



ALAN WILSON  
ATTORNEY GENERAL

November 18, 2011

RECEIVED

NOV 18 2011

C. Supreme Court

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

**Re: Ismael Cruz v. State of South Carolina**  
**2009-CP-23-8380**

Dear Mr. Shearouse:

I am enclosing the original and six (6) copies of the **Return to Petition for Writ of Certiorari** in the above case.

Sincerely,

Karen C. Ratigan  
Assistant Attorney General

KCR/jacc  
Enclosures

cc: Wanda H. Carter, Esquire  
Trisha Allen, Victim Services

# The Supreme Court of South Carolina

Ismael R. Cruz,

Petitioner,

v.

State of South Carolina,

Respondent.

The Honorable Robin Stilwell  
Greenville County  
Trial Court Case No. 2009-CP-23-08380

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## ORDER

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For good cause shown, the request for an extension until October 24, 2011 to serve and file the Petition for Writ of Certiorari and Appendix in this matter is granted. Pursuant to this Court's order dated March 18, 2009, any further extension request must show the existence of extraordinary circumstances, state what measures are being taken to insure that no further extension will be required, and be signed by the appropriate attorneys.

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY *Wanda S. Shealy*  
Clerk

*Chief Deputy*  
Columbia, South Carolina

September 26, 2011

cc: Deputy Chief Appellate Defender Wanda H. Carter  
Assistant Attorney General Karen Ratigan

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

Certiorari to Greenville County  
Robin B. Stilwell, Circuit Court Judge

RECEIVED

SEP 23 2011

S.C. Supreme Court

ISMAEL R. CRUZ,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

PETITION FOR EXTENSION TO FILE  
PETITION FOR WRIT OF CERTIORARI  
AND APPENDIX

(3)

The undersigned counsel would respectfully request a thirty-day extension in which to file the petition for writ of certiorari and appendix in the above-referenced case. In support of this motion, counsel would respectfully show the Court the following exigent circumstances:

1. The petition for writ of certiorari and appendix in this case are due to be served and filed today, having been extended by two prior orders of this Court.

2. Counsel is the attending the annual South Carolina Public Defender's Conference in Myrtle Beach September 26-28, 2011. Counsel filed the brief of petitioner in the case of Johnnie Smith, Jr. v. State on September 22, 2011. Counsel had an oral argument in the case of State v. Jennifer Rayanne Dykes in this Court on September 22, 2011. Counsel filed the petition for writ of certiorari and accompanying appendix in the case of State v. Anthony A. Williams on September 20, 2011. Counsel filed the petition for writ of certiorari and accompanying appendix in the case of State v. Brian Keith Nesbitt on September 19, 2011. Counsel had an oral argument in the case of State v. Vashaun Ravenel in the Court of Appeals on September 14, 2011. Counsel filed the petitions for writ of certiorari and accompanying appendices in the cases of Mickey

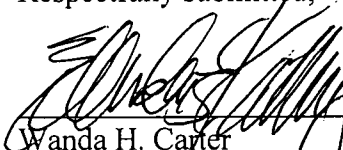
Terrell Dover v. State, Curtis Scott v. State, and Jamel Alexandrette v. State on September 12, 2011. Counsel filed the return to petition for rehearing in the case of Jonathan K. Hill v. State on September 8, 2011. Counsel filed the petition for writ of certiorari and accompanying appendix in the case of Tommy Novack Lloyd v. State on September 7, 2011. In August, 2011, Counsel filed the petitions for writ of certiorari and accompanying appendices in the cases of Artie T. Burns v. State, Eric B. Jones v. State, Douglas Turner v. State and Dennis H. Crowe v. State. In July 2011, Counsel filed the petitions for writ of certiorari and accompanying appendices in the following cases: Steve Bagwell v. State, of Lekan Fawmi v. State, Quinton Bryant v. State, Fela Jamison v. State, Avery Mason v. State, Demetrius Adams v. State, Brian Douglas Laws v. State, Matthew Jackson v. State, John Austin Acrey v. State, David Eugene McCall v. State and Steven Rollinson v. State.

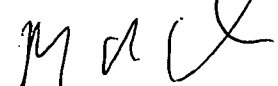
3. This request is made in good faith, and not for purposes of delay.

4. As indicated by her consent below, counsel for the state graciously consents to or does not oppose this request.

WHEREFORE, the undersigned counsel would respectfully request a thirty-day extension in which to file the petition for writ of certiorari and appendix in this case. Counsel requests that the time limits for filing the petition for writ of certiorari be held in abeyance pending a ruling on this motion.

