

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Aiken County

James R. Barber, III, Circuit Court Judge

REC-1111

MAY -7 2012

S.C. Supreme Court

ORIGINAL

ALBERT ROMERO LOPEZ,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPENDIX

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1 STATE OF SOUTH CAROLINA

2 COUNTY OF AIKEN

CIRCUIT COURT
2006-GS-02-1166 thru 1170

3
4
5 STATE OF SOUTH CAROLINA,

6 -vs-

TRANSCRIPT OF RECORD

7 ALBERTO R. LOPEZ,
8 Defendant.

9
10 Heard on Thursday, March 12, 2009

11 Aiken, South Carolina

12
13 BEFORE:

14 THE HONORABLE THOMAS A. RUSSO

15
16 APPEARANCES:

17 Counsel on Behalf of the State:
18 J. Strom Thurmond, Jr., Esq.

19 Counsel on Behalf of the Defendant:
20 Everett K. Chandler, Esq.

21 Interpreter:
22 Luis Navarro

23 Cheri L. Young, RPR
24 Circuit Court Reporter
25 P O Box 1154
Aiken, SC 29802-1154

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E X H I B I T I N D E X

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(NO EXHIBITS IDENTIFIED/INTRODUCED.)

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1 ON THURSDAY, MARCH 12, 2009 AT 10:02 A.M.

2 THE COURT: Yes, sir?

3 MR. THURMOND: Mr. Chandler is bringing his
4 client in.

5 THE COURT: Okay.

6 MR. THURMOND: Alberto Lopez.

7 Your Honor, these are indictment numbers: 2006-
8 GS-02-1166, an indictment for kidnapping; 1167, resisting
9 arrest with a deadly weapon; 1168, possession of a firearm
10 or knife during during the commission of or attempt to
11 commit a violent crime; 1169, indictment for assault and
12 battery with intent to kill; and 1170, another indictment
13 for kidnapping.

14 These are all straight-up pleas with no
15 recommendation from the State.

16 THE COURT: All right, sir.

17 MR. THURMOND: Judge, prior to bringing the plea,
18 we should probably take up the matter that we discussed
19 with you in chambers.

20 (Interpreter placed under oath.)

21 THE COURT: Mr. Chandler, you represent
22 Mr. Alberto Lopez?

23 MR. CHANDLER: I do, Your Honor.

24 THE COURT: Before we get into the plea itself,
25 and, Mr. Chandler, you and I have talked in chambers

1 regarding this issue. And that would be that of
2 Mr. Navarro serving as an interpreter for the purposes of
3 this plea. You've discussed that with Mr. Lopez. Is that
4 correct, sir?

5 MR. CHANDLER: I have, Your Honor.

6 THE COURT: And, Mr. Lopez, Mr. Navarro, who is
7 obviously very fluent in Spanish and who is a certified
8 court interpreter, is also employed by the Second Circuit
9 Solicitor's Office.

10 What I want to make sure is that you don't have
11 any problem with him serving as the interpreter. Do you
12 understand that Mr. Navarro is an employee of the
13 solicitor's office?

14 THE DEFENDANT: Si.

15 MR. NAVARRO: Yes.

16 THE COURT: Do you have any reservations or
17 concerns with having Mr. Navarro function as the
18 interpreter in this case?

19 THE DEFENDANT: No.

20 MR. NAVARRO: No.

21 MR. THURMOND: Judge, I'm sorry to interrupt. My
22 deputy's telling me that Mr. Lopez is not sworn.

23 THE CLERK: I swore the interpreter.

24 THE COURT: Okay. Well, go ahead and do that.
25 I'm sorry.

1 (Defendant placed under oath.)

2 MR. NAVARRO: I swear. Yes.

3 THE COURT: Thank you, Solicitor.

4 Mr. Lopez, I just want to make sure that you
5 understand if you wished or desired to have an interpreter
6 other than Mr. Navarro, if you wished to have somebody
7 who's not affiliated or associated with the solicitor's
8 office, I would make sure that you had that. Do you
9 understand that?

10 THE DEFENDANT: Si --

11 MR. NAVARRO: Yes. I feel okay.

12 THE COURT: So you would like to proceed with
13 Mr. Navarro as being the interpreter?

14 THE DEFENDANT: Si.

15 MR. NAVARRO: Yes.

16 THE COURT: Mr. Lopez, I'm going to go over with
17 you the charges that are before the Court and ask that you
18 please listen carefully.

19 Indictment 2006-GS-02-1166 is an indictment for
20 the offense of kidnapping. That charge carries a possible
21 penalty or a maximum penalty of up to 30 years in prison
22 and is classified as a violent and a most-serious
23 offense.

24 Do you understand that?

25 THE DEFENDANT: Si.

1 MR. NAVARRO: Yes.

2 THE COURT: Indictment 2006-GS-02-1167 is an
3 indictment, true billed indictment for resisting arrest
4 with a deadly weapon. That charge carries a possible
5 sentence or a maximum sentence of not less than two years
6 nor more than 10 years, and that it cannot be suspended to
7 less than six months in any case.

8 Do you understand that?

9 THE DEFENDANT: Si.

10 MR. NAVARRO: Yes.

11 THE COURT: Okay. Indictment 2006-GS-02-1168 is
12 an indictment for possession of a firearm or a knife
13 during the commission of a violent crime.

14 That charge carries a maximum penalty of up to
15 five years. Do you understand that?

16 THE DEFENDANT: Si.

17 MR. NAVARRO: Yes.

18 THE COURT: Indictment 2006-GS-02-1169 is an
19 indictment for assault and battery with intent to kill.

20 That charge carries a maximum penalty of up to 20
21 years and is also classified as a violent and most-serious
22 offense. Do you understand that?

23 THE DEFENDANT: Si.

24 MR. NAVARRO: Yes.

25 THE COURT: And indictment 2006-GS-02-1170 is

1 another indictment for kidnapping which, as I said
2 earlier, carries a maximum penalty of up to 30 years and
3 is classified as a violent and most-serious offense. Do
4 you understand that?

5 THE DEFENDANT: Si.

6 MR. NAVARRO: Yes.

7 THE COURT: All right. Mr. Lopez, understanding
8 the nature of the charges against you, and the possible
9 punishments that are associated with those offenses, how
10 do you plead to each of those indictments that I've just
11 reviewed with you, guilty or not guilty?

12 MR. NAVARRO: Guilty.

13 THE COURT: Thank you. I've forgot all about
14 that.

15 MR. THURMOND: Yes, sir.

16 THE COURT: Now, Mr. Lopez --

17 MR. NAVARRO: Your Honor, one second.

18 (Conferring with defense counsel).

19 MR. NAVARRO: Okay.

20 THE COURT: Mr. Lopez, I'm going to cover another
21 issue with you regarding your -- however, this regards
22 your representation.

23 I understand that you are currently represented
24 by Mr. Everett Chandler. Is that correct?

25 THE DEFENDANT: Yeah, Si.

1 MR. NAVARRO: Yes.

2 THE COURT: All right. However, it has been
3 brought to my attention that at some point in the past
4 there was some conversation between a member of your
5 family and Solicitor Thurmond when Solicitor Thurmond was
6 in private practice. Is that correct?

7 THE DEFENDANT: Si.

8 MR. NAVARRO: Yes.

9 THE COURT: Solicitor, if I may, I'm going to let
10 you put on the record what that, the extent of that
11 communication and then I'll ask Mr. Lopez some additional
12 questions regarding that.

13 MR. THURMOND: Thank you, Your Honor.

14 Judge, sometime in mid to late 2006, I was
15 contacted in my capacity as a private attorney at the time
16 by, I believe, Mr. Lopez's mother. She scheduled an
17 appointment to meet with me for an initial consultation
18 for her to consider the representation of my firm of
19 Mr. Lopez for these charges.

20 As was my practice, I got on the jail's website
21 and I learned the warrant numbers and the charges that
22 were pending against Mr. Lopez. I also contacted an
23 investigator with the Aiken County Sheriff's Office to ask
24 them a little bit about the case as was my practice with,
25 before meeting with a potential client or a family member

1 of a potential client.

2 I met with his mother, with the Defendant's
3 mother, for approximately 10 minutes. I advised her of
4 the penalties and the nature of the charges against her
5 son. I did not receive any information from her about the
6 case or any information that would rise to the nature of
7 an attorney-client privileged communication.

8 We had a substantial language barrier. I was
9 having difficulty understanding what she was saying and I
10 think vice versa. My recollection at that -- I then
11 referred them to another attorney in Aiken who speaks and
12 understands Spanish.

13 I never met with Mr. Lopez at the jail. I never
14 spoke with him, at -- over the telephone from the
15 detention center. I never gave or received any
16 communications from him that would be of an attorney-
17 client privileged nature.

18 THE COURT: All right. And am I correct, his
19 family never retained you? Never paid you anything to --

20 MR. THURMOND: That's correct, Your Honor.

21 THE COURT: They were simply inquiring as to
22 whether or not you would possibly look into these
23 matters?

24 MR. THURMOND: Yes, sir. Very preliminarily.

25 THE COURT: All right. Mr. Lopez, have you

1 understood everything that Solicitor Thurmond just said?

2 THE DEFENDANT: Si.

3 MR. NAVARRO: Yes.

4 THE COURT: Have you ever had conversations with
5 Solicitor Thurmond prior to him taking over as the
6 solicitor in this case?

7 THE DEFENDANT: No.

8 MR. NAVARRO: No, no.

9 THE COURT: Are you aware of -- or, is it your
10 understanding that your family never hired Solicitor
11 Thurmond on this matter?

12 THE DEFENDANT: Si.

13 MR. NAVARRO: Yes.

14 THE COURT: Are you aware of or do you believe
15 there is any conflict or any difficulty with Solicitor
16 Thurmond prosecuting this case on behalf of the State?

17 THE DEFENDANT: No.

18 MR. NAVARRO: No.

19 THE COURT: Mr. Chandler, do you have any
20 questions or any comments to make regarding this matter?

21 MR. CHANDLER: I did have an opportunity to speak
22 with Mr. Lopez, specifically regarding the conversations
23 that his mother had with, at that time, Attorney Thurmond
24 who is now the solicitor.

25 It was at that time my client expressed to me

1 that he had no problem. We're moving forward recognizing
2 that he never had any conversations. And, according to my
3 client, they never paid him any money. She just talked to
4 him.

5 So I do understand why we're placing it on the
6 record but based on my conversations with my client it is
7 not an issue regarding us resolving this matter today.

8 THE COURT: All right. And after discussing the
9 matter and hearing the extent of the communications and
10 the relationship, it appears clear to the Court that there
11 was never any attorney-client relationship between
12 Mr. Thurmond and Mr. Lopez or Mr. Lopez's family.

13 It does appear that there was a brief meeting
14 where Mr. Lopez's mother was seeking an attorney for her
15 son, and in doing so inquired as to the possibility of
16 Mr. Thurmond representing her son.

17 In regards to that communication, Mr. Thurmond
18 received information no greater than what would simply
19 appear in a police report and that was warrant numbers and
20 charges that he's actually charged with.

21 There does not appear to be any conflict. There
22 never appeared to be any attorney-client relationship
23 between Mr. Lopez and Mr. Thurmond. And I don't find any
24 conflict with Mr. Thurmond's involvement as the prosecutor
25 in this case. And so we will proceed.

1 Now, and I've already covered -- he's already
2 indicated he's pleading guilty, is that correct? Just to
3 refresh me.

4 Just for the record, I'll make sure. Mr. Lopez,
5 understanding, and I'm going to ask you again, I think
6 I've asked you this but I want to make sure.

7 Understanding the nature of the charges against
8 you, and the possible penalties associated with those
9 charges, how do you plead to these indictments that I've
10 reviewed with you, guilty or not guilty?

11 MR. NAVARRO: Guilty.

12 THE COURT: All right. Thank you, sir.
13 Mr. Chandler, you represent Mr. Lopez?

14 MR. CHANDLER: I do, Your Honor.

15 THE COURT: Have you discussed with him the
16 charges that he is pleading to, his constitutional rights
17 to a trial, sir?

18 MR. CHANDLER: Yes, I have.

19 THE COURT: All right, sir. Also, did you review
20 with him the strike rule in South Carolina and that two of
21 these offenses are considered most serious under that
22 rule?

23 MR. CHANDLER: I did, Your Honor. And I
24 explained to him that if he now receives any
25 combination -- well, any other serious or most-serious

1 offense he could serve life in prison.

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

3 MR. CHANDLER: Yes.

4 THE COURT: Mr. Lopez, am I correct, sir, that
5 you're 25 years of age?

6 THE DEFENDANT: Si.

7 MR. NAVARRO: Yes.

8 THE COURT: All right. And, sir, do you work
9 anywhere? Or before you got locked up, were you working
10 anywhere?

11 THE DEFENDANT: Si.

12 MR. NAVARRO: Yes.

13 THE COURT: What type of work have you done,
14 sir?

15 MR. NAVARRO: What was I working at before?

16 THE COURT: Yes.

17 MR. NAVARRO: A factory.

18 THE COURT: All right. Are you married or
19 single?

20 MR. NAVARRO: Married.

21 THE COURT: Do you have any children, sir?

22 THE DEFENDANT: Dos.

23 MR. NAVARRO: Two.

24 THE COURT: And how long have you been in jail on
25 these charges?

1 MR. CHANDLER: 1045 days, Your Honor.

2 THE COURT: All right. Mr. Lopez, I am going to
3 go over with you your constitutional rights. If at any
4 time you have any question about anything that I say, or
5 if you need additional time to talk with Mr. Chandler, if
6 you let me know that I will stop and I will give you that
7 opportunity. Okay?

