

THE STATE OF SOUTH CAROLINA
In the Supreme Court

 ORIGINAL

APPEAL FROM CHARLESTON COUNTY
Court of General Sessions

RECEIVED

J. C. Nicholson, Circuit Court Judge

SEP 07 2016

S.C. SUPREME COURT

Appellate Case No. 2015-001576

The State of South Carolina.....Respondent/Petitioner,

v.

Venancio Diaz Perez Petitioner/Respondent.

RESPONSE BRIEF OF PETITIONER/RESPONDENT VENANCIO DIAZ PEREZ

Jason Scott Luck
jluck@seibelsfirm.com
SEIBELS LAW FIRM, P.A.
38 Broad Street, Suite 200
Charleston, SC 29401
843.722.6777 (phone)
843.722.6781 (telefax)

and

Robert M. Dudek
rdudek@sccid.sc.gov
S.C. Comm'n on Indigent Defense
1330 Lady St., Suite 401
Columbia, SC 29201
803.734.1330 (phone)

Attorneys for Petitioner/Respondent
Venancio Diaz Perez

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QUESTION PRESENTED

The State's Question Presented in its July 23, 2015, Petition for Certiorari was as follows:

Inasmuch as the Record on Appeal clearly establishes the sentence in this case was not based upon Respondent's exercise of his right to a trial by jury, but upon the trial court's proper consideration of the crimes of which Respondent was convicted and the evidence presented, did the Court of Appeals err in setting aside Respondent's sentences and remanding for resentencing?

(State's Pet. p. 4). The State's Question Presented in its Principal Brief differs slightly:

Inasmuch as the Record on Appeal clearly establishes the sentence in this case was not based on upon Petitioner-Respondent's exercise of his right to trial by jury, but upon the trial court's proper consideration of the crimes of which Petitioner-Respondent was convicted and the evidence presented, did the Court of Appeals err in setting aside Petitioner-Respondent's sentences and remanding for resentencing, especially since such relief exceeded that requested by Petitioner-Respondent?

(State Prin. Brief p. 4).

Perez asks that the State be held to the Question Presented from its Petition.

STATEMENT OF THE CASE

On July 15, 2010, Petitioner/Respondent Venancio Diaz Perez was arrested for Criminal Sexual Conduct with a Minor. (R. p. 12). Perez's accuser was a minor female (Minor 1) whom his wife babysat in their home. (R. pp. 10-13, 16-17, 134, 432, 434, 438-39). On November 8, 2010, he was formally indicted for Criminal Sexual Conduct with a Minor ("CSC")¹ and Lewd Act on a Minor ("Lewd Act").² (R. pp. 10, 16). The charges were tried together January 14-18, 2013, before Judge J.C. Nicholson in Charleston,

¹ S.C. Code § 16-3-655(A) (Supp. 2010).

² S.C. Code § 16-15-140 (Supp. 2010).

South Carolina. (R. p. 18). The State was represented by Deborah Herring-Lash and Jennifer McCoy of the Charleston County Solicitor's Office, and Perez was represented by the late Andrew Grimes and Christina Parnall of the Charleston County Public Defender's Office. (R. p. 18).

Before trial began, counsel for the State and for Perez met with the trial judge for what the judge referred to as an "informal conference". (R. pp. 554-55, 660). At this conference, the trial judge stated that if the case was tried before him non-jury, he would find Perez guilty of Assault and Battery of a High and Aggravated Nature³ ("ABHAN" – a lesser included offense of CSC) and Lewd Act. (R. p. 554, 660). The trial judge then made a plea offer to Perez, which the trial judge later described: "If you wanted to enter a plea I would do away with the high and aggravated and let him plead to the lewd act and give you a range of 10 to 15." (R. pp. 554-55). Perez refused this offer, and trial proceeded.