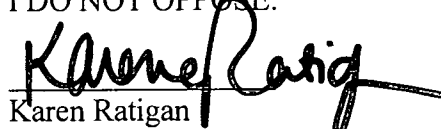
Respectfully submitted,

  
\_\_\_\_\_  
Wanda H. Carter  
Deputy Chief Appellate Defender

  
\_\_\_\_\_  
Robert M. Dudek  
Chief Appellate Defender

September 23, 2011

I DO NOT OPPOSE:

  
\_\_\_\_\_  
Karen Ratigan

# The Supreme Court of South Carolina

Ismael R. Cruz,

Petitioner,

v.

State of South Carolina,

Respondent.

The Honorable Robin Stilwell  
Greenville County  
Trial Court Case No. 2009-CP-23-08380

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## ORDER

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For good cause shown, the request for an extension until September 23, 2011 to serve and file the Petition for Writ of Certiorari and Appendix is granted. Pursuant to this Court's order dated March 18, 2009, any further extension request must be based on a showing of good cause and must be signed by the appropriate attorneys.

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY *Brenda J. Stealy*  
Clerk

Columbia, South Carolina *Chief Deputy*

August 25, 2011

cc: Deputy Chief Appellate Defender Wanda H. Carter  
Assistant Attorney General Karen Ratigan

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

\_\_\_\_\_  
Certiorari to Greenville County  
Robin B. Stilwell, Circuit Court Judge  
\_\_\_\_\_

RECEIVED

AUG 24 2011

S.C. Supreme Court

ISMAEL R. CRUZ,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

\_\_\_\_\_  
**PETITION FOR EXTENSION TO FILE  
PETITION FOR WRIT OF CERTIORARI  
AND APPENDIX**  
\_\_\_\_\_

(2)

The undersigned counsel would respectfully request a thirty day extension in which to file the petition for writ of certiorari and appendix in the above-referenced case. In support of this motion, counsel would respectfully show the Court the following exigent circumstances:

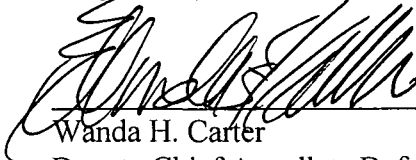
1. The petition for writ of certiorari and appendix in this case are due to be served and filed today, having been extended by one prior order of this Court.
2. Counsel is filing the petitions for writ of certiorari and accompanying appendices in the cases of Douglas Turner v. State and Anthony A. Williams v. State on Friday, August 26, 2011. Counsel filed the petition for writ of certiorari and accompanying appendix in the case of Dennis H. Crowe v. State on August 19, 2011. Counsel filed the petition for writ of certiorari and accompanying appendix in the case of Steve Bagwell v. State on July 29, 2011. Counsel filed the petitions for writ of certiorari and accompanying appendices in the cases of Lekan Fawmi v. State and Quinton Bryant v. State on July 28, 2011. Counsel filed the petition for writ of certiorari and

accompanying appendix in the case of Fela Jamison v. State on July 25, 2011. Counsel filed the petitions for writ of certiorari and accompanying appendices in the cases of Avery Mason v. State and Demetrius Adams v. State on July 22, 2011. Counsel filed the petitions for writ of certiorari and accompanying appendices in the cases of Brian Douglas Laws v. State and Matthew Jackson v. State on July 21, 2011. Counsel filed the petitions for writ of certiorari and accompanying appendices in the cases of John Austin Acrey v. State and David Eugene McCall v. State on July 20, 2011. Counsel filed the petition for writ of certiorari and accompanying appendix in the case of Steven Rollinson v. State on July 13, 2011. In June, 2011, Counsel filed the petitions for writ of certiorari and accompanying appendices in the cases of Tyrone Perry Edwards v. State, Gary Jerome Garrett v. State, Alfred Tyrone Walker v. State, Andrew Fruster v. State, Christopher J. Francis v. State, Derrek Young v. State, and Ronnie Eugene Harris v. State, David Lemans White v. State, Frank Furtick, Jr. v. State, Alfred Malloy v. State and Ricky Brannon v. State. In addition, Counsel filed the initial briefs of appellant and designations of matter in the cases of State v. Eric Smith and State v. Dewain Maxwell in June 2011. Also in June, 2011, Counsel filed the brief of petitioner in the case of Barrett Bernard Harris v. State.