8 THE DEFENDANT: Si.

9 MR. NAVARRO: Yes.

10 THE COURT: All right. First, I want to review
11 with you, and I know Mr. Chandler has already discussed
12 with you, but with regards to these charges, two -- three
13 of these charges as I told you earlier are classified as
14 violent and most serious under our laws.

15 Under the law in South Carolina, if a person is
16 convicted of either three serious offenses or two most-
17 serious offenses then on that third offense of the serious
18 classification or on the second offense of the most-
19 serious classification the State could seek a penalty of
20 life without parole upon a conviction of a third most-
21 serious -- excuse me, a third serious or a second most
22 serious. Do you understand that?

23 THE DEFENDANT: Si.

24 MR. NAVARRO: Yes.

25 THE COURT: Now, the fact that you are pleading

1 guilty to these three charges which are classified as most
2 serious even though those are three separate charges that
3 are classified as most serious, the fact that you are
4 pleading to them today at this one time means that that is
5 only one strike for a most-serious offense on your
6 record. Do you understand?

7 THE DEFENDANT: Si.

8 MR. NAVARRO: Yes.

9 THE COURT: Now, all of us have the same
10 constitutional rights that I'm going to go over with you.
11 What's important for you to understand is that by going
12 forward with a guilty plea you waive or you give up these
13 rights.

14 These rights are as follows: You have the right
15 to remain silent. And you have the right to a jury
16 trial. But if you plead guilty or go forward with your
17 guilty plea, then you give up both of those important
18 constitutional rights. Do you understand that?

19 THE DEFENDANT: Si.

20 MR. NAVARRO: Yes.

21 THE COURT: Associated with your right to a jury
22 trial are other rights that you have. And the best way to
23 go over those rights with you is to explain to you what
24 those rights are.

25 If you were -- in other words, if you were going

1 to have a jury trial, I'll tell you what those rights are
2 to help you better understand. For example, if you had a
3 jury trial, the law would presume that you are innocent of
4 these charges and the burden to prove your guilt would be
5 on the State of South Carolina.

6 The State has the burden of proof in a criminal
7 case. And the way they would go about doing that or
8 proving that burden would be that during the course of a
9 jury trial they would call witnesses to the witness
10 stand. Those witnesses would be placed under oath, and
11 they would testify, more than likely, against your best
12 interests.

13 Now, during the course of a trial you would have
14 the right to question the State's witnesses, to ask them
15 questions, to cross-examine them as to their testimony.
16 That is your right of confrontation under the
17 constitution.

18 The Constitution of the United States provides
19 that any person charged with a criminal offense has the
20 right to face their accusers or to confront their
21 accusers. And during the trial, if you were to have a
22 trial that would be your opportunity to confront or to
23 face those witnesses. Do you understand that?

24 THE DEFENDANT: Si.

25 MR. NAVARRO: Yes.

1 THE COURT: Now during the course of a trial, if
2 you were to have one, the State is not the only one that
3 can call witnesses. You could call witnesses in your own
4 defense if you chose to do so. You, yourself, Mr. Lopez,
5 you could take the witness stand and testify in your own
6 defense as well.

7 However, you're not required to do those things.
8 You're not required to do anything. In this country no
9 person charged with a criminal offense is ever required to
10 prove themselves innocent. This burden of proof always
11 rests on the State.

12 Therefore, if you had a jury trial you could
13 exercise your right to remain silent. And if you did
14 that, I would explain to the jury that they could not hold
15 that against you. I would tell them that that is your
16 constitutional right and the fact that you're remaining
17 silent or the fact that you did not take the stand is an
18 issue that they would not be allowed to even talk about in
19 the jury room. I would tell them that they could not
20 penalize you for exercising that constitutional right.
21 And that they could not consider it in any way in their
22 deliberations. Do you understand that?

23 THE DEFENDANT: Si.

24 MR. NAVARRO: Yes.

25 THE COURT: Mr. Lopez, I would also tell you that

1 the State, as I said earlier, has the burden of proof.
2 And they have to carry that burden to a unanimous
3 decision. In other words, it would take all 12 members of
4 the jury to agree that you are guilty of these charges or
5 they could not find you guilty. Do you understand that?

6 THE DEFENDANT: Si.

7 MR. NAVARRO: Yes.

8 THE COURT: If, however, you did go through a
9 jury trial and if you were convicted or found guilty of
10 one or more of these charges, you could appeal that
11 conviction or that guilty finding to a higher court if you
12 felt that was appropriate. Do you understand that, sir?

13 THE DEFENDANT: Si.

14 MR. NAVARRO: Yes.

15 THE COURT: Also, Mr. Lopez, you have a right to
16 appeal this Court today on the decision that I make. In
17 other words, if you wish to file an appeal on the decision
18 that I make here today, you may do that, but if you choose
19 to do that you must file that notice of intent to appeal
20 within 10 days of today's date. Do you understand that?

21 THE DEFENDANT: Si.

22 MR. NAVARRO: Yes.

23 THE COURT: In other words, when we complete this
24 hearing, if you wish to appeal my decision you can do that
25 but you must do it within 10 days. Do you understand?

1 THE DEFENDANT: Si.

2 MR. NAVARRO: Yes.

3 THE COURT: Okay. Mr. Lopez, understanding these
4 rights as I went over them, and understanding that if you
5 go forward with your plea that you give up these rights or
6 you waive them, understanding that, do you still wish to
7 go forward with your plea?

8 THE DEFENDANT: Si.

9 MR. NAVARRO: Yes.

10 THE COURT: Do you understand that you will not
11 have a jury trial and your case will be resolved pursuant
12 to this plea? Do you understand that?

13 THE DEFENDANT: Si.

14 MR. NAVARRO: Yes.

15 THE COURT: Sir, has anyone promised you
16 anything, held out any hope of reward or threatened you in
17 any way to get you to plead to these charges?

18 THE DEFENDANT: No.

19 MR. NAVARRO: No.

20 THE COURT: Are you satisfied with the
21 representation and the advice that Mr. Chandler has
22 provided?

23 THE DEFENDANT: Si.

24 MR. NAVARRO: Yes.

25 THE COURT: Do you have any complaints against

1 him or any member of his office or his staff?

2 THE DEFENDANT: No.

3 MR. NAVARRO: No.

4 THE COURT: Have you told Mr. Chandler everything
5 you know about these charges so that he could explore any
6 possible defenses that you may have?

7 THE DEFENDANT: Si.

8 MR. NAVARRO: Yes.

9 THE COURT: Have you worked with Mr. Chandler and
10 cooperated with him? Have you told him and given him the
11 names of everybody who would possibly be a witness in this
12 case? Have you given him all the information that he
13 needs to help you, help defend you in this matter?

14 THE DEFENDANT: Si.

15 MR. NAVARRO: Yes.

16 THE COURT: Has Mr. Chandler done everything that
17 you've asked him to do for you, sir?

18 THE DEFENDANT: Si.

19 MR. NAVARRO: Yes.

20 THE COURT: Are you satisfied with his services
21 as your lawyer?

22 THE DEFENDANT: Si.

23 MR. NAVARRO: Yes.

24 THE COURT: Is there anything that he has not
25 done for you that you have asked him to do for you or that

1 you feel he should do for you?

2 THE DEFENDANT: No --

3 MR. NAVARRO: No, he's done everything.

4 THE COURT: Mr. Lopez, are you under the
5 influence of any substance either drugs or alcohol or
6 anything that would affect your ability to under what
7 you're doing today?

8 THE DEFENDANT: No.

9 MR. NAVARRO: No.

10 THE COURT: Do you have or have you ever been
11 diagnosed with a physical or mental or emotional condition
12 that would interfere with your ability to understand what
13 you're doing today?

14 THE DEFENDANT: No.

15 MR. NAVARRO: No.

16 THE COURT: Do you have any complaints against
17 the solicitor's office, law enforcement, or anyone at the
18 detention center?

19 THE DEFENDANT: No.

20 MR. NAVARRO: No.

21 THE COURT: Have you understood the questions
22 that I've asked you here today?

23 THE DEFENDANT: Si.

24 MR. NAVARRO: Yes.

25 THE COURT: Have your answers to those questions

1 been truthful?

2 THE DEFENDANT: Si.

3 MR. NAVARRO: Yes.

4 THE COURT: Are you pleading guilty on these
5 charges of your own free will?

6 THE DEFENDANT: Si.

7 MR. NAVARRO: Yes.

8 THE COURT: And are you guilty of these charges
9 that you are pleading guilty to?

10 THE DEFENDANT: Si.

11 MR. NAVARRO: Yes.

12 THE COURT: All right. Mr. Lopez, I am going to
13 ask the solicitor to give me a brief explanation of the
14 facts that support these charges. And I would ask that
15 you listen carefully because I'm going to come back and
16 ask you if these facts are correct. Solicitor?

17 MR. THURMOND: Thank you, Your Honor. May it
18 please the Court.

19 Judge, in the early morning of May the 2nd, 2006
20 at approximately one a.m., Alejandro Morales who is
21 present in the courtroom along with his now wife, and
22 aunt, Maria and Juliette Diez, were returning home after a
23 late evening of fishing. They resided at

24 in Clearwater, South Carolina.

25 Upon returning to their residence they noticed a

1 burgundy sedan in their front yard. An individual later
2 identified as the Defendant, Mr. Lopez, told them that he
3 was looking for a white girl and two guys and asked them
4 if they had seen them. Mr. Morales responded no and they
5 proceeded on inside of their residence.

6 A few moments later there was a knock at the
7 door. They opened the door and Mr. Lopez was standing in
8 the doorjamb brandishing a pistol. He came in the house
9 and he acted like he was searching for something. He went
10 to every room in the house looking for this purported
11 white girl and two guys.

12 He herded all occupants of the residence, that
13 Mr. Morales and Marie and Juliette Diez, into the living
14 room and told the three of them that he was going to have
15 to kill them. He then fired a round into the floor of the
16 living room.

17 Mr. Morales then began to plead for the lives of
18 his aunt and then girlfriend and asked Mr. Lopez to only
19 kill him.

20 Mr. Lopez then escorted Mr. Morales out the front
21 door, closed the front door and shot Mr. Morales in the
22 abdomen. Mr. Morales then fled the scene and Mr. Lopez
23 unloaded the gun on him, striking him seven more times in
24 both his arms, his chest and his back.

25 Mr. Morales headed in the direction of

1 bleeding profusely. Mr. Lopez pursued him in the
2 burgundy sedan. Shell casings were left in the front
3 yard.

4 Judge, a second crime scene is
5 Mr. Morales crashed through the back door of that
6 residence. The occupants then called 9-1-1.
7 Simultaneously -- this is a densely populated area,
8 several others call to 9-1-1 for a shots fired were
9 received by the sheriff's office.

10 Deputies Chavous and Cagle with the Aiken County
11 Sheriff's Office responded out in front of
12 simultaneously as Mr. Morales (sic) pulled up in front of
13 that residence to continue to pursue Mr. Morales.

14 THE COURT: Mr. Lopez.

15 MR. THURMOND: Mr. Lopez. Excuse me, Your
16 Honor.

17 Mr. Lopez exited his vehicle, gun drawn.
18 Sheriff's deputies told him multiple times to put down the
19 gun. He finally complied. They then had to fight
20 Mr. Lopez. They had to use their Capstun guns. They
21 eventually got him into one of the vehicles. He then
22 kicked out the glass of the vehicle and they ultimately
23 Tazed him.

24 Mr. Morales was bleeding profusely inside
25 EMS responded. He was in critical condition

1 and taken to MCG.

2 Law enforcement then returned back to

3 which was the original crime scene and began to
4 interview witnesses, the Diez women and collect evidence.
5 Evidence was then sent to SLED.

6 The shell casings found in the front yard of the
7 matched shell casings that were test
8 fired from the handgun that was in Mr. Lopez's possession
9 upon his arrest.

10 Additionally the clothing that he was wearing as
11 well as his right hand tested positive for the presence of
12 gunshot residue.

13 Judge, this case was investigated primarily by
14 Investigator Brad Wertz and this was, I believe, his first
15 major crime as an investigator, a serious case with
16 multiple crime scenes and he was instrumental in gathering
17 all the witnesses and putting the evidence together that
18 has now resulted in the successful prosecution. I just
19 wanted to point him out to the Court and thank him and his
20 agency for all of his hard work.

21 Your Honor, that concludes the presentation from
22 the State.

23 Mr. Morales is present. He does not wish to
24 address the Court but he would like to show the Court his
25 injuries at the appropriate time. He has suffered

1 immeasurably, even up into the last couple weeks, we're
2 almost three years after the incident. He is still having
3 surgeries.

4 THE COURT: All right. Solicitor, I certainly
5 will see that in a moment. Thank you.

6 Any prior history that you're able to detect?

7 MR. THURMOND: None, Your Honor.

8 THE COURT: All right. Mr. Lopez, the facts that
9 the solicitor has given the Court that -- regarding these
10 charges, are those facts essentially correct that he gave
11 the Court?

12 THE DEFENDANT: Si.

13 MR. NAVARRO: Yes.

14 THE COURT: All right. I find that the State has
15 provided a substantial factual basis to support the charge
16 that Mr. Lopez, the charges, excuse me, that Mr. Lopez has
17 pled guilty to.

18 I find that the decision that Mr. Lopez has made
19 to enter these pleas has been a decision that has been
20 made freely, voluntarily and intelligently.

21 He has had the advice and the counsel of an
22 outstanding lawyer in Mr. Everett Chandler. And Mr. Lopez
23 has indicated to the Court that he is satisfied with the
24 representation and the advice that Mr. Chandler has
25 provided.

1 Just as a note on a couple of other matters. I
2 again find that there is absolutely no conflict regarding
3 Solicitor Thurmond prosecuting this case as there has
4 never been any attorney-client privilege or any privileged
5 information or relationship between Mr. Lopez and
6 Mr. Thurmond.