On January 14, 2013, the trial court held a pretrial hearing on the admissibility of the testimony of Minor 2. Minor 2 was another child Perez's wife babysat, and the State sought to introduce Minor 2's accusations under Rule 404(b), SCRPC. (R. pp. 438-39, 552).⁴ After taking testimony from Minor 1 and Minor 2 in camera, the trial court, over Perez's objection, ruled Minor 2 would be allowed to testify under Rule 404(b), citing State v. Wallace, 384 S.C. 428, 683 S.E.2d 275 (2009). (R. pp. 113-14). At this hearing the Court also ruled Perez would be allowed to examine Mother 1 (Minor 1's mother) about her immigration status and her application for a U visa (her application was based

³ State v. Fennell, 340 S.C. 266, 274, 531 S.E.2d 512, 516-17 (2000).

⁴ The State dismissed its case against Perez arising out of Minor 2's accusations. (R. p. 552).

on Minor 1's accusations against Perez).⁵ Trial commenced the same day, with Perez re-asserting his objections as the State presented the objectionable testimony of Minor 2; the trial court overruled these objections. (R. pp. 240, 249, 468).

On January 15, 2013, Mother 1 testified as to her residency status and U visa application. Later that day, Mother 2 testified; however, when Perez's counsel attempted to cross-examine Mother 2 on her residency status and U visa application, the trial court *sua sponte* excluded any cross examination on these subjects. (R. pp. 259-60, 265-66). The trial court later allowed a proffer of Mother 2's testimony, where she testified that she was given information on obtaining a U visa when she brought Minor 2 in for "questioning and exam". (R. pp. 263-65).

On January 16, 2013, the trial court excused juror number 102 for performing unauthorized research "on the visa kits or visa situation." (R. p. 368). The state concluded its case that day without presenting any physical evidence of Perez's guilt. Perez's defense, presented the same day, was to question the credibility of the accuser: "...our theory of defense is...this never happened...She's making it up for whatever reason..." (R. pp. 106, 127-28).

On January 17, 2013, the parties gave closing arguments and the trial court charged the jury. In his closing, Perez's counsel also noted the polished, yet inconsistent, nature of Minor 1's accusations. (R. pp. 479-80). Perez's counsel also argued that Mother

⁵ A U visa ("U nonimmigrant status") legalizes the status of an undocumented immigrant who "...been helpful, is being helpful, or is likely to be helpful to a certifying agency in the investigation or prosecution of the qualifying criminal activity..." 8 C.F.R. § 214.14(b)(3). A U visa requires the certification of an agency in the investigation or prosecution in the qualifying criminal activity. *Id.* (R. p. 301 ll. 18-23). The qualifying agency can, at any time, withdraw this certification and thus revoke a U visa holder's ability to remain in this country legally. 8 C.F.R. § 214.14(i)(A). Please see Section II of Perez's Principal Brief for more information on U visas.

I was using Minor 1 to obtain legal status in this country. (R. p. 485). One of the charges the trial court presented to the jury was the following:

The testimony of a victim may not be corroborated in prosecutions [of Criminal Sexual Conduct]. The victim is defined as the complaining witness.

(R. pp. 526). Perez objected to the inclusion of this charge, which the trial court overruled. (R. pp. 529-30).

On January 18, 2013, the jury arrived at a verdict. (R. pp. 470-515, 535). The jury acquitted Perez of CSC, but found him guilty of the lesser-included offense of ABHAN; they also found Perez guilty of Lewd Act. (R. pp. 9, 15, 553-54). The trial court sentenced Perez to ten years imprisonment for the former, and fifteen years imprisonment for the latter (the maximum for each offense). (R. pp. 8, 14, 554-56). The trial court ordered these sentences to be served consecutively. (R. pp. 8, 14, 554-56). At this time, Perez objected to this sentence in the following exchange:

Defense Counsel: Your Honor, one more matter. I normally don't bring this up but given the sentence we would object to it as being vindictive.

Trial Court: I'm sorry, what now?