3. This request is made in good faith, and not for purposes of delay.

WHEREFORE, the undersigned counsel would respectfully request a thirty-day extension in which to file the petition for writ of certiorari and appendix in this case. Counsel requests that the time limits for filing the petition for writ of certiorari be held in abeyance pending a ruling on this motion.

Respectfully submitted,



Wanda H. Carter  
Deputy Chief Appellate Defender

August 24, 2011

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

---

Certiorari to Greenville County  
Robin B. Stilwell, Circuit Court Judge

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ISMAEL R. CRUZ,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

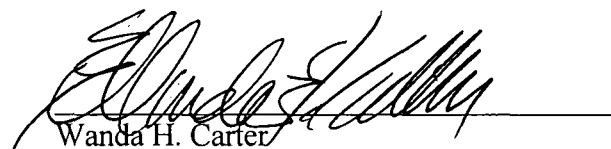
RESPONDENT

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CERTIFICATE OF SERVICE

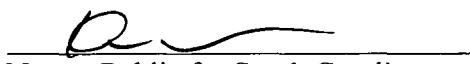
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The undersigned attorney hereby certifies the petition in which to file the petition for writ of certiorari and appendix in the above referenced case has been served upon Karen Ratigan, Esquire, Assistant General, Office of the Attorney General, Rembert Dennis Building, 1000 Assembly Street, Rm. 519, Columbia, SC 29201, this 24<sup>th</sup> day of August, 2011.

  
Wanda H. Carter  
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me  
this 24<sup>th</sup> day of August, 2011.

 (L.S.)  
Notary Public for South Carolina  
My Commission Expires: October 2, 2013.

# The Supreme Court of South Carolina

Ismael R. Cruz,

Petitioner,

v.

State of South Carolina,

Respondent.

The Honorable Robin Stilwell  
Greenville County  
Trial Court Case No. 2009-CP-23-08380

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## ORDER

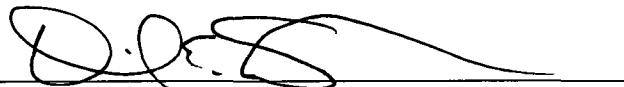
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The request for an extension to serve and file the Petition for a Writ of Certiorari is granted and extended until August 24, 2011. Pursuant to this Court's order dated March 18, 2009, any further extension request must be based on a showing of good cause.

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY



CLERK

Columbia, South Carolina

July 26, 2011

cc: Deputy Chief Appellate Defender Wanda H. Carter  
Assistant Attorney General Karen Ratigan

ORIGINAL



**SCCID**

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Division of Appellate Defense  
1330 Lady Street, Suite 401  
Columbia, South Carolina 29201-3332  
Post Office Box 11589  
Columbia, South Carolina 29211-1589  
Telephone: (803) 734-1330  
Facsimile: (803) 734-1397

Robert M. Dudek, Chief Appellate Defender  
Wanda H. Carter, Deputy Chief Appellate Defender

RECEIVED

JUL 25 2011

S.C. Supreme Court

July 25, 2011

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

Re: Ismael R. Cruz v. State of South Carolina

Dear Mr. Shearouse:

The petition for writ of certiorari and appendix in the above-referenced case are due to be served and filed today. Because of my present workload, I respectfully request a thirty-day extension of this deadline. No prior extensions have been requested in this case.

By copy of this letter, I am informing Karen Ratigan, Esquire, of the Office of the Attorney General, of this extension request.

Thanking you for your cooperation and assistance in this matter.

Sincerely

Wanda H. Carter  
Deputy Chief Appellate Defender

WHC/kam

cc: Karen Ratigan



# SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Division of Appellate Defense  
1330 Lady Street, Suite 401  
Columbia, South Carolina 29201-3332

Post Office Box 11589  
Columbia, South Carolina 29211-1589  
Telephone: (803) 734-1343  
Facsimile: (803) 734-1397

Robert M. Dudek, Chief Appellate Defender  
Wanda H. Carter, Deputy Chief Appellate Defender

RECEIVED

JUN 1 2011

S.C. Supreme Court

June 1, 2011

The Honorable Daniel E. Shearouse  
Clerk, S.C. Supreme Court  
Post Office Box 11330  
Columbia, SC 29211

Dear Mr. Shearouse:

The following case falls under the 60 day rule for appeals, and the date we received the transcript is listed to the side.

Ismael R. Cruz v. State of South Carolina

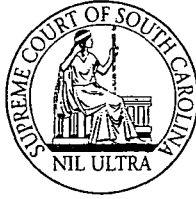
5/26/2011

I would appreciate you beginning our time limits from the above date, and if you need additional information, or have any questions please contact me.