7 And that Mr. Navarro's role as the interpreter in
8 this case, that Mr. Lopez has indicated his satisfaction
9 with Mr. Navarro, does not feel that there is any issue or
10 problems with Mr. Navarro serving in that capacity and I
11 find that there is no issue regarding that. And the
12 voluntariness and the willingness to enter into this plea
13 has been done without coercion and I'm going to accept his
14 pleas.

15 Mr. Chandler, I'm happy to hear from you and
16 anyone else or from Mr. Lopez.

17 MR. CHANDLER: May it please the Court. Your
18 Honor, as my client has already indicated to you, he is 25
19 years of age. He was 22 at the time of this incident.

20 He does have two children, one, Jennifer is five
21 years of age, and the son, Antonio, who is four years of
22 age. His wife Yolanda is with the children currently in
23 Mexico. As I indicated, there's been a number of deaths
24 in the family due to some recent violence in the country.

25 This case -- as we had indicated before, my

1 client has been incarcerated for over a thousand days, a
2 1045 days. And in the period of time since my
3 representation of Mr. Lopez, we have been really working
4 to see if his family could help at least with the
5 restitution towards the, help with the medical expenses
6 for the victim.

7 My client expressed a tremendous amount of
8 remorse. In addition, when I first spoke with him he did
9 share with me that he was high on methamphetamines at the
10 time and recognizes that the victim unfortunately was just
11 a random person that got caught up into the violence.

12 He has no prior record, Your Honor. He does in
13 fact have pending charges in Georgia for possession with
14 intent to distribute methamphetamines which will be
15 consistent with his, not only his addiction but what he
16 was actually involved in at the time at a very young age.

17 Also, there is a hold on him from Immigration.
18 Your Honor, considering the fact that he has served a
19 considerable amount of time already in Aiken County
20 Detention Center, some 1,045 days, we would ask for a
21 time-served sentence in this case, Your Honor, so that he
22 could then go on to Georgia and serve his sentence as well
23 as then be deported by the Immigration Service.

24 Your Honor, we do recognize that this is an
25 extremely serious case. And as is evident that the victim

1 in this case, not only the victim but also his family, has
2 suffered dearly.

3 If you do not feel that time served would be
4 sufficient in this case, we would ask for a 10-year
5 sentence which would then allow our client to go up, serve
6 time with the Department of Corrections and then go and
7 answer the charges in Georgia, and then be deported back
8 to Mexico and out of this country.

9 Your Honor, my client at the time that you deem
10 appropriate would like to address the Court.

11 THE COURT: Sure. I'm more than happy to hear
12 from anyone. Does anyone else --

13 MR. CHANDLER: No one else. The family is in
14 Mexico with the deaths.

15 THE COURT: Yeah. That's fine.

16 MR. CHANDLER: Yes, sir.

17 THE COURT: I'm more than happy to hear from
18 Mr. Lopez.

19 MR. NAVARRO: Your Honor, I want to apologize. I
20 was under drugs. It's not an excuse either. I made a
21 mistake. I'm going to pay for it. I leave it up to your
22 decision.

23 THE COURT: Thank you, sir. Solicitor?

24 MR. THURMOND: Judge, Mr. Morales could come
25 forward.

1 THE COURT: Sure.

2 MR. THURMOND: Judge, he is truly an innocent
3 victim. He did not know Mr. Lopez, had never seen him
4 before. And all we can glean from this is that Mr. Lopez
5 went to the wrong residence.

6 THE VICTIM: (Displaying wounds).

7 MR. THURMOND: He still has a bullet lodged in
8 his spine that has not been removed.

9 THE COURT: Thank you, Mr. Morales for -- I want
10 to thank you very much, Mr. Morales, for being present and
11 coming here today. And I'm very sorry for your
12 experience, sir.

13 Anything further, Solicitor?

14 MR. THURMOND: No, Your Honor.

15 THE COURT: Mr. Chandler, anything further?

16 DEFENSE COUNSEL: No, sir.

17 THE COURT: I don't understand why this occurred
18 or why people suffer like this. I do understand
19 Mr. Lopez's comments that he was on drugs.

20 But there must be some explanation beyond just
21 that. Simply being on drugs would not, I would not
22 believe, cause this type of violence. I don't understand
23 it, but, but for the fact that the Lord spared
24 Mr. Morales, not only would this be a murder case but it
25 would possibly, based on these facts, be a capital murder

1 case.

2 TAKING ALL OF THIS INTO CONSIDERATION THE
3 SENTENCE OF THE COURT ON 2006-GS-02-1166 IS THAT YOU BE
4 COMMITTED TO THE STATE DEPARTMENT OF CORRECTIONS FOR A
5 PERIOD OF 30 YEARS.

6 ON INDICTMENT 2006-GS-02-1168, THAT YOU BE
7 COMMITTED TO THE STATE DEPARTMENT OF CORRECTIONS FOR A
8 PERIOD OF FIVE YEARS.

9 ON INDICTMENT 2006-GS-02-1169, THAT YOU BE
10 COMMITTED TO THE STATE DEPARTMENT OF CORRECTIONS FOR A
11 PERIOD OF 20 YEARS.

12 AND THAT ON INDICTMENT 2006-GS-02-1170 THAT YOU
13 BE COMMITTED TO THE STATE DEPARTMENT OF CORRECTIONS FOR A
14 PERIOD OF 30 YEARS.

15 THOSE SENTENCE ARE ALL TO RUN CONCURRENT.

16 ON THE 2006-GS-02-1167, THE SENTENCE OF THE COURT
17 IS THAT YOU BE COMMITTED TO THE STATE DEPARTMENT OF
18 CORRECTIONS FOR A PERIOD OF 10 YEARS. THAT IS TO RUN
19 CONSECUTIVE TO INDICTMENT 1166.

20 Good luck to you, Mr. Lopez.

21 MR. CHANDLER: Thank you, Your Honor.

22 END OF PROCEEDINGS: 10:56 A.M.

23 * * * *

24 CERTIFICATE OF REPORTER

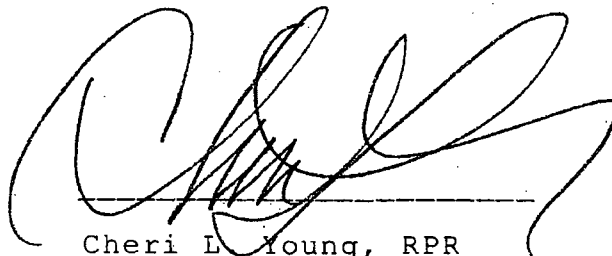
25 I, Cheri L. Young, Registered Professional Reporter,

1 and Official Court Reporter for the State of South
2 Carolina, do hereby certify that the foregoing transcript
3 of proceedings heard on Thursday, March 12, 2009, in
4 Aiken, South Carolina, was reported by me using machine
5 shorthand and realtime computer-aided translation and is a
6 true, accurate and complete transcript of the proceedings
7 had and evidence introduced in the hearing of the matter.

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

10 I have hereunto set my hand this Friday, the 11th day
11 of June, 2010.

12
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Cheri L. Young, RPR
Official Court Reporter

K065130, 131, 132, 133, 134

2010-TP-02-00917
2006-GS-02-1168-1170

33

FORM 5

STATE OF SOUTH CAROLINA

County of AikenAlberto Gomez Lopez #333724
Full name and prison number (if any) of Applicant

v.

State of South Carolina

IN THE COURT OF COMMON PLEAS

APPLICATION FOR

POST-CONVICTION RELIEF

Filed 4-2-2010
 Deputy Clerk James B. Blythe
 Trial Judge James B. Blythe
 Trial Atty. Everett O. Blythe
 Court Reporter Chad Young
 Sec. PCR Petitioner James B. Blythe
 General Sessions James B. Blythe
 Appointed Atty. James B. Blythe

INSTRUCTIONS - READ CAREFULLY

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

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

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

- Place of detention Lieber Correctional Institution, P.O. Box 205
Ridgely, S.C. 29472
- Name and location of Court which imposed sentence Aiken County Court of General Sessions
- Name(s) of co-defendant(s) (if any) N/A
- The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - 2006-GS-02-1168-1170
 -

1

STATE OF SOUTH CAROLINA
COUNTY OF AIKEN

I, Liz Godard, Clerk of Court of Common Pleas and General Sessions for Aiken County, South Carolina do hereby certify that the foregoing constitutes a true and correct copy of the original documents which have been filed in my office this

JUN 18 2010

Liz Godard
 Clerk of Court, Aiken County, S.C.
James B. Blythe
 Deputy Clerk

- (c) _____
5. The date upon which sentence was imposed and the terms of the sentence:
- (a) March 12, 2009 - (30) years, (10) years to run consecutive
- (b) Totally (40) years
- (c) _____
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty ✓
- (b) after a plea of not guilty _____
- (c) after a plea of nolo contendere _____
7. Did you appeal from the judgment of conviction or the imposition of sentence?
No
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
- i. _____
- ii. N/A
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. _____
- ii. N/A
- iii. _____
- (c) the date of each such result:
- i. _____
- ii. N/A
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. _____
- ii. N/A
- iii. _____
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) Not advised by Trial Counsel of right to 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) Voluntary Guilty Plea
- (c) Due Process Violation
11. State concisely and in the same order the facts which support each of the grounds set out in (10):
- (a) See Attached Memorandum of Law
- (b) See Attached Memorandum of Law
- (c) See Attached Memorandum of Law
12. Prior to this application have you filed with respect to this conviction:
- (a) any petition in a State Court under South Carolina Law? Yes
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? N/A
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? N/A
- (d) any other petitions, motions or applications in this or any other Court? N/A
13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:
- (a) the specific nature thereof:
- i. Motion To Reconsider and To Reduce Sentence/Alter
- ii. or Amend The Sentence
- iii. _____
- iv. _____
- (b) the name and location of the Court in which each was filed:
- i. Court of General Sessions For the Second Circuit,
- ii. Aiken, South Carolina
- iii. _____
- iv. _____

(c) the disposition thereof:

- i. Motion denied
- ii. _____
- iii. _____
- iv. _____

(d) the date of each such disposition:

- i. _____
- ii. _____
- iii. _____
- iv. _____

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

- i. _____
- ii. 11/11
- iii. _____
- iv. _____

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

11/11

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

(a) which grounds have been presented:

- i. _____
- ii. 11/11
- iii. _____

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

- i. _____
- ii. 11/11
- iii. _____

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) Post Conviction Issues
 (b) Post Conviction Issues
 (c) Post Conviction Issues

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

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

Yes

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

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

i. Everett K. Chandler - P.O. Box 2391 Aiken SC.
29802-2391 - 225 Chesterfield St. NW Aiken SC. 29801
 ii. J. Falkner Wilkes - 638 East Washington St.
Greenville, S.C. 29601
 iii. _____

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

i. Everett K. Chandler - Arraignment, Plea and
Sentencing
 ii. J. Falkner Wilkes - Motion To Reconsider And To
Reduce Sentence, /Alter or Amend The Sentence.
 iii. _____

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

Sentence and Conviction Vacated

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

No

STATE OF SOUTH CAROLINA)

County of _____)

VERIFICATION

I, Alberto Ramiro Lopez # 333724, 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.

Alberto Lopez

SWORN to and subscribed before me this 19th
day of April, 2010.

Sylvia Jones (L.S.)
Notary Public

My Commission Expires: 1/24/2018

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

I, Alberto Rivas Lopez # 333 724, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

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

Alberto Lopez
Applicant

SWORN or affirmed to and subscribed before me this

19th day of April, 2010.

Sylva Jones
Notary Public

My Commission Expires: 1/24/2010

State of South Carolina	)	
County of <u>Aiken</u>	)	MEMORANDUM OF LAW IN SUPPORT
	)	OF POST-CONVICTION RELIEF
Alberto Romero Lopez #333724	)	APPLICATION
applicant	)	PURSUANT TO S.C. CODE OF LAWS
	)	17-27-110,-160
V.	)	
State of South Carolina,	)	
Respondent,	)	

Now, comes the applicant, Alberto Romero Lopez #333724, who respectfully submits to this Honorable Court a MEMORANDUM of Law in Support of his attached post-conviction relief application pursuant to S.C. Code of laws §17-27-110,-160.

Respectfully submitted,

s/ Alberto Lopez

FILED IN COURT OF _____
 APRIL 16 1976
Sylvia Jones
 CLERK OF COURT
 STATE OF SOUTH CAROLINA
 MY COMMISSION EXPIRES 1/24/2018

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

The proper measure of performance is whether the attorney provided representation within 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 judgement. Strickland, Id. The applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624(1984).

A two-prong test is used in evaluating allegations of ineffective assistance of counsel whether applicant had an actual trial by jury or entered a plea of guilty. Strickland, Id.

First, the applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms". Cherry, 300 S.C. at 117, 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 results of the proceeding would have been different". Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

Where an applicant seeks relief on post-conviction from a plea of guilty, the applicant must (1), counsel was ineffective or deficient in his or her performance or representation, and (2), that absent counsel's unprofessional and erroneous advice, applicant would not have pleaded guilty but insisted in going to trial. Hill v. Lockhart, 894 F.2d 1009(8th Cir,1990).

ALLEGATION

I.

Counsel was ineffective by failing to put the Court on notice that prosecuting attorney/ Strom Thurmond, Jr., had involvement with applicant's case when he was a practicing defense attorney and then later assigned and prosecuted applicant's case as prosecuting attorney. This is a clear violation of applicant's due process rights and a conflict of interest. Counsel's failure to object was ineffective assistance of counsel.