Defense Counsel: We object to the sentence being run consecutively as being vindictive and punishing Mr. Perez for going to trial. I think there were -- and this is where I'm a little reluctant to go into detail but we did have -- I think I have to, to preserve Mr. Perez's rights to make the record clear. We did have an in-chambers conference where we talked about potential pleas --

Trial Court: I didn't have an in-camera conference. I was talking to the two of you unofficially, off the record trying to work out a plea. Now, if you want to put that on the record I'll put that on the record. I very clearly told you that if I was trying this case nonjury I would find him guilty of lewd act and high and aggravated. If you wanted to enter a plea I would do away with the high and aggravated and let him plead to the lewd act and give you a range of 10 to 15.

Defense Counsel: Yes, sir.
Trial Court: That's what I told you.
Defense Counsel: Yes, sir.
Trial Court: Now, if you want to take exception to that, that's fine. That was an informal conference where I was trying to assist you and the solicitor in dismissing the case. Is that what you were doing?
Defense Counsel: Yes, sir.
Trial Court: Because if it is it's the last time I will speak with you without a court reporter present.
Defense Counsel: I apologize. But, yes, sir. I think I have to.
Trial Court: Pardon? It was not an in-camera hearing. I was trying to facilitate the disposition of this case.
Defense Counsel: I apologize if I mischaracterized a hearing. You are correct. It was unofficial. It was off the record, but that was what was said.
Trial Court: Pardon?
Defense Counsel: That's an accurate summary of what was said.
Trial Court: Okay. Now, do you want to make a motion on that, what I put on the record?
Defense Counsel: Yes, sir.
Trial Court: What's your motion?
Defense Counsel: That running these sentences consecutively is punishing Mr. Perez for his right to go to trial.
Trial Court: Motion is denied. This Court is of the opinion that the little girl was abused. This Court is also of the opinion that there was penetration, digital penetration based upon her sworn testimony. The jury has found her not guilty. The Court's of the opinion he's guilty of all the charges from the testimony I've heard. So it's not any abuse in giving him the consecutive. You understand?
Defense Counsel: Yes, sir.
Trial Court: All right. Motion denied. Anything else?
Defense Counsel: No, sir.
Trial Court: Thank you very much.

(R. p. 554 l. 7 – p. 556 l. 17).

Perez served his Notice of Appeal on January 25, 2013. (R. p. 6-7). The Court of Appeals heard oral arguments on February 5, 2015, and issued its opinion on April 29,

2015, affirming in part and reversing in part the trial court. (R. pp. 652-57).⁶ The Court of Appeals held that (1) the trial court did not err in admitting Minor 2's Lyle testimony; (2) the trial court violated the Confrontation Clause by excluding Mother 2's U visa testimony, but this error was harmless; and (3) the trial court violated the Due Process clause with its vindictive sentence. The Court of Appeals ordered that Perez be re-sentenced, though the opinion is silent as to which judge shall re-sentence him. (R. p. 656).

The State filed a Motion to Seal the record on or about April 29, 2015, which the Court of Appeals denied by order dated May 8, 2015. (R. pp. 647-51). The Court of Appeals refiled its opinion on May 8, 2015, redacting the name of the mother of one of the witnesses. (R. pp. 652-57). Both the State and Perez filed Petitions for Rehearing on May 13, 2015, which the Court of Appeals denied by order dated June 23, 2015. (R. pp. 658-94).

Perez and the State filed Petitions for a Writ of *Certiorari* on July 23, 2015. This Court granted both petitions by order dated June 16, 2016.

ARGUMENT

The Court of Appeals found that the trial court's sentenced Perez on the basis of his choice to pursue a jury trial and on the basis that the trial court believed he was guilty of CSC. (R. pp. 655-56). This decision is correct and should be affirmed.⁷

⁶ Please note this is the version of the opinion re-filed on May 8, 2015, which redacts the name of Mother 2.

⁷ Perez, however, has petitioned this Court to reverse the remainder of the Court of