Thank you for your assistance in this matter.

Sincerely,

Sharon A. Graham  
Administrative Coordinator



# The Supreme Court of South Carolina

DANIEL E. SHEAROUSE  
CLERK OF COURT

BRENDA F. SHEALY  
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330  
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

March 30, 2011

Ismael R. Cruz #334125  
Lee Correctional Institution  
990 Wisacky Highway  
Bishopville, SC 29010

Re: Cruz, Ismael R. v. The State

Dear Mr. Cruz:

This responds to your undated letter to Chief Justice Toal received by this office on March 24, 2011. Please be advised the Chief Justice cannot intervene in this matter. Since you are represented by counsel in this matter, no action will be taken on your pro se letter. Jones v. State, 348 S.C. 13, 558 S.E.2d 517 (2002); State v. Stuckey, 333 S.C. 56, 508 S.E.2d 564 (1998); Foster v. State, 298 S.C. 306, 379 S.E.2d 907 (1989).

Any concerns you have about this matter should be raised to the Division of Appellate Defense. The address for that Office is P.O. Box 11589, Columbia, SC 29211, and their phone number is 803-734-1343.

Very truly yours,



CLERK

DES/jj

cc: Appellate Defense  
Assistant Attorney General Karen Ratigan

Honorable chief Justice Jean H.  
Toal

South Carolina Supreme Court  
Post office Box 11330  
Columbia, South Carolina 29211

Re: Case # 2009-CP-23-8380

RECEIVED

MAR 24 2011

Dear Justice Toal:

S.C. SUPREME COURT

My name is Imael Cruz, and I'm currently serving time, will you please take notice of the following concerns at matter. I was charge for ~~sexual conduct~~ <sup>SEXUAL CONDUCT WITH MINOR-VICTIM</sup> and received a very substantial amount of time on a guilty plea. Please keep in mind that I had a paid lawyer by the name Richard Warder who also was paid 13,000 in cash for this miscarriage of justice. Mr. Warder never came and seen me when I was in the

(1)

country waiting on trial, he lied to me about my plea agreement that was suppose to be for 10 to 15 years instead of ~~50~~ years. I received on a plea. Please correct me if I'm wrong no person in their right mind will take a plea for that amount of time when I could of went to trial. They gave me the max on a plea agreement. But also take notice that I am a mexican and no nothing that was going on my lawyer Mr. Warden trick me into ~~my~~ signing a plea agreement by telling me that the papers was for power of attorney for my sister to be incharge of my belonging. I also have witness to these aligations. Mr. Warden also took me in front of Judge John C. Few, please take notice that he also was the judge in my family court matters and my criminal

trial. (Basically a conflict of interest.) according to title 17-27-1602. Mr. Warden really did nothing for me from day one.

Miss Caroline Horlbeck was my Post-conviction Attorney and she was very unprofessional. Miss Horlbeck took me to Post-conviction without ever talking to me or neither seeing her, the first time I saw this lady is when I went to court. I told her I was not ready because we never talk about my case, but she said she was ready to go to court.

I wrote this lady months before we went to ~~the~~ court and told her I wanted my witness present. But she did nothing for me. Miss Caroline Horlbeck didn't even appeal my order of dismissal. The court gave me 30 days to appeal but she barred my time by

holding my order of dismissal January 14, 2011, I received on March 4, 2011, So please tell me how was I to file for a timely appeal. Please all I ask for is my Due Process of law.

The United States Constitution guarantees a criminal defendant in the VI Amendment the Right to Effective Assistance of Competent Counsel. The constitutional right of the accused to competent counsel requires only that counsel, in good faith and to the best of their ability, render service that is directed towards the furtherance of a fair trial or plea agreement. In pursuing the claim of Ineffective Assistance of Counsel, a criminal defendant must overcome the presumption that challenged actions of counsel might be

considered as being Sound Trial Strategy, but counsel in the position to not be insulted, from finding that their performance was ineffective merely by classifying those challenged actions as inactions and not being sound trial strategies.

The Quality of service rendered by counsel must meet all the requirements of Due Process, when counsel ~~is~~ is a member in good standing of the State Bar Association; gives their client their complete loyalty;... serves their client in good faith and to the best of their ability;... and their service is of such character as to preserve the essential integrity of the judicial system.