Applicant alleges that at time of his arrest his mother, Jurintina Lopez Barron met with and discussed applicant's case with then defense attorney Strom Thurmond, Jr. After meeting with him and discussing applicant's case with him, attorney Thurmond called the Aiken County jail and obtained information concerning applicant's case. Sometime later it was determined that Thurmond wanted forty (40) Thousand dollars to represent applicant. Applicant's mother could not afford to pay his fee for representation of applicant, so applicant was forced to seek an attorney within affordable range. After Thurmond's consideration to represent applicant and after obtaining critical information in regards to applicant's case from his mother and records at the Aiken County jail, then later acted as the prosecuting attorney in applicant's case is clearly a conflict of interest. Counsel's failure to put the Court on notice and have Thurmond recuse himself from applicant's case fell below an objective reasonable-standard and was ineffective assistance of counsel. It is ironic that Prosecutor Thurmond when he was a defense counsel wanted to charge applicant's mother forty (40) thousand dollars to represent applicant and since applicant's mother could not afford his representation he, Thurmond later as prosecuting attorney winds up with applicant's case and applicant ends up pleading to forty (40) years. Counsel's failure to object to this conflict of interest was ineffective assistance of counsel.

In Cuyler v. Sullivan, 466 U.S. 335, 344-45, the Supreme

Court ruled that a defendant can demonstrate a Sixth Amendment violation by showing: (1) that defense counsel was actively representing conflicting interests, and (2) that the conflict had an adverse effect on specific instances of counsel's performance. When a defendant alleges that his/her guilty plea resulted from defense's conflict of interest on his/her counsel's advice. The trial Court has a limited duty to avoid potential conflicts of interests. The Court must initiate an inquiry if it knows or reasonably should know that a potential conflict exists. When the trial Court has notice of a potential conflict but fails to make such inquiry, the reviewing Court will presume a violation of the Sixth Amendment right to counsel.

The trial Court in applicant's case was aware that solicitor Strom Thurmond while acting in the capacity of private practice defense attorney, secured and obtained information in regard to applicant's case and later while acting as or working for the prosecutor's office, elected or was assigned applicant's case for prosecution. Applicant's plea counsel was also aware of this potential conflict but failed to object. Counsel's failure was ineffective and applicant was prejudiced by counsel's failure. See United States v. Garcia, 517 F.2d 272 (5th Cir. 1975)(waiver of conflict must be on the record by clear and unequivocal language). See U.S. v. Ziegenhagen, 890 F.2d 937 (7th Cir. 1989), which held: A conflict of interest is established where defense counsel previously appeared against defendant at State sentencing hearing (20) years earlier and any subsequent representation of same defendant in defense capacity was not proper. See also: U.S. v. Shorter, 54 F.3d 1248 (7th Cir. 1995)(Defendant's accusing attorney of forcing him to plead guilty, and attorney claiming that the defendant's statements were false, constitutes a conflict of interest). Defendant's trial attorney, who was also city Attorney created a conflict of interest. Jamison v. Lockhart, 980 F.2d 470 (8th Cir. 1992). Counsel's failure to pursue favorable plea negotiations on defendant's behalf, which was motivated by a conflict of interest, established ineffective assistance of counsel. Porter v. Wainwright, 805 F.2d 930 (11th Cir 1992).

ALLEGATION

II

Trial counsel was ineffective by promising applicant three (3) years and once applicant entered his plea of guilty, he was sentenced to forty (40) years.

Applicant was in the Aiken County jail for approximately (3) years prior to entering a plea of guilty on the advice of his counsel. Applicant's counsel advised him and his family members that "since applicant was already locked up for at least 3 years in the County jail, that he had spoken with the prosecuting attorney and the prosecuting attorney Strom Thurmond, Jr. agreed to allow applicant to plead guilty to 3 years time served. Once applicant went before the Court and entered his plea of guilty, applicant was sentenced to (30) years and (10) years consecutive, amounting to a total of (40) years. Counsel's lying to applicant and breach of recommended and promised plea agreement constituted ineffective assistance of counsel.

Applicant's plea agreement included a promise that the prosecution would make a specific recommendation or refrain from objecting to a proposed sentence by defense counsel and that promise was not kept, therefore applicant's sentence is illegal. The promise is not required to be in writing.

The U.S. Supreme Court in Santobello v. New York, 404 U.S. 257(1971) set the standard. The Court standard is what you reasonably understood the recommended sentence would be in exchange for your guilty plea. In a later case of Blackledge v. Allison, 431 U.S. 63 (1977), the Supreme Court again addressed the question of promises made during plea bargaining and issued a decision in favor of a prisoner who alleged that he had been promised a particular sentence in exchange for his guilty plea. Ambiguity of language in plea agreement is construed in favor of defendant and against the government. Margalli v. I.N.S., 43 F.3d 345(8th Cir. 1994). Reversal is required where government promised in plea agreement to recommend a ten year sentence and their advocated position of PSR which called for sentencing range of 151 to 188 months. U.S. v. Taylor, 77 F.3d 368(11th Cir.

1996). Government's failure to recommend concurrent sentences and its subsequent recommendation of consecutive sentences was breach of plea agreement requiring that sentence be vacated. U.S. v. Van Thournout, 100 F.3d 590(8th Cir. 1996). U.S. v. McCray, 849 F.2d 304(8th cir. 1988). U.S. v. Giardino, 797 F.2d 30 (1st Cir. 1986); U.S. v. Espinoza, 866 F.2d 1067 (9th Cir. 1988).

ALLEGATION

III

Trial counsel was ineffective by failing to object to applicant being sentenced consecutively where offenses were so closely connected in time that under S.C. Law shall be treated as one offense.

Both offenses in which applicant pled guilty occurred on the same date, May 02, 2006, at the same residence, North Augusta, S.C. and involved the same victim. Counsel's failure to object to the applicant being sentenced to consecutive sentences where offenses were so closely related in time and place was ineffective assistance of counsel and counsel's failure to object fell below an objective standard of professional norm. Title 17 of the S.C. Code of Laws, Closely Connected Crimes, shall be treated as one offense. §17-25-50 Considering closely connected offenses as one offense.

In determining the number of offenses for the purpose of imposition of sentence, the Court shall treat as one offense any number of offenses which has been committed at times so closely connected in point of law they constitute separate and distinct offenses. State v. Boyd, 341 S.E2d 144, 288 S.C. 206 (S.C. App. 1986).

ALLEGATION

IV

Trial counsel was ineffective by failing to request that applicant be sentenced under the Youthful Offender Act of South Carolina.

This is applicant's first time ever being arrested and convicted of a crime. Applicant has no prior record. Applicant

was under the age of 26 when he was arrested and when he appeared before the Judge to enter his plea of guilty upon counsel's erroneous advice and promise of time served. Under South Carolina Youthful Offender Statute, a defendant shall have the right to be considered for sentencing under the Act if he/she is a first time offender and 17 to 26 years of age. See Burley v. Cabana, 818 P.2d 414(5th Cir. 1987), which held that Trial counsel was ineffective for failing to inform judge of sentencing alternative under youthful offender act when judge mistakenly believed that life imprisonment was only sentence available and stated his opinion that sentence was too harsh. Also see; Gary v. State, So.2d _____, (2000 WL 706089 Miss. June 1, 2000). Counsel was ineffective in armed robbery case for failing to argue for sentencing under Youthful Court Act. Defendant was 17 years old with no priors and did not possess gun during robbery (as his co-defendant did). State law did not require the Court to sentence under the youth act but did require the Court to consider it. Counsel's conduct in failing to request youth sentencing was deficient when he could have gotten only a year under the youth Act if the Court had accepted the argument. §24-19-20 Youthful Offender Division Created in Department of Corrections: Staff. §24-19-50 Powers of Courts upon conviction of Y.O.A., The effect of the enactment of this section was to provide alternative methods of sentencing youthful offender, leaving the decision as to its application in each case to the discretion of the trial judge. Powell v. State, 206 S.E.2d 883, 262 S.C. 592 (S.C. 1974).

This section grants the trial judge a broad discretion in determining under which subsection sentence will be imposed.

When a defendant between the ages of 17 and 25 is convicted he is before the Court for sentencing under this chapter. He must be sentenced in accordance with this section and cannot be sentenced in any other fashion. Creel v. State, 206 S.E.2d 825, 262 S.C. 558 (S.C. 1974). The absence of a request for sentencing under this chapter by defense counsel has no effect upon the validity of the defendant's sentence because the State requires

that he be considered as a youthful offender by the trial judge. Creel supra.

While an explicit finding that the offender would not benefit from the Youthful Offender Act treatment is not prerequisite to imposition of sentence under other applicable penalty provision, the better practice is to make an explicit finding for the record the defendant will receive no benefit from Y.O.A.. Bell v. Leake, 266 S.C. 563 (S.C. 1976).

ALLEGATION

V

Counsel was ineffective by failing to provide applicant with translator or interpreter whereas applicant was hispanic Mexican Origin and understood very little and limited english.

Counsel was ineffective in his failure to secure a translator or interpreter for applicant where applicant did not understand the procedure and the consequences of his plea, thus making his plea unknowingly, involuntarily, and unintelligent.

In order to make a knowingly, voluntary and intelligent plea, a defendant must be capable of understanding the consequences of his plea. He/She must be considered legally competent in order to enter a plea knowingly and voluntarily and with the capability to understand the plea and its effect. factors that are considered in determining legal competency include:

- [a] Education level;
- [b] I.Q. level;
- [c] Ability to distinguish right from wrong;
- [d] Ability to understand the English Language;
- [e] If defendant has an interpreter, the interpreters ability to communicate with defendant in his dialect;
- [f] Whether or not defendant were/are taking prescribed medication (or illegal drugs) that affects or affected your ability to think;
- [g] Whether or not you suffer from a debilitating mental disease;
- [h] Whether the Court refused or failed to order psychiatric evaluation in light of defendant's past circumstances

See Pate v. Robinson, 383 U.S. 375 (1966). a defendant must be

able to understand the elements of the offense to which he is pleading guilty. Elements are the specific factors included in the statutory definition of a charged offense. The defendant must be informed of the elements of the offense prior to or during the plea hearing. A defendant who was not informed of critical element of the offense to which he pled guilty entered his plea involuntarily. Henderson v. Morgan, 426 U.S. 637 (1976). U.S. v. Brown, 117 F.3d 471 (11th Cir. 1997).

South Carolina Rules of Evidence Rule 604 §4.17 Using Interpreters.

When a witness cannot communicate in Court, an interpreter may be used. People Nat'l Bank v. Manas, Inc., 84 S.E.2d 357, 226 S.C. 257 (1954); Rule 43(f) SCRPC.

An interpreter is subjected to the provision of these rules relating to qualification as an expert and administration of oath or a affirmation to make true translation.

In addition to the provisions of Rule 604, the General Assembly has enacted three statutes governing appointments of interpreters. S.C. Code Ann. §15-27-15 (for deaf persons), §15-27-155 (for non-english speaking, in civil cases, and §17-1-50, for non-english speakers in criminal cases.

The rule is based on need and fairness. A person who cannot effectively communicate is entitled to the same benefits and protections of the law as anyone else. See State v. Weldon, 17 S.E.2d 688, 39 S.C. 312 (1971). Rahman v. Brown & Sonnetier, 30 S.C.L. (4. Rich.) 479(850).

In a criminal case §17-1-50(b)(2), However, the Court may waive the use of a certified or qualified interpreter if the Court finds that it is not necessary for the fulfillment of justice. The Court must first make a finding on the record that the waiver of a certified or otherwise qualified interpreter is requested by a non English speaking party, witness or victim in a legal proceeding. That the waiver has been made knowingly, voluntarily, and intelligently, and that granting the waiver is in the best interest of justice.

The applicant did not waive his right to an interpreter.

Applicant was not aware or understood the elements of his offense or the nature or consequences of his plea. Thus rendering his plea involuntary. Counsel's failure to grant applicant's request for interpreter who was fluent in his language who could have translated the proceedings to him constituted ineffective assistance of counsel.

Lia Godard, Clerk of Court
 Wilkes County Circuit Court
 P.O. Box 583
 Macon, S.C. 29802

333724
 M. Alberto R. Lopez
 Lieber Corr. Inst.
 P.O. Box 205
 Ridgerville, S.C.
 29472

April 17, 2000

Dear Honorable Clerk:

Enclosed for filing please find an application for post conviction relief and attached memorandum of law in support thereof. At your next earliest convenience, please check stamp and assign case number and return clocked copy to me at the above listed address for my records.

Thanking you in advance
 Sincerely

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF AIKEN	)	2010-CP-02-0917
	)	
Alberto R. Lopez, #333724	)	
	)	
Applicant,	)	
	)	
v.	)	RETURN
	)	(Appointment of Counsel Requested)
State of South Carolina,	)	
	)	
Respondent.	)	
	)	

In response to the post-conviction relief application filed April 22, 2010, the Respondent would show this Court:

I.

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Aiken County Clerk of Court. The Applicant was indicted at the July 2006 term of the Aiken County Grand Jury for Kidnapping (2006-GS-02-1166), Resisting Arrest with a Deadly Weapon (2006-GS-02-1167), Possession of Firearm or Knife during Commission of or Attempt to Commit a Violent Crime (2006-GS-02-1168), Assault and Battery with Intent to Kill ("ABWIK") (2006-GS-02-1169), and Kidnapping (2006-GS-02-1170). Everett K. Chandler, Esquire, represented him on the charges. On March 12, 2009, Applicant pled guilty as indicted. The Honorable Thomas A. Russo sentenced him to the following:

- Thirty (30) years for each count of Kidnapping (concurrent);
- Ten (10) years confinement for resisting arrest with a deadly weapon (consecutive to Kidnapping, 2006-GS-02-1166);

- Five (5) years confinement for Possession of Firearm or Knife during Commission of or Attempt to Commit a Violent Crime (concurrent); and
- Twenty (20) years confinement for ABWIK (concurrent).

A Motion to Reconsider and to Reduce or Alter Sentence was filed on Applicant's behalf.

By an order filed February 22, 2010, Judge Russo denied the motion.

