mr. Shearouse:

Enclosed for filing is a notice of appeal in the above case. Also enclosed are the following:

1. A copy of the order which is to be challenged on appeal.
2. Proof of service of notice of appeal on the Respondent.
3. A letter ordering the hearing transcript from the court reporter.

Sincerely,


Ashleigh R. Wilson
Assistant Attorney General

cc: Carol Ruff, Esquire
Harley Ruff, Esquire
South Carolina Department of Corrections
Beaufort County Clerk of Court
Solicitor I. Duffie Stone
Office of Appellate Defense
Trisha Allen, Victim Services

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

The Honorable James R. Barber, Circuit Court Judge

Case No. 2007-CP-07-2195

Osiel Narciso.....Respondent.

v.

State of South Carolina.....Petitioner.

NOTICE OF APPEAL

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

June 18, 2014

Ashleigh R. Wilson
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211-1549
(803) 734-4037
SC Bar #100269
Attorney for the Petitioner

Other Counsel of Record:
Carol Ruff, Esquire
Harley Ruff, Esquire
Ruff & Ruff, LLC
17 Professional Village Circle
Beaufort, SC 29907
Attorneys for Respondent

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	CASE NO.: 2007CP0702195
JOSEIL GOMEZ NARCISO,	)	
PETITIONER	)	
V.	)	ORDER
THE STATE OF SOUTH CAROLINA,	)	
RESPONDENT	)	

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

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

FINDINGS OF FACT

1. Petitioner was tried and convicted of trafficking cocaine on January 18, 2007, and sentenced to 25 years in prison.
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THE COURT: What's - what we got this morning?

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

THE COURT: All right.

MR. FRIEDMAN: May we approach on this one?

THE COURT: Yeah. (Bench conference.)

MR. FRIEDMAN: Thank you, Your Honor.

THE COURT: Okay. Appreciate it. Thank you.

--- END OF TRANSCRIPT OF RECORD ---

(See Exhibit 1)

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CONCLUSIONS OF LAW

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

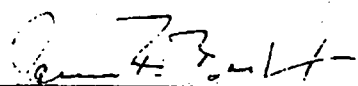
2. A valid waiver of the right to PCR must be knowing, intelligent and voluntary; and in making this determination, a court must examine the particular facts and circumstance surrounding the case, including the background, experience and the conduct of the accused. *Spoone v. State*, 370 S.C. 138, 665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

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

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AND IT IS SO ORDERED.



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

Beaufort, South Carolina

Jude
April 5, 2014

STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

OSIEL NARCISO

Respondent.

vs

STATE OF SOUTH CAROLINA.

Petitioner.

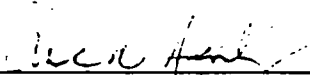
IN THE SOUTH CAROLINA SUPREME
COURT

Case No. 2007-CP-07-2195

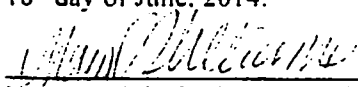
AFFIDAVIT OF SERVICE BY MAIL

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

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

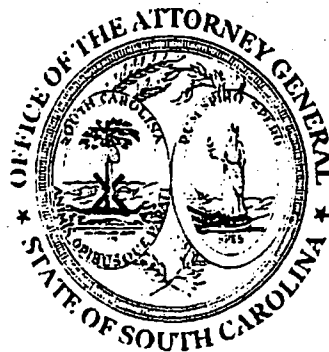

 Anne R. Henley, Legal Assistant
 For Petitioner

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

 (L.S.)

Notary Public for South Carolina.

My Commission Expires: 7/1/15



ALAN WILSON
ATTORNEY GENERAL

June 18, 2014

Ruth Mott
P.O. Box 2012
Goose Creek, SC 29445

Re: Osiel Narciso v. State of South Carolina
2007-CP-07-2195

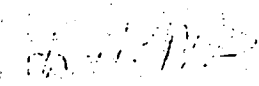
Dear Ms. Mott:

Please prepare the hearing transcript of the above named individual taken on February 20, 2014 before the Honorable James R. Barber, for the term of the Court of Common Pleas in Beaufort County. If you have already typed it once for Appellate Defense, let me know before you send me a copy.

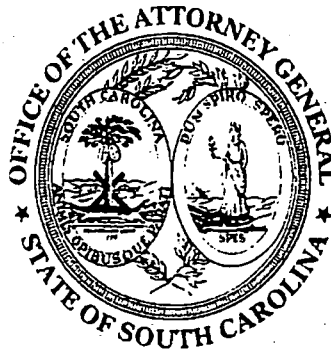
Please note that Rule 243(f)(3) SCACR, now requires as detailed an index for PCR hearings as for trial transcripts filed in the Supreme Court. The index should include all exhibits. If exhibits are not introduced, then please note that no exhibits were submitted at the hearing.

If the cost of this transcript will exceed \$500, please inform me in writing before you complete the transcript. If you will prepare this transcript and forward it to me along with your statement, I will arrange for payment. Please note that all statements are to be signed.

Sincerely,


Ashleigh R. Wilson
Assistant Attorney General

Cc: Desiree R. Allen, Court Administration



ALAN WILSON
ATTORNEY GENERAL

June 18, 2014

The Honorable Jerri Ann Roseneau
Clerk of Court for Beaufort County
Post Office Drawer 1128
Beaufort, South Carolina 29901

Re: Osiel Narciso, Respondent v. State, Petitioner
Case No. 2007-CP-07-2195

Dear Ms. Roseneau:

Enclosed for filing is a notice of appeal in the above case. Also enclosed are the following:

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