The right to effective assistance of counsel contemplates a guiding hand of an "able" and "responsible" lawyer;... whom has

ample opportunity to acquaint themselves with laws and facts of the case and is afforded the proper opportunity to present the case to the Honorable Court or a Jury of One's Peers in their most favorable light. Counsel has a duty to make a reasonable investigation(s) or to make a reasonable decision that makes that particular investigation(s) unnecessary. A convicted defendant making a claim of Ineffective Assistance of Counsel, must identify acts or omissions of counsel that are alleged to not have been a result of reasonable professional judgment and that the Trial Court must determine, the Trial Court should keep in mind that counsel's functions is to make adversarial testing process work in that particular case. To succeed on

a claim of Ineffective Assistance of Counsel, a criminal defendant must show that there is a reasonable probability, which is a probability to sufficiently undermine the confidence in the outcome, that for counsel's unprofessional Error (5), the results of the proceedings would have been different. To demonstrate Error in the Assistance of Counsel's; a criminal defendant must show that counsel's performance and representation fell below an objective standard of reasonableness. In order to prove Ineffective Assistance of Counsel, a criminal defendant must show first, counsel's performance was Deficient; and second, that Deficiency Prejudiced its Defense. To make out a claim of Ineffective Assistance of trial counsel, a criminal

(7)

defendant must show and demonstrate Error and Prejudice (laboring under a Conflict of Interest). Any Deficiencies in counsel's performance must be Prejudicial to Defense in order to constitute Ineffectiveness of Counsel. Prejudice is presumed only if the defendant demonstrates that counsel actively represented conflicting interests and that an actual conflict of interest adversely affected their counsel's performance. Actual / Constructive denial of Assistance of Counsel altogether is legally presumed to result in <sup>the</sup> Prejudice. Actual Ineffective Assistance of Counsel claims alleging and Deficiency in counsel's performance are subject to the general requirement that the defendant must affirmatively prove Prejudice. A charge of inadequate

legal representation can prevail only if it can be said that what was done or not done by counsel made the proceedings a "farce and a mockery of justice", shocking to the conscience of the court, and the speculation (fact or hope) that different or more palatable results might have been obtained by different counsel.

For a petitioner to be granted relief in Post-Conviction as a result of Ineffective Assistance of Counsel, the applicant must show both that their counsel failed to render reasonable effective assistance under prevailing professional norms, and that they were prejudiced by their counsel's ineffective assistance. Strickland v.

Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed. 2d 674

(1984); Butler v. State, 286 S.C.  
441, 334 S.E. 2d 813 (1985), cert. denied,  
474 U.S. 1094, 106 S. Ct. 869, 88 L.Ed  
2d 908 (1986).

So as you can see my  
rights have been violated,  
so please Justice Tolson come  
before this court to ask  
for my appeal or my  
p.c.R. be granted, because  
they time barred me. I have  
all document, so please let  
the court have mercy on  
me please. All I ask for  
is a ~~fake~~ chance to appeal  
my p.c.R.

Thank You  
With the Kindest  
Regards



# SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Division of Appellate Defense  
1330 Lady Street, Suite 401  
Columbia, South Carolina 29201-3332  
Post Office Box 11589  
Columbia, South Carolina 29211-1589  
Telephone: (803) 734-1330  
Facsimile: (803) 734-1397

Robert M. Dudek, Chief Appellate Defender  
Wanda H. Carter, Deputy Chief Appellate Defender

March 17, 2011

Ms. April P. Herron  
Circuit Court Reporter  
P O Box 17675  
Greenville, SC 29606

Dear Ms. Herron:

Please provide us with the following transcript:

Ismael R. Cruz v. State of South Carolina      Case #:      09-CP-23-08380

County: Greenville      Date of Trial: November 16, 2010

Presiding Judge: Robin B. Stilwell

To ensure prompt payment, please sign and complete the enclosed CID FORM 3500 and include the original criminal case number (Indictment number) where the space is provided.

Please number the lines on the paper from 1-25, and include any and all recorded motions, pre and post-trial. Additionally, please transcribe the jury selection, and the State and defense counsel's opening and closing arguments.

If you are aware of any co-defendants or if the Attorney General's Office has already requested a transcript, please let us know.

Sincerely,

  
Lorie French  
Legal Services Coordinator

cc: S.C. Supreme Court  
Attorney General's Office

RECEIVED

MAR 17 2011

S.C. Supreme Court

# Law Office of Lawrence W. Crane

101 WHITSETT STREET  
GREENVILLE, SOUTH CAROLINA 29601

LAWRENCE W. CRANE, ESQ.  
ELIZABETH P. WIYGUL, ESQ.  
CAROLINE M. HORLBECK, ESQ.