For the purpose of this Return, the Respondent incorporates the Clerk of Court records, the South Carolina Department of Corrections' records, and the guilty plea transcript. The Respondent reserves the right to amend this Return upon receipt of any relevant materials.

II.

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

- I. Ineffective assistance of counsel.
 - a. "Counsel was ineffective by failing to put the Court on notice that prosecuting attorney/ Strom Thurmond, Jr., had involvement with applicant's case when he was a practicing defense attorney and then later assigned and prosecuted applicant's case as prosecuting attorney. ..."
 - b. "Trial counsel was ineffective by promising applicant three (3) years and once applicant entered his plea of guilty, he was sentenced to forty (40) years. ..."
 - c. "Trial counsel was ineffective by failing to object to applicant being sentenced consecutively where offenses were so closely connected in time that under S.C. Law shall be treated as one offense. ..."
 - d. "Trial counsel was ineffective by failing to request that applicant be sentenced under the Youthful Offender Act of South Carolina. ..."
 - e. "Counsel was ineffective by failing to provide applicant with translator or interpreter whereas applicant was Hispanic Mexican origin and understood very little and limited English."

Any claims not specifically enumerated in the PCR application or amendments will be opposed by the State at an evidentiary hearing, and the State will seek summary dismissal of

vague or general claims at an evidentiary hearing. S.C. Code §17-27-50. All amendments should be made well in advance of an evidentiary hearing by counsel of record. Rule 11, SCRPC.

III.

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

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

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of plea counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland. Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. With respect to guilty plea counsel, the Applicant must show that there is a reasonable probability that, but for

counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed. 2d 203 (1985).

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

IV.

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

V.

WHEREFORE, having made its Return, the State requests that an attorney be appointed to represent the Applicant and that a hearing be held.

Respectfully submitted,

HENRY DARGAN McMASTER
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

MARY S. WILLIAMS
Assistant Attorney General

By: 
ATTORNEYS FOR RESPONDENT
P.O. Box 11549
Columbia, S.C. 29211

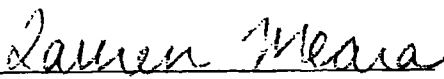
Aug. 10, 2010.

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF AIKEN	)	
	)	
	)	2010-CP-02-0917
	)	
ALBERTO R. LOPEZ, #333724	)	
	)	
Applicant,	)	
	)	
vs	)	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 that 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 by depositing same in the United States mail, postage prepaid:

**Paige Tiffany, Esquire
Whetstone Myers Perkins & Young, LLC
Post Office Box 651
Aiken SC 29802**

DATED this 10th day of August, 2010.


Lauren Meara, Legal Assistant
For Respondent

1 STATE OF SOUTH CAROLINA

2 COUNTY OF AIKEN

CIRCUIT COURT
2010-CP-02-00917

3
4 ALBERTO ROMERO LOPEZ,
5 Applicant,

6 -vs-

TRANSCRIPT OF RECORD

7 STATE OF SOUTH CAROLINA,
8 Respondent.

9 Post Conviction Relief Hearing

10 Heard on Tuesday, July 12, 2011

11 Aiken, South Carolina

12 BEFORE:

13 THE HONORABLE JAMES R. BARBER III
14
15

16 APPEARANCES:

17 Counsel on Behalf of the Applicant:
18 Paige Tiffany, Esq.

19 Counsel on Behalf of the Respondent, State of SC:
20 Rob D. Corney, Esq.

21 Interpreter:
22 Luis Navarro

23
24 Cheri L. Young, RPR
Circuit Court Reporter
P O. Box 1154
25 Aiken, SC 29802-1154

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(NO EXHIBITS IDENTIFIED/INTRODUCED.)

1 ON TUESDAY, JULY 12, 2011 AT 12:28 P.M.:

2 THE COURT: Let's bring out Mr. -- who is this,
3 Mr. Lopez?

4 MR. CORNEY: Yes, Your Honor.

5 (Applicant enters courtroom.)

6 (Interpreter Luis Navarro placed under oath.)

7 MR. NAVARRO: My name is Luis Navarro, federal and
8 state certified court interpreter, license C06061 and
9 federal license 11051.

10 THE COURT: All right, senor.

11 MR. CORNEY: This is Albert Lopez. Case number 2010-
12 CP-02-09117. Mr. Lopez was indicted during the July 2006
13 Aiken County Grand Jury term for two counts of kidnapping,
14 resisting arrest with a deadly weapon, possession of a
15 firearm or knife during the commission or attempt to
16 commit a violent crime and assault and battery with intent
17 to kill.

18 He pled guilty as indicted before Judge Russo on
19 March 12, 2009, was sentenced to 30 years for each count
20 of kidnapping to run concurrent, five years for possession
21 of a firearm during the commission of a crime to run
22 concurrent, and 20 years for the assault and battery with
23 intent to kill to run concurrent and 10 years for
24 resisting arrest with a deadly weapon to run
25 consecutively.

ALBERTO ROMERO LOPEZ - DIRECT

1 He filed this PCR timely on April 22nd -- he timely
2 filed this PCR application April 22nd, 2010, and is
3 represented today by Ms. Paige Tiffany.

4 THE COURT: All right.

5 MS. TIFFANY: Thank you, Your Honor. I'd like to
6 call Mr. Lopez to the stand.

7 THE CLERK: Please have a seat in the box and state
8 your full name for the Court.

9 ALBERTO ROMERO LOPEZ, having been duly sworn, was
10 examined and testified as follows:

11 *** COURT REPORTER NOTE: ALL QUESTIONS WERE
12 TRANSLATED FROM ENGLISH TO SPANISH AND POSED TO THE
13 APPLICANT. THE ANSWERS OF THE APPLICANT WERE TRANSLATED
14 INTO ENGLISH AND SPOKEN BY THE INTERPRETER ON BEHALF OF
15 THE APPLICANT. ***

16 DIRECT EXAMINATION

17 BY MS. TIFFANY:

18 A. My name is Alberto Romero Lopez.

19 Q. Mr. Lopez, how old are you?

20 A. Twenty.

21 Q. Where were you born?

22 A. In Mexico.

23 Q. And what is your native language?

24 A. Spanish.

25 Q. When did you move to the United States?

ALBERTO ROMERO LOPEZ - DIRECT

1 A. In 1999.

2 Q. And how old were you then?

3 A. Fifteen.

4 Q. Did you speak English when you came to the United
5 States?

6 A. No.

7 Q. When did you learn to speak English or can you speak
8 English?

9 A. I learned a little while I was working here, and now I
10 learned it in jail.

11 Q. What kind of -- type of work did you do before you
12 were arrested?

13 A. I worked for a window company before I got arrested.

14 Q. Were you able to speak or understand English on the
15 date you were arrested on May 6th of 2006?

16 A. I understand a little. I can speak a little, but I
17 really don't do it that much.

18 Q. How long were you incarcerated before you pled guilty
19 on March 12th, 2009?

20 A. About three years.

21 Q. You never made bond?

22 A. No.

23 Q. How many times did you meet with your attorney,
24 Mr. Chandler, during that time, approximately?

25 A. I really didn't count them but it seemed to be like

ALBERTO ROMERO LOPEZ - DIRECT

1 four or five times.

2 Q. How many times did your attorney bring an interpreter
3 with him to speak with you?

4 A. The first time. Only the first time he came to see
5 me.

6 Q. When he didn't bring an interpreter, were you able to
7 communicate with him?

8 A. Very little. I really couldn't understand too much.
9 Very little. I tried to understand him, but I really
10 didn't understand that much.

11 Q. On the day that you pled guilty, did he have an
12 interpreter with you in the back?

13 A. No. Only when I was -- when I was actually brought
14 into the courtroom here during the hearing is when I had
15 an interpreter.

16 Q. Well, on the day you pled guilty, what did you
17 understand your attorney to say? What was the conditions
18 of the plea?

19 A. What I understood my attorney to tell me somewhat is
20 that if I declare myself guilty they're probably going to
21 go free and get deported or possibly a maximum of 10
22 years.

23 Q. Did Mr. Chandler explain to you your constitutional
24 rights that day or beforehand at any time?

25 A. I really don't remember. I don't even know if he did

ALBERTO ROMERO LOPEZ - DIRECT

1 or not. I really don't know if he did it.

2 Q. At any time did he bring a Spanish interpreter to
3 explain your constitutional rights to you?

4 A. No.

5 Q. But you did have an interpreter with you at the time
6 of your guilty plea, correct, and that was Mr. Navarro?

7 A. I had an interpreter here in the courtroom.

8 Q. And that was Mr. Navarro; correct?

9 A. And it was Mr. Navarro.

10 Q. And he was -- actually worked for the solicitor's
11 office at that point?

12 A. Yeah. He worked for the office there, yes.

13 Q. This is the first time you had an interpreter in three
14 years?

15 A. The first time Mr. Chandler came to see me at the jail
16 he brought his secretary. And from that point on he never
17 brought another interpreter.

18 Q. Did Mr. Chandler explain to you the three-strike rule?

19 A. I really don't know. I don't think so. I don't
20 understand. I really didn't understand him.

21 Q. Well, during the guilty plea when the Judge asked you
22 your constitutional -- if you understood your
23 constitutional rights and Mr. Navarro interpreted those,
24 it was in Spanish; correct?

25 A. Yes. He told me in Spanish.

ALBERTO ROMERO LOPEZ - DIRECT

1 Q. So did you understand them at that point?

2 A. I understood what Mr. Navarro was translating but I
3 didn't really know what it was all about.

4 Q. Did anybody ever explain to you what burden of proof
5 is?

6 A. No.

7 Q. Do you understand what presumption of innocence is?

8 A. Does that mean that someone didn't do anything?

9 Q. Kind of.

10 A. I guess I understand.

11 Q. Do you understand what it means to be placed under
12 oath?

13 A. Yes, that I shouldn't be telling lies.

14 Q. That's right. Very good. What about testimony or
15 cross-examining?

16 A. I really don't know what that is.

17 Q. But -- or your constitutional rights, do you know what
18 those are?

19 A. No, no.

20 Q. Did you even know what the constitution is?

21 A. No. Truthfully, no.

22 Q. Okay. Well, Mr. Navarro was with you during the
23 guilty plea; correct?

24 A. Yes.

25 Q. Now were you able to ask him any questions, explain

ALBERTO ROMERO LOPEZ - DIRECT

1 these terms in a way that you could understand better?

2 A. No. He only translated what was being said to me. He
3 never really explained anything to me.

4 Q. Now when the Judge asked you if anybody -- anybody had
5 promised you anything, held out any hope of reward or
6 threatened you in any way to make you plead to these
7 charges. You answered no.

8 Explain to the Court why your testimony under oath at
9 that time shouldn't be recognized by this Court today.

10 A. Because right before we came into court when I was
11 talking in the back room with Mr. Chandler, from what I
12 understood from him, I had told him I never been in a
13 courtroom, I don't know anything about this, about being
14 in a courtroom. What you're going to say is you're going
15 to answer yes and no when they tell you. That if I -- if
16 they asked me, are you pleading guilty, I should say yes.

17 What I understood is what I answered.

18 Q. And what did you think at the end of this plea would
19 accomplish?

20 A. Well, basically what he told me, that they were going
21 to ship me to Mexico or give me 10 years.

22 Q. Did you understand that you were facing 95 years total
23 during this plea?

24 A. Yes. I understood, but when he visited me the next
25 time -- the first time, basically what he told his

ALBERTO ROMERO LOPEZ - CROSS

1 secretary the first time he came to see me, he told me he
2 was going to try to get me more time or get me deported to
3 Mexico.

4 Q. The Judge explained to you the maximum time that these
5 charges could carry; correct?

6 A. Yes, he explained it to me.

7 Q. But you were under the impression that you weren't
8 going to get that time, you were going to get deported or
9 10 years; correct?

10 A. I never thought that they were going to give me that
11 -- those many years.

12 Q. In fact, didn't your attorney assure you of that?

13 A. He never gave me anything in writing from when I spoke
14 to him. He said he was going to get me 10 years, time
15 served and -- time served and deportation or 10 years.

16 Q. And if you had known that you had the possibility of
17 getting 40 years or as many as 95 for pleading guilty,
18 would you have pled guilty or would you have asked for a
19 jury trial?

20 A. I would have asked for a trial.

21 MS. TIFFANY: I don't have anything further.

22 THE COURT: I'm sorry?

23 MS. TIFFANY: Nothing further.

24 THE COURT: All right. Mr. Corney, anything else?

25 CROSS-EXAMINATION

ALBERTO ROMERO LOPEZ - CROSS

1 BY MR. CORNEY:

2 Q. Mr. Lopez, and you are guilty of these crimes that you
3 were charged with?

4 A. I pled guilty to them.

5 Q. You told Judge Early that you were guilty of the
6 crimes at your plea; right?

7 THE COURT: Judge Russo.

8 THE WITNESS: That's what my lawyer told me to say.

9 BY MR. CORNEY:

10 Q. And you were, and you admitted that you were high on
11 methamphetamines the night you committed these crimes?

12 A. Yes.

13 Q. And you agreed to have Mr. Navarro as your interpreter
14 at your plea hearing also; right?

15 A. Yes, I agreed to that.

16 Q. And to your knowledge is he -- he's a certified court
17 reporter (sic) in South Carolina?

18 A. Yes. He translates good.

19 Q. At the end of your plea hearing, Judge Russo asked you
20 if you understood all the questions that he asked you
21 there; correct?

22 A. I understood everything that was being told to me in
23 translating to me in my language, but there were concepts
24 and things being said to me that I never heard in my life.

25 Q. Why didn't you bring that to the Court's attention

1 when he asked you that question?

2 A. Well, I was already in the expectation that I was
3 either going to go away deported or get 10 years, so I
4 didn't really need to ask any questions.