TELEPHONE (864) 235-2900  
FAX (864) 467-1916  
TOLL FREE (800) 852-0899

February 28, 2011

**Via Regular Mail**

Mr. Daniel E. Shearouse  
Clerk, The S.C. Supreme Court  
Post Office Box 11330  
Columbia, South Carolina 29211

**Re:** ISMAEL CRUZ v. State

Dear Mr. Shearouse:

Enclosed you will find the original Notice of Appeal in the above matter along with Proof of Service upon the Respondents. The Notice has been filed with the Greenville County Clerk of Court.

These matters are being referred to the Office of Appellate Defense in that we were participating as Court appointed counsel at trial.

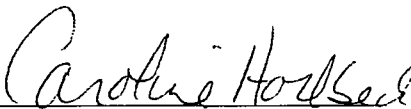
Thank you for your attention to this matter.

Yours very truly,

**RECEIVED**

MAR 07 2011

**S.C. SUPREME COURT**

  
Caroline M. Horlbeck, Esq.

Enclosure

cc: Office of the Attorney General  
Office of Appellate Defense

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

APPEAL FROM GREENVILLE COUNTY  
Court of Common Pleas  
THE HONORABLE ROBIN B. STILWELL

CA No. 2009-CP-23-8380

ISMAEL CRUZ,

APPELLANT,

vs.

STATE OF SOUTH CAROLINA

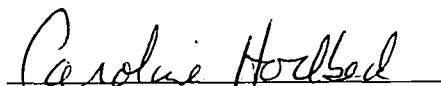
RESPONDENT.

FILED-CLERK OF COURT  
GREENVILLE CO. S.C.  
PAUL B. WICKENS/HR  
2011 FEB 28 P 1:09

NOTICE OF APPEAL

Appellant ISMAEL CRUZ, appeals from the Order of the Honorable Robin B. Stilwell, Circuit Court Judge clocked January 28, 2011.

Respectfully submitted,

  
Caroline M. Horlbeck, Esq.  
101 Whitsett St  
Greenville, SC 29601

RECEIVED

MAR 07 2011

S.C. SUPREME COURT

Date: February 28, 2011

Other Counsel of Record: Karen Ratigan, Esq.  
Assistant Attorney General  
Post Office Box 11549  
Columbia, SC 29211

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF GREENVILLE )

IN THE SUPREME COURT

Ismael Cruz, )  
 )  
 )  
Appellant, )

C.A. No. 2009-CP-23-8380

-vs- )

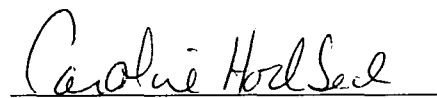
CERTIFICATE OF SERVICE

State of South Carolina, )  
 )  
 )  
Respondent. )

This is to certify that I am an employee in the law office of Lawrence W. Crane, attorneys for Applicant, and that I have this day caused to be served upon the person(s) named below Applicant's Notice of Appeal by placing copies of same in the United States mail, with adequate postage thereon, addressed as follows:

Ms. Lorie French  
S.C. Office of Appellate Defense  
1205 Pendleton St., Suite 306  
Columbia, SC 29201

Karen Ratigan, Esq.  
Office of the Attorney General  
P.O. Box 11549  
Columbia, SC 29211

  
\_\_\_\_\_  
Caroline M. Horlbeck

Greenville, South Carolina

Feb. 28, 2011

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

JUDGMENT IN A CIVIL CASE  
CASE NO: 2009CP2308380

Ismael Cruz vs. South Carolina State Of

FILED  
PAUL D. WALKER  
CLERK  
GREENVILLE CO. SC  
2011 JAN 28 PM 4:00

**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.
- ACTION DISMISSED (CHECK REASON):**  
SCRPC (Vol. Nonsuit);  Rule 43(k), SCRPC (Settled);  Rule 12(b), SCRPC;  Rule 41(a),  
 Other: \_\_\_\_\_
- ACTION STRICKEN (CHECK REASON):**  
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;  
 Rule 40(j) SCRPC;  Bankruptcy;  
 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;  Statement of Judgment by the Court:

Dated at Greenville, South Carolina, this .

Court Reporter:

\_\_\_\_\_  
PRESIDING JUDGE -

This judgment was entered on the 28th day of Jan, 2011, and a copy mailed first class this 28th day of Jan. 2011, to attorneys of record or to parties (when appearing pro se) as follows:

✓ Caroline M.W. Horlbeck Law Offices Of Lawrence  
W. Crane 101 Whitsett Street Greenville, SC 29601

Karen Ratigan

\_\_\_\_\_  
ATTORNEY(S) FOR THE PLAINTIFF(S)

\_\_\_\_\_  
ATTORNEY(S) FOR THE DEFENDANT(S)

STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF GREENVILLE )  
 )  
 Ismael R. Cruz, )  
 S.C.D.C. No. 334125, )  
 )  
 Applicant, )  
 )  
 v. )  
 )  
 State of South Carolina, )  
 )  
 Respondent. )  
 )

IN THE COURT OF COMMON PLEAS  
 C.A. No. 2009-CP-23-8380

**ORDER OF DISMISSAL**

FILED IN THE COURT OF COMMON PLEAS  
 COUNTY OF GREENVILLE, SOUTH CAROLINA  
 JAN 28 PM 3:40

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed October 1, 2009. The Respondent made its return on December 29, 2009. An evidentiary hearing into the matter was convened on November 16, 2010 at the Greenville County Courthouse. The Applicant was present at the hearing and represented by Caroline Horlbeck, Esquire.<sup>1</sup> Karen C. Ratigan, Esquire of the South Carolina Office of the Attorney General represented the Respondent.

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

**PROCEDURAL HISTORY**

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Greenville County Clerk of Court. The Applicant

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<sup>1</sup> A Spanish language interpreter was also present.

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waived presentment to the Greenville County Grand Jury on charges of second-degree criminal sexual conduct (CSC) with a minor (2008-GS-23-9798), two (2) counts of first-degree CSC with a minor (2008-GS-23-9799, -9803), and incest (2008-GS-23-9800). Richard H. Warder, Esquire represented the Applicant.

On April 4, 2009, the Applicant pled guilty. The Honorable John C. Few sentenced the Applicant to concurrent terms of twenty (20) years for second-degree CSC with a minor and twenty-five (25) years for one count of first-degree CSC with a minor.<sup>2</sup> Judge Few then levied a five (5) year sentence for incest and a twenty-five (25) year sentence for the second count of first-degree CSC with a minor<sup>3</sup> and ordered these sentences would be consecutive. The Applicant did not file an appeal.

### ALLEGATIONS

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

1. Ineffective assistance of counsel.
2. Abuse of discretion in sentencing.

### FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony and arguments presented at the PCR hearing. This Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their credibility. This Court has weighed the testimony accordingly.

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

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<sup>2</sup> 2008-GS-23-9799.

<sup>3</sup> 2008-GS-23-9803.

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### Ineffective Assistance of Counsel

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

For an applicant to be granted PCR as a result of ineffective assistance of counsel, he must show both: (1) that his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by his counsel’s ineffective performance. See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006). When there has been a guilty plea, the applicant must prove that counsel’s representation was below the standard of reasonableness and that, but for counsel’s unprofessional errors, there is a reasonable probability that he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 58-59, 106 S. Ct. 366, 370 (1985); Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001).

The Applicant stated plea counsel never discussed a plea offer with him. The Applicant stated he pled guilty because plea counsel promised he would not receive a long sentence. The Applicant stated plea counsel did not promise he would receive a particular sentence. The Applicant stated he would have taken the case to trial if he had known the State would ask for a lengthy sentence. The Applicant testified plea counsel did not advise him of the right to appeal. The Applicant testified he wanted to appeal because (1) he received a lengthy sentence and (2) he was innocent of two of the charges that he pled guilty to that day.

Plea counsel testified he filed discovery motions and reviewed those materials with the Applicant. Plea counsel testified he and the Applicant also discussed that a paternity test revealed he had fathered a child with his thirteen-year-old daughter. Plea counsel testified the

best offer the State would make in this case was for forty (40) years, which the Applicant rejected. Plea counsel testified it was determined the Applicant would plead guilty without a recommendation, but that the solicitor requested "significant time" at the plea. Plea counsel stated he told the Applicant he would be pleading guilty without a sentence recommendation and that some charges would be dismissed. Plea counsel stated the Applicant understood he could receive anything between the minimum and maximum sentence on each charge. Plea counsel stated he advised the Applicant of his appellate rights but that the Applicant did not ask for an appeal. Plea counsel stated there were no legal errors in the guilty plea hearing, but that he would have filed an appeal if he had been asked to do so.