5 Q. Okay. Did you fill out the PCR application that you
6 sent, that was sent in to initiate this court proceeding?

7 A. No. Someone helped me to fill it out in the prison.

8 Q. Okay. You had an interpreter to help you with that?

9 A. There was someone that spoke Spanish that translated
10 everything for me.

11 Q. Okay. It was brought up at your plea hearing that
12 Solicitor Thurmond was involved in your case?

13 MS. TIFFANY: Your Honor, I might be able to save a
14 little bit of time. We waived all other issues.

15 MR. CORNEY: I'll withdraw that question.

16 THE COURT: All right. What is the sole issue, that
17 he didn't understand his plea?

18 MS. TIFFANY: Ineffective assistance of counsel and a
19 non-voluntary plea because --

20 THE COURT: He didn't understand --

21 MS. TIFFANY: -- he didn't have an interpreter during
22 his consultations with his attorney.

23 THE COURT: All right.

24 MR. CORNEY: I apologize. I'll withdraw that
25 question. I believe that's all I have for Mr. Lopez.

LUIS NAVARRO - DIRECT

1 THE COURT: All right. Anything else?

2 MS. TIFFANY: Yes, Your Honor. I'd like to call
3 Mr. Luis Navarro to the stand.

4 LUIS NAVARRO, having been duly sworn, was examined
5 and testified as follows:

6 DIRECT EXAMINATION

7 BY MS. TIFFANY:

8 Q. Mr. Navarro, can you please tell the Court what your
9 occupation is?

10 A. I'm a federal and state certified court interpreter
11 and translator and a medical interpreter and translator as
12 well.

13 Q. What education or special training do you have to
14 qualify you as that?

15 A. I graduated, had an under grad, magna cum laude with
16 foreign languages, French and Spanish. I have a federal
17 certification from the Administrative Office of the
18 Courts. I'm also a certified court interpreter by the
19 National State Office of Courts.

20 I'm a medical interpreter by Bridge The Gap in
21 Seattle, Washington. I'm also a Spanish and English
22 instructor with a certificate from the Canadian Institute
23 of English.

24 I'm a CLE ethics instructor, working with interpreters
25 for the judiciary. And I've done many CLE courses and

LUIS NAVARRO - DIRECT

1 lectures at judges conferences, schools, many, many
2 places.

3 THE COURT: Whoa, whoa, whoa. You need to be
4 interpreting this. So, Mr. Lopez, do you understand him?

5 (Pause. Interpreter conferring with Applicant.)

6 THE WITNESS: I was going to do it after.

7 BY MS. TIFFANY:

8 Q. How many times have you interpreted in court?

9 A. Hundreds of times.

10 Q. How many times on behalf of the State?

11 A. Well, the role of the court interpreter when he is
12 sworn in or she is sworn in, is like the court reporter;
13 you're neutral. And so you interpret what is being said.
14 just like a court reporter types what is said. We don't
15 take sides. So it's really a neutral aspect.

16 Q. So what you're saying is that you aren't permitted to
17 explain words to somebody?

18 A. That is correct. We have to simply repeat, like a
19 parrot, what is being said and not adjust the register or
20 the level of language or explain terms. We just have to
21 basically repeat.

22 Q. Okay. During your capacity as a court interpreter,
23 instructor, CLE instructor, do you discuss the cultural
24 barriers that Mexican-Spanish defendants might have in the
25 criminal justice system?

LUIS NAVARRO - DIRECT

1 A. Yes. The -- for example, the legal system in most
2 countries other than the United States and Britain don't
3 have a jury system. They don't have a grand jury system.

4 We explain the different judiciary capacity, what
5 judges do, can do in South America or in Mexico that can't
6 be done in the United States. We also explain the
7 cultural differences either within the country, for
8 example in New York you may say yous guys, whereas down
9 here you say y'all.

10 So we have to know the differences and the subtleties
11 of all the languages and adjust and change. And that's
12 why we do these classes to explain to them that the
13 concepts of rule of law or the concepts of judiciary in
14 many countries is completely foreign to somebody other
15 than the United States.

16 Q. For example, in Mexico an attorney makes a deal?

17 A. Oh, yes.

18 Q. And a defendant understands that there's a deal?

19 A. That is correct. There is no jury system. It is
20 basically between the lawyers and the judge.

21 Q. Is it possible for them to end up with a different
22 sentence?

23 A. After -- in Mexico?

24 Q. Uh-huh.

25 A. Oh, yes. Different judge, different lawyers.

LUIS NAVARRO - DIRECT

1 Q. Okay. Your Honor, I'd like to present him as an
2 expert in interpretation. I'd like to ask him his
3 opinion. I'd like to present him as an expert in Spanish
4 interpretation.

5 THE COURT: Look. I'm going to let him testify.
6 He's an interpreter. I don't know what an expert --

7 MS. TIFFANY: Interpretation.

8 THE COURT: -- in interpretation is but --

9 MS. TIFFANY: That's fine, Your Honor.

10 THE COURT: -- based on his experience, I'm going to
11 allow him to testify to things that he might have some
12 knowledge of from his experience, not an expert in
13 interpretation.

14 MS. TIFFANY: Thank you.

15 Q. The first time you met Mr. Lopez was in front of the
16 Judge; is that correct?

17 A. Yes.

18 Q. Did you have an opportunity to speak with Mr. Lopez
19 beforehand at all?

20 A. No.

21 Q. Is that unusual?

22 A. Yes.

23 Q. What is your usual course of action?

24 A. The usual course of action is that the interpreter
25 meets with the client or the defendant or whoever, the

LUIS NAVARRO - DIRECT

1 patient, to be able to understand what their educational
2 level is, what Spanish they speak, what registry or the
3 level of the language is, their education, what part of
4 Mexico he's from. There's a big difference between a
5 Yankee Mexican and a Southern Mexican.

6 And so we have to understand so that the interpreter's
7 words are correct that the person can understand.

8 Q. Why didn't you have the opportunity to do that this
9 time?

10 A. Well, I worked at the solicitor's office and any
11 conversations that would have been there would have been
12 attorney-client privilege. And so we certainly didn't
13 want to do that.

14 And although -- if something had happened, I would
15 have -- you know, it was a different, conflict of
16 interest, that's why I had no opportunity to talk to him
17 except right here on the bar.

18 Q. Did you even have the opportunity -- I'm sorry. Go
19 ahead.

20 Did you even have the opportunity to explain to him
21 that he had the right to ask you to explain something he
22 didn't understand?

23 A. No, I did not.

24 Q. What's your normal colloquy with something before you
25 interpret?

LUIS NAVARRO - DIRECT

1 A. What I tell them, once I determine where they're from
2 and what country they're from, I explain to them if I
3 speak too fast, you don't understand, there's a word you
4 don't understand, please don't be shy. Just ask, and I
5 will ask the Judge or the attorneys to stop to explain it
6 to you. But don't be shy, you know. Don't just say yes
7 or no not knowing it, because my job is to make sure you
8 understand. And if you don't understand, for whatever
9 reason, it's up to you, not me, to get you an explanation.

10 Q. But because you worked for the solicitor's office you
11 weren't given that opportunity; correct?

12 A. Correct.

13 Q. Were you able to make an assessment at that point as
14 to his ability to understand English?

15 A. No.

16 Q. Knowing that he didn't have an interpreter during the
17 three years represented by Mr. Chandler, in your opinion
18 could there have been some miscommunication going on?

19 A. My opinion is there was definitely miscommunication.
20 As far as I know, Mr. Chandler doesn't speak Spanish. And
21 so the -- even other Spanish people have to understand
22 other Spanish people.

23 People from the United States that speak English still
24 need perhaps an interpreter for British English because
25 the terms are somewhat different. And so to me, in my

LUIS NAVARRO - CROSS

1 experience, to not bring an interpreter to discuss
2 something as important as a case is, there's just no way
3 they could have communicated.

4 Q. Do you think it's possible that he didn't understand
5 -- based on your experience, do you think it's possible
6 that he didn't understand what constitutional rights he
7 had and which ones he was waiving?

8 A. That is correct. I don't think he could have
9 understood them.

10 MS. TIFFANY: I have nothing further, Your Honor.

11 THE COURT: Anything? Mr. Corney, anything?

12 MR. CORNEY: Beg the Court's indulgence for one
13 minute, Your Honor. (Pause.) Just briefly.

14 CROSS-EXAMINATION

15 BY MR. CORNEY:

16 Q. You said you never got the chance to speak with
17 Mr. Lopez to let him know if he didn't understand
18 something, to ask you about it?

19 A. That is correct.

20 Q. So you still don't know whether he understood these
21 things that were being said to him in court or not, he
22 never brought anything to your attention?

23 A. No, he did not.

24 MR. CORNEY: That's all I have, Your Honor.

25 THE WITNESS: There was a pause during the statement

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1 that something happened. And there -- but, I think it's
2 in line 18 there, there was a consultation between. But
3 that's all I know. That's all I remember. I really don't
4 remember -- it's -- once we say it, it's said.

5 BY MR. CORNEY:

6 Q. But as far as you remember, he never brought anything
7 to your attention that he didn't understand what was being
8 said?

9 A. That is correct.

10 MR. CORNEY: That's all I have.

11 THE COURT: Thank you. You may step down.

12 THE WITNESS: Thank you, Your Honor.

13 MS. TIFFANY: Nothing else from --

14 THE COURT: Anything from the State?

15 MR. CORNEY: Yes, Your Honor. We'd like to call
16 Mr. Chandler, Everett Chandler.

17 THE COURT: All right. Mr. Chandler, you testified
18 earlier today and you were put under oath earlier. You're
19 still under oath, if you don't mind.

20 THE WITNESS: Not at all.

21 EVERETT KEITH CHANDLER, having been duly sworn, was
22 examined and testified as follows:

23 DIRECT EXAMINATION

24 BY MR. CORNEY:

25 Q. Mr. Chandler, do you remember Mr. Lopez's case and

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1 becoming involved in it?

2 A. I do remember it.

3 Q. Were you retained on this case?

4 A. I was retained.

5 Q. You were retained. Okay. Do you remember going over
6 the indictments and charges against Mr. Lopez with him?

7 A. Yes.

8 Q. And during your first meeting, I think it's been said
9 that you did have an interpreter present with you?

10 A. Yes. I had employed with me Melissa Palmer. She
11 worked for my office for a couple of months, maybe almost
12 a year. And she came over and she was there present at
13 the initial consultation.

14 And it seems as if she might have been there present
15 for at least two more. In addition to, she was the one
16 that would field all calls with Mr. Lopez whenever
17 Mr. Lopez would call the office.

18 Q. So you spoke with him several times outside of this
19 one meeting?

20 A. Oh, certainly.

21 Q. With an interpreter?

22 A. Without any question.

23 Q. During the discussions with the interpreter present,
24 were you able to go over his constitutional rights, the
25 indictments and charges facing him, that he was facing?

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1 A. I did it with and without the interpreter.

2 At some point my -- the employment relationship with
3 Ms. Palmer had terminated. And it was at that time that I
4 was busily trying to find an interpreter.

5 And when -- he called my office and asked that I come
6 up and speak with him, and I was surprised that he was
7 with ease speaking clearly to my staff. And I went up
8 there to tell him I was trying to get, you know, an
9 interpreter. And he basically shared with me and actually
10 proved with me that his English was actually was very
11 good. And, frankly, I joked -- I joked around with him
12 and told him his English was better than mine.

13 Q. So in speaking English with him you had no problem
14 communicating with him?

15 A. Absolutely not. Without any question. There was no
16 question in my mind that, that my client, Mr. Lopez, knew
17 everything that we were discussing.

18 He was active. Initially we were working -- we worked
19 with two solicitor's in this case, first Ms. Morgan and
20 then Solicitor Thurmond. And there was specific
21 information that I needed from him in reference to trying
22 to maybe handle some restitution issues with both of
23 them.

24 And he communicated clearly with me with another
25 English-speaking person, a Mr. Cheatham, who was his

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1 friend that he would send back and forth with me.

2 Mr. Cheatham doesn't speak Spanish either.

3 And basically he was speaking clearly with me as to
4 providing the restitution to the victims in this case
5 based on some attempted plea negotiations that Barbara
6 Morgan was trying to negotiate.

7 Q. Okay. Is it your belief that he had a good
8 understanding of the consequences he was facing with these
9 charges?

10 A. Yes. And we talked about it at length. We talked
11 about his defense at length.

12 My client was under the impression that the victim
13 would not be around because the victim was transient and
14 he -- and was from the Hispanic community. My client had
15 reason to believe that he wouldn't be available.

16 And I remember specifically coming up to talk to him
17 about that the victim was available and he was kind of
18 shocked. And we talked about what that meant, especially
19 when we transitioned from Barbara Morgan to Strom
20 Thurmond, when Thurmond pulled all of the deals off the
21 table that Barbara Morgan was discussing.

22 Q. And, just briefly. When you reviewed his
23 constitutional rights with him, did you have the
24 opportunity to kind of delve into them and explain to him
25 more than just the words, what the meanings of what his

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1 constitutional rights were?

2 A. Yes, of course I did. But understand, that because --
3 as soon as we started talking specifically, I certainly
4 did that with Ms. Palmer. But when we started talking
5 one-on-one it was -- it was fairly easy to be able to let
6 him know about his right to a trial by a jury, what we
7 planned on proving, what they had without the alleged,
8 well, the actual victims in this case, officers who would
9 testify, what they would say.

10 And Mr. Lopez was fully apprised of the entire process
11 as well as his rights as it related to the entire process
12 of a trial and what it actually meant, ultimately, to, to
13 proceed and plead guilty.

14 In reality, Strom in addition to resolving a matter
15 that was waived by Mr. Lopez regarding his prior
16 consultation in this matter when he was in the private
17 bar, was operating in an abundance of caution to bring
18 Mr. Navarro in to interpret.