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

The Applicant admitted to the plea judge both that he was guilty and that the facts recited by the solicitor were true. (Plea transcript, p.13; p.15; p.17; p.19; p.24; p.26). The Applicant also told the plea judge that he understood the trial rights he was waiving in pleading guilty, was satisfied with counsel, and had not been coerced in any way. (Plea transcript, pp.12-15).

This Court finds the Applicant failed to meet his burden of proving plea counsel did not relay the initial forty (40) year plea offer to the Applicant. This Court specifically finds plea counsel is more credible than the Applicant on this issue. This Court notes plea counsel had a specific recollection of relaying the offer to the Applicant and the Applicant opting to refuse it. This Court finds plea counsel fulfilled his responsibilities in this regard. Cf. Davie v. State, 381

S.C. 601, 675 S.E.2d 416 (2009) (holding counsel's failure to convey the State's plea offer to defendant constituted deficient performance).

This Court finds the Applicant failed to meet his burden of proving plea counsel should have objected to a violation of the plea agreement. Plea counsel testified the plea recommendation from the State was that the Applicant would plead guilty without a recommendation and the State would nol pros additional charges. This was the recommendation recited at the plea hearing. (Plea transcript, p.14; p.25). Plea counsel testified he explained to the Applicant that he could receive anything between the minimum and maximum sentence on each charge. While the Applicant stated he believed the sentence he received was too harsh, he had been properly advised of the maximum sentences he could receive on the charges. See Roddy v. State, 339 S.C. 29, 36, 528 S.E.2d 418, 422 (2000) ("Wishful thinking regarding sentencing does not equal a misapprehension concerning the possible range of sentences, especially where one acknowledges on the record that one knows the range of sentences and that no promises have been made."). This Court notes that, while the Applicant pled guilty without a sentence recommendation, the assistant solicitor stated at the plea hearing that the police officer in this case wanted the Applicant to receive "significant time." (Plea transcript; p.27). The assistant solicitor later said "[t]he defense did not want the State's recommendation in this case and asked to go without it. But the State naturally would be requesting very significant time on this case." (Plea transcript, pp.34-35). This Court finds plea counsel was not obligated to have made an objection. This Court finds the plea recommendation from the State was not violated because the assistant solicitor did not request a specific sentence or make a specific recommendation. Rather, the assistant solicitor merely echoed the request of the investigating officer. The plea recommendation was not violated because the assistant solicitor did not make a

sentence recommendation, the Applicant had been advised of the possible sentences he could receive, and plea counsel asked the plea judge to be lenient in sentencing.<sup>4</sup>

This Court finds the Applicant failed to meet his burden of proving plea counsel did not advise him about the right to appeal. Plea counsel testified he had advised the Applicant about his appellate rights, but that the Applicant never told him to file an appeal. Regardless, plea counsel has a constitutionally imposed duty to consult with the defendant about an appeal only when there is reason to think either: (1) that a rational defendant would want to appeal or (2) that this defendant reasonably demonstrated to counsel that he was interested in appealing. Roe v. Flores-Ortega, 528 U.S. 470, 480, 120 S. Ct. 1029, 1036 (2000). This Court finds neither instance was present in this case. This Court further notes the Applicant cannot point to any legal errors in the guilty plea proceeding and wanted to raise issues on appeal that were not cognizable appellate issues.

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

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

#### **All Other Allegations**

As to any and all allegations that were raised in the application or at the hearing in this

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<sup>4</sup> Plea transcript, p.34.

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

**CONCLUSION**

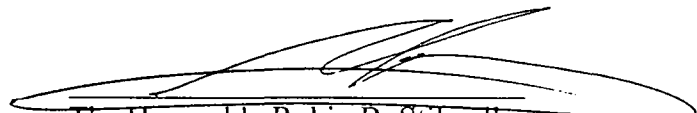
Based on all the foregoing, this Court finds and concludes the Applicant has not established any constitutional violations or deprivations before or during his guilty plea and sentencing proceedings. Counsel was not deficient in any manner, nor was the Applicant prejudiced by counsel's representation. Therefore, this application for PCR must be denied and dismissed with prejudice.

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

**IT IS THEREFORE ORDERED:**

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

**AND IT IS SO ORDERED** this 14 day of JAN, 2011.



The Honorable Robin B. Stilwell  
Presiding Judge, Thirteenth Judicial Circuit

Greenville, South Carolina.

Lawrence W. Crane

*Attorney At Law*

101 WHITSETT STREET  
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*Ismael  
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**Via Regular Mail**

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