19 But I never had any problems with communicating with
20 my client as soon as I figured out how, how good his
21 English was.

22 Q. During your meetings with him, did you ever promise
23 him a potential, I guess, not a potential -- excuse me --
24 did you ever promise him a certain sentence or?

25 A. Never promised him but I did discuss with him

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1 something that Barbara was talking around. Barbara was
2 offering -- and I can't say it was an official offer, but
3 basically the victim had suffered a number of medical
4 issues because he was shot in the ab, I believe in the
5 abdomen and Barbara was real concerned about possibly
6 providing some financial relief to them.

7 My client shared with me on numerous occasions that he
8 was a means -- family owned a restaurant or he owned a
9 restaurant in Chicago. And we discussed details about his
10 brother or his cousin bringing, I think it was anywhere --
11 I can't believe -- I can't remember if it was 10- or
12 \$15,000 to pay towards the restitution.

13 It was at that time that we only discussed the
14 possibility of him doing 10 years and then being deported.

15 As soon as Barbara Morgan retired, Strom stepped on
16 the scene and all of that was taken away. And I did
17 explain to Mr. Lopez the different philosophies of
18 different solicitors.

19 And, of course, I worked with both Barbara and also
20 with Strom. And so I knew that different philosophies and
21 I explained that to him as it goes with negotiating these
22 type cases and resolving his.

23 Q. Okay. And you discussed potential deportation as a
24 consequence of this?

25 A. Certainly. Certainly. I mean, you know, I shared

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1 with him that if he pleads to a felony or when he pleads
2 to any of these felonies, because he had a number of
3 charges related to an incident, to the surrounding
4 circumstances, surrounding incident, I clearly said that
5 when he plead he would be ultimately deported but it would
6 be after he serves time in the Department of Corrections,
7 assuming that he didn't get life as soon as the
8 discussions of the 10 years broke down.

9 Q. Okay. Prior to going into that plea hearing, did you
10 advise him or give him any kind of advice to answer the
11 questions in a particular way for Judge Russo?

12 A. No, of course not. I do let my clients know what the
13 questions are. I tell them what the litany that the
14 judges would kind of run down.

15 I even tell them what they're -- really what they're
16 looking for. I share with my clients that even how these
17 things -- I always tell them that these are actually
18 designed to even defeat you coming back saying that you
19 didn't know, you weren't aware.

20 And I tell them what the questions are. So that's why
21 they ask you if, you know, you had any drugs and alcohol
22 over the past 24 hours. And we walk through each and
23 every one of those questions which I always tell my client
24 to answer truthfully.

25 Q. And during the plea hearing, I believe you and

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1 Mr. Lopez both consented to Mr. Navarro being the
2 interpreter; correct?

3 A. Certainly. It was my understanding -- I mean, you
4 know, it was my understanding that he was just going to
5 interpret what was said. And I had no problem with him
6 interpreting what was said.

7 Again, all of this was done just, you know,
8 and suggested by the solicitor, in an abundance of
9 caution.

10 Q. At any time during the plea hearing, did Mr. Lopez
11 turn to you and say he didn't understand something or did
12 he ever indicate to you he didn't understand?

13 A. You know, I just can't recall any specifics, any time
14 that he suggested that he didn't understand. It would
15 just really be inconsistent with all of our discussions
16 and preparations leading up to that as well.

17 Q. Okay. And you believe it was ultimately his decision
18 to enter this plea?

19 A. Yeah, without any question. I mean, certainly he
20 didn't want to, I mean. Certainly, you know, we talked
21 about it.

22 I mean, we would have loved to be able to work that
23 deal. But he had a lot of situations going on by the
24 time -- by the time he pled guilty. There were a lot of
25 murders or violence that was going on in Mexico.

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1 He had told me about family members who were trying to
2 work towards the restitution at the end and I said, look
3 man, that whole discussion is over with. A new solicitor,
4 you know, a new deal.

5 We're forced to come before -- I felt pretty good that
6 the best chances he had, considering the judges that were
7 floating around in the circuit at that time, was Judge
8 Russo who does bend over backwards to kind of help
9 defendants out. And I felt like the best chance that we
10 could have was to be before Judge Russo.

11 MR. CORNEY: I believe that's all I have.

12 THE COURT: All right. Anything?

13 CROSS-EXAMINATION

14 BY MS. TIFFANY:

15 Q. Mr. Chandler, so it's your testimony that in your
16 experience Mr. Lopez could actually speak English?

17 A. Oh, without any question; yes.

18 Q. If he couldn't speak English or understand it very
19 well, it would be definitely ineffective assistance of
20 counsel not to bring an interpreter with you when you were
21 speaking with him?

22 A. Well, if he couldn't speak English, yes, absolutely.
23 When you say not understand it very well, I don't know to
24 what degree you're talking about.

25 But I felt very comfortable that he had a mastery of

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1 it. As I told you before, I even joked around to him,
2 with him about him speaking it better than I did. And
3 certainly --

4 Q. You said --

5 A. -- I had no question as to him understanding concepts
6 based on questions, answers he would give me or questions
7 that he would come back, any concepts that we had talked
8 about in preparation for his plea.

9 Q. You said he was speaking with your staff and that's
10 when you were joking with him about it?

11 A. Yeah. He -- yes, ma'am. What would happen, you know,
12 with me being in court, as I'm in court now, and there are
13 clients who are at Aiken County Detention Center or
14 Barnwell or whoever calling the office, they would speak
15 to my staff and leave messages and talk about, you know,
16 have specific questions about things.

17 Either I'm going to get back to the jail to see them
18 or I would convey a message to them if it's something they
19 need right away when they call collect because they're
20 able to call my office collect. But, yes, at the time
21 that Ms. Palmer was separated I was, you know, concerned
22 about being able, you know, to communicate because
23 Mr. Lopez -- she was with me when Mr. Lopez and she
24 fielded a lot of those telephone calls that Mr. Lopez
25 would call if I was not in the office at the time when he

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1 would call.

2 And, but -- but then when those who couldn't speak
3 Spanish indicated that he was talking to them and he was
4 communicating quite well when I went to talk to him and I
5 was, like, hey man, I didn't know. And he just went on
6 and we just communicated clearly.

7 And that was that first time and after that it was
8 just us discussing everything that went on.

9 Q. Would somebody who could speak English take an English
10 class when they got to jail to learn to speak English?

11 A. Pardon me?

12 Q. When someone who already could speak English, would
13 they take an English class when they got to jail to learn
14 to speak English?

15 A. I mean, I spoke English and I took English in high
16 school and in college. So, I mean, I don't know what
17 reasons anyone would take an English class, but, Mr. Lopez
18 communicated clearly with me.

19 Q. Is it possible that you're remembering another
20 defendant?

21 A. No. I'm, I'm remembering Mr. Lopez to the best of my
22 ability. I mean, I felt very comfortable with my
23 communications with my client.

24 Q. But you had no idea whether he understood or not?

25 A. Well, yes, actually I did. I mean, just like I said,

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1 one way to understand if somebody is understanding what
2 you're saying is their response to you, how clearly they
3 communicate their response, and in their response how
4 they're processing the information that you, you know,
5 that you had just gave them.

6 And from all of those reasons, I'm certainly not an
7 expert in interpretation or anything like that but for all
8 of those reasons and my lifetime of communicating with
9 people, I felt pretty comfortable with the fact that
10 Mr. Lopez understood what I saying.

11 Q. So you had no intention of hiring an interpreter for
12 the guilty plea?

13 A. I, I don't remember any of that entering -- that was a
14 while ago, but I certainly don't remember any of that
15 entering into my mind.

16 Q. So, were you confident enough in his ability to
17 understand English that you weren't going to have an
18 interpreter at his guilty plea?

19 A. That's my understanding. I know that I was confident
20 in my ability to communicate with my client.

21 Q. Why was the solicitor uncomfortable then?

22 A. I think he was just doing it in an abundance of
23 caution. There was already some issues that were going on
24 with his prior consultation with Mr. Lopez's mother as to
25 his representation back when Strom was a solicitor -- I

1 mean, when Strom was in private practice.

2 And I think that everything was just done because of
3 the seriousness of these charges just in abundance of
4 caution.

5 But, you know, I had -- have -- I have Spanish-
6 speaking clients all the time. I have some who need
7 assistance and I have some who frankly don't need
8 assistance. And I make that determination. And Mr. Lopez
9 clearly did not need any assistance.

10 MS. TIFFANY: Nothing further.

11 THE COURT: Anything?

12 MR. CORNEY: That's all.

13 THE COURT: All right. Thank you. You may step
14 down. Anything further from the State?

15 MR. CORNEY: Nothing further.

16 THE COURT: Anything from the applicant?

17 MS. TIFFANY: No, Your Honor.

18 THE COURT: We will recess until 2:30 p.m.

19 END OF PROCEEDINGS: 1:16 P.M.

20 * * *

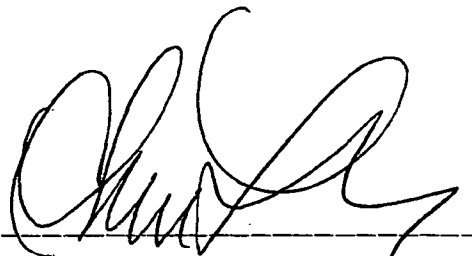
21 CERTIFICATE OF REPORTER

22 I, Cheri L. Young, Registered Professional Reporter,
23 and Official Court Reporter for the State of South
24 Carolina, do hereby certify that the foregoing transcript
25 of proceedings heard on Wednesday, July 12, 2011, in

1 Aiken, South Carolina, was reported by me using machine
2 shorthand and realtime computer-aided translation and is a
3 true, accurate and complete transcript of the proceedings
4 had and evidence introduced in the hearing of the matter.

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

7 I have hereunto set my hand this Saturday, the 3rd day
8 of December, 2011.

9
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11 

12 Cheri L. Young, RPR
13 Official Court Reporter
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STATE OF SOUTH CAROLINA
COUNTY OF AIKEN

IN THE COURT OF COMMON PLEAS
FOR THE SECOND JUDICIAL CIRCUIT

2010-CP-02-0917

Albert Romero Lopez # 333724,

Applicant,

v.

State of South Carolina,

Respondent.

ORDER OF DISMISSAL

FILED 31 August 20 11

Liz Hodard
C.C.P. & C.S.

3:00 Angel Miles am
pm Deputy Clerk

PROCEDURAL HISTORY

This matter comes before the Court by way of an Application for Post-Conviction Relief filed April 22, 2010. The Respondent made its Return on August 10, 2010. An evidentiary hearing into the matter was convened on Tuesday, July 12, 2011, at the Aiken County Courthouse. The Applicant was present at the hearing and was represented by Paige Tiffany, Esquire. The Respondent was represented by Robert D. Corney of the South Carolina Attorney General's Office.

At the hearing, the Applicant testified on his own behalf. Also testifying was Applicant's trial counsel, Everett Chandler, Esquire ("counsel"). Louis Navarro, Esquire, of the Aiken County Solicitor's office was present as a sworn, court certified translator for Applicant. This Court also had before it a copy of the transcript of the proceedings against the Applicant, the records of the Aiken County Clerk of Court, the Applicant's records from the South Carolina Department of Corrections.

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

County Clerk of Court. The Applicant was indicted at the July 2006 term of the Aiken County Grand Jury for Kidnapping (2006-GS-02-1166), Resisting Arrest with a Deadly Weapon (2006-GS-02-1167), Possession of Firearm or Knife during Commission of or Attempt to Commit a Violent Crime (2006-GS-02-1168), Assault and Battery with Intent to Kill ("ABWIK") (2006-GS-02-1169), and Kidnapping (2006-GS-02-1170). Everett K. Chandler, Esquire, represented him on the charges. On March 12, 2009, Applicant pled guilty as indicted. The Honorable Thomas A. Russo sentenced him to thirty (30) years for each count of Kidnapping (concurrent); ten (10) years confinement for resisting arrest with a deadly weapon (consecutive to Kidnapping, 2006-GS-02-1166); five (5) years confinement for Possession of Firearm or Knife during Commission of or Attempt to Commit a Violent Crime (concurrent); and twenty (20) years confinement for ABWIK (concurrent).

A Motion to Reconsider and to Reduce or Alter Sentence was filed on Applicant's behalf. By an order filed February 22, 2010, Judge Russo denied the motion.

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

1. Ineffective assistance of counsel.
 - a. "Counsel was ineffective by failing to put the Court on notice that prosecuting attorney/ Strom Thurmond, Jr., had involvement with applicant's case when he was a practicing defense attorney and then later assigned and prosecuted applicant's case as prosecuting attorney. ..."
 - b. "Trial counsel was ineffective by promising applicant three (3) years and once applicant entered his plea of guilty, he was sentenced to forty (40) years. ..."
 - c. "Trial counsel was ineffective by failing to object to applicant being sentenced consecutively where offenses were so closely connected in time that under S.C. Law shall be treated as one offense. ..."
 - d. "Trial counsel was ineffective by failing to request that applicant be sentenced under the Youthful Offender Act of South Carolina. ..."

- e. "Counsel was ineffective by failing to provide applicant with translator or interpreter whereas applicant was Hispanic Mexican origin and understood very little and limited English."

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony at the post-conviction relief hearing. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility and weigh their testimony accordingly. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (1985).

In a post-conviction relief action, the Applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 286 S.C. 441, 334 S.E.2d 813 (1985).

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

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the Applicant must prove that counsel's performance was deficient. Under this

prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

With respect to guilty plea counsel, the Applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed. 2d 203 (1985). In PCR cases, a defendant asserting a constitutional violation must frame the issue as one of ineffective assistance of counsel. Al-Shabazz v. State, 338 S.C. 354, 527 S.E.2d 742 (1999). A defendant who pleads guilty on the advice of counsel may collaterally attack the plea only by showing that (1) counsel was ineffective and (2) there is a reasonable probability that but for counsel's errors, the defendant would not have pled guilty and would have insisted on going to trial. Roscoe v. State, 345 S.C. 16, 546 S.E.2d 417 (2001). A defendant alleging that his guilty plea was induced by ineffective assistance of counsel must prove that counsel's advice was not "within the competence demanded of attorneys in criminal cases." Hill v. Lockhart, 474 U.S. 52, 56, 106 S. Ct. 366, 369 (1985). A guilty plea is a solemn, judicial admission of the truth of the charges against the defendant. Statements made during the plea should be considered conclusive unless the defendant presents reasons why he should be allowed to depart from the truth of those statements. Crawford v. U.S., 519 F.2d 347 (4th Cir. 1975); Edmonds v. Lewis, 546 F.2d 566 (4th Cir. 1976).

assistant left her position with counsel's firm, counsel met with Applicant without a translator present. Counsel went on to say that based on those meetings, he had no doubt that Applicant spoke and understood English very well, and that Applicant was able to fully understand their conversations about the pending charges based on Applicant's responses to the conversations. Counsel went on to say that Applicant called his office several times during which he spoke fluent English to his office staff as well. Additionally, counsel testified that Applicant was part of a discussion with several English speaking people in which he discussed potential restitution payments for the crimes as part of his sentence. Counsel recalled he spoke with Applicant about his constitutional rights, the charges and all potential sentences he was facing including deportation, all of which he was sure Applicant fully understood. Counsel stated that he felt no need for an interpreter to be present at the plea hearing, but the State requested Mr. Navarro interpret simply out of an abundance of caution. Finally, counsel testified that it was ultimately Applicant's decision to enter the plea.

This Court finds Counsel's testimony to be credible and persuasive into the issue of whether Applicant actually understood the conversations and concepts that he discussed with counsel during the course of counsel's representation. Conversely, I find Applicant's testimony to not be credible. Counsel advised Applicant of all relevant issues regarding the charges he was facing, including his constitutional rights, the facts giving rise to the charges and the potential sentences he was facing including deportation, and the Applicant understood those discussions. Additionally, counsel gave Applicant all the information and advice to make an intelligent and voluntary decision on whether to enter this plea and, based on counsel's testimony, at no point did counsel have reason to suspect Applicant did not understand. Based on the facts above, I find that Applicant did not prove by a preponderance of the evidence that counsel was ineffective in

Ineffective Assistance of Counsel

At the PCR hearing, Applicant waived the allegations set forth in his application and pursued only the claim that counsel was ineffective for not having a translator present at his meetings with Applicant, as Applicant is a native Spanish speaker. Applicant started by testifying that he was born in Mexico, but moved to the United States at the age of fifteen, roughly twelve years before this hearing. He stated at the time of his arrest in 2006, he spoke and understood very little English. Applicant went on to testify he met with counsel four or five times leading up to the plea hearing, but counsel only brought an interpreter to their first meeting. Applicant testified that during those meetings, he did not recall whether counsel advised him of his constitutional rights. Applicant went on to say, based on his discussions with counsel, he knew he was facing up to ninety years in jail, but thought he would get either deported to Mexico or a ten year jail sentence. Applicant testified that the entire plea hearing was translated in Spanish to him, but he did not understand the concepts relayed to him; however, because he thought he was receiving a ten year sentence, he did not ask any questions or tell anyone he didn't understand the plea.

Louis Navarro, the certified court interpreter both at the PCR hearing and at Applicant's plea hearing was called to testify by the Applicant as well. Navarro started by explaining his duties as a court interpreter. Navarro went on to say he was unable to meet with Applicant prior to the plea hearing, but that at no point during the plea did Applicant bring to Navarro's attention that he couldn't understand something that was said by either attorney or the judge.

Counsel then testified stating that he did not see any need for an interpreter after his meetings with Applicant. Counsel stated that during his initial two or more meetings with Applicant, he brought along his office assistant who was fluent in Spanish to translate. After his

his representation, namely for failing to provide a Spanish interpreter during their meetings. Further, I find that Applicant's guilty plea was entered knowingly and voluntarily after being fully and adequately advised by competent counsel acting within the range of competence demanded of attorneys in criminal cases.

As discussed above, the Applicant has failed to carry his burden in this action. Therefore, this Court finds that the application must be denied and dismissed in its entirety.

CONCLUSION

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

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

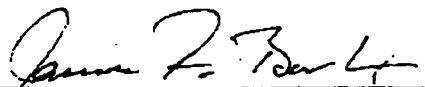
This Court advises Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the

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

IT IS THEREFORE ORDERED:

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

AND IT IS SO ORDERED this 2 day of August, 2011.



 James R. Barber, III
 Presiding Judge
 Second Judicial Circuit

Columbia, South Carolina.

STATE OF SOUTH CAROLINA)
COUNTY OF AIKEN)

INDICTMENT

At a Court of General Sessions, convened on July 17, 2006, the Grand Jurors of Aiken County present upon their oath:

RESISTING ARREST WITH A DEADLY WEAPON

That ALBERTO ROMERO LOPEZ A/K/A JOSE BALDERAS, seventeen years of age or older, did in Aiken County on or about May 2, 2006, resist the efforts of Officer Chris Chavous, a law enforcement officer of this State, to make a lawful arrest with the use or threat of use of a deadly weapon, to wit: handgun against the officer when the said defendant was in possession and/or claimed to be in possession of the said deadly weapon.

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


BARBARA R. MORGAN, SOLICITOR

4m2120

WITNESSES

B. Wertz, A.C.S.O.

FILED

July 13 2006

Luiz Anderson
C.C.C.P. & G.S.

Jessie Thompson
Deputy Clerk

ARREST WARRANT NUMBER

K-065132

ACTION OF GRAND JURY

True Bill

Foreperson of Grand Jury

Date: July 13, 2006

Thaddeus Richard

VERDICT

Foreperson of Petit Jury

Date:

DOCKET NO. 2006-GS-02

1167

The State of South Carolina

County of Aiken

COURT OF GENERAL SESSIONS

July 17, TERM 2006

THE STATE

vs.

**ALBERTO ROMERO LOPEZ
A/K/A JOSE BALDERAS**

Indictment for

**RESISTING ARREST
WITH A DEADLY WEAPON**

SC Code: 16-3-625

CDR Code: 2352

Class FEL-E

STATE OF SOUTH CAROLINA)
COUNTY OF AIKEN)

INDICTMENT

At a Court of General Sessions, convened on July 17, 2006, the Grand Jurors of Aiken County present upon their oath:

KIDNAPPING

That ALBERTO ROMERO LOPEZ A/K/A JOSE BALDERAS did in Aiken County on or about May 2, 2006, unlawfully seize and confine Julietta Diaz without authority of law, all in violation of §16-3-910 of the Code of Laws of South Carolina (1976), as amended.

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


BARBARA R. MORGAN, SOLICITOR

DOCKET NO. 2006-GS-02 - 1166

10
WITNESSES

B. Wertz, A.C.S.O.

The State of South Carolina

County of Aiken

FILED

July 13, 2006

L. J. Anderson
J.C.C.P. & G.S.

Spencer Thompson
Deputy Clerk

COURT OF GENERAL SESSIONS

JULY 17, TERM 2006

ARREST WARRANT NUMBER

K-065130

THE STATE

VS.

ACTION OF GRAND JURY

True Bill

ALBERTO ROMERO LOPEZ
A/K/A JOSE BALDERAS

Foreperson of Grand Jury

Date: July 13, 2006

Fred R. Riche

VERDICT

Indictment for

KIDNAPPING

SC Code: 16-3-910

CDR Code: 0095

Class FEL-A

Foreperson of Petit Jury

Date:

STATE OF SOUTH CAROLINA)
COUNTY OF AIKEN)

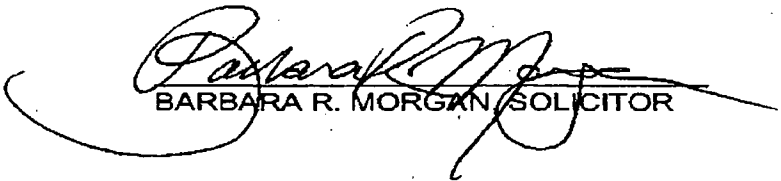
INDICTMENT

At a Court of General Sessions, convened on July 17, 2006, the Grand Jurors of Aiken County present upon their oath:

KIDNAPPING

That ALBERTO ROMERO LOPEZ A/K/A JOSE BALDERAS did in Aiken County on or about May 2, 2006, unlawfully seize and confine Maria Diaz without authority of law, all in violation of §16-3-910 of the Code of Laws of South Carolina (1976), as amended.

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


BARBARA R. MORGAN, SOLICITOR

CM 3/20

WITNESSES

B. Wertz, A.C.S.O.

FILED July 13 2006
[Signature]
U.C.C.P. & G.S.
[Signature]
Deputy Clerk

ARREST WARRANT NUMBER

K-065131

ACTION OF GRAND JURY

True Bill

Foreperson of Grand Jury
Date: July 13, 2006

[Signature]

VERDICT

Foreperson of Petit Jury
Date:

DOCKET NO. 2006-GS-02 - 1170

The State of South Carolina

County of Aiken

COURT OF GENERAL SESSIONS

JULY 17, TERM 2006

THE STATE

VS.

**ALBERTO ROMERO LOPEZ
A/K/A JOSE BALDERAS**

Indictment for

KIDNAPPING

SC Code: 16-3-810
CDR Code: 0095
Class FEL-A

STATE OF SOUTH CAROLINA)
COUNTY OF AIKEN)

INDICTMENT

At a Court of General Sessions, convened on July 17, 2006, the Grand Jurors of Aiken County present upon their oath:

ASSAULT AND BATTERY WITH INTENT TO KILL

That ALBERTO ROMERO LOPEZ A/K/A JOSE BALDERAS did in Aiken County on or about May 2, 2006, with malice aforethought commit an assault and battery upon one Alejandro Morales with intent to kill the said victim. All in violation of §16-3-620 of the Code of Laws of South Carolina (1976), as amended.

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


BARBARA R. MORGAN, SOLICITOR

dm 3/20

WITNESSES

B. Wertz, A.C.S.O.

FILED

July 13 2006

[Signature]
C.C.P. & G.S.

[Signature]
Deputy Clerk

ARREST WARRANT NUMBER

K-065134

ACTION OF GRAND JURY

True Bill

Foreperson of Grand Jury

Date: July 13, 2006

[Signature]

VERDICT

Foreperson of Petit Jury

Date:

DOCKET NO. 2006-GS-02 -

1169

The State of South Carolina

County of Aiken

COURT OF GENERAL SESSIONS

JULY 17, TERM 2006

THE STATE

vs.

ALBERTO ROMERO LOPEZ

AK/A JOSE BALDERAS

Indictment for

**ASSAULT AND BATTERY WITH
INTENT TO KILL**

SC Code: 16-3-620

CDR Code: 014

Class FEL-C(V)

STATE OF SOUTH CAROLINA)
COUNTY OF AIKEN)

INDICTMENT

At a Court of General Sessions, convened on July 17, 2006, the Grand Jurors of Aiken County present upon their oath:

**POSSESSION OF FIREARM OR KNIFE DURING COMMISSION OF OR
ATTEMPT TO COMMIT A VIOLENT CRIME**

That ALBERTO ROMERO LOPEZ A/K/A JOSE BALDERAS did in Aiken County on or about May 2, 2006, possess or visibly display a firearm or visibly display a knife during the commission or attempted commission of a violent crime, to wit: Assault And Battery With Intent To Kill, all in violation of Section 16-23-490, Code of Laws of South Carolina (1976), as amended.

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


BARBARA R. MORGAN, SOLICITOR

STATE OF SOUTH CAROLINA)
COUNTY OF AIKEN)

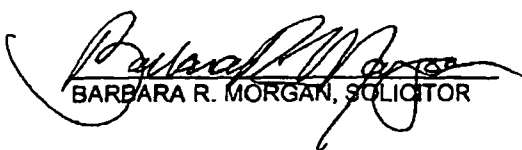
INDICTMENT

At a Court of General Sessions, convened on July 17, 2006, the Grand Jurors of Aiken County present upon their oath:

POSSESSION OF FIREARM OR KNIFE DURING COMMISSION OF OR
ATTEMPT TO COMMIT A VIOLENT CRIME

That ALBERTO ROMERO LOPEZ A/K/A JOSE BALDERAS did in Aiken County on or about May 2, 2006, possess or visibly display a firearm or visibly display a knife during the commission or attempted commission of a violent crime, to wit: Assault And Battery With Intent To Kill, all in violation of Section 16-23-490, Code of Laws of South Carolina (1976), as amended.

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


BARBARA R. MORGAN, SOLICITOR

WITNESSES

B. Wertz, A.C.S.O.

FILED

July 13 2006

W.C.C.P. & G.S.

Spencer Thompson
Deputy Clerk

ARREST WARRANT NUMBER

K-065133

ACTION OF GRAND JURY,

True Bill

Foreperson of Grand Jury

Date: July 13, 2006

VERDICT

Foreperson of Petit Jury

Date:

DOCKET NO. 2006-GS-02 -

1168

The State of South Carolina

County of Aiken

COURT OF GENERAL SESSIONS

JULY 17, TERM 2006

THE STATE

, vs. ,

ALBERTO ROMERO LOPEZ
A/K/A JOSE BALDERAS

Indictment for
POSSESSION OF FIREARM OR KNIFE
DURING COMMISSION OF OR
ATTEMPT TO COMMIT A VIOLENT
CRIME

SC Code: 16-23-490

CDR Code: 549

Class FEL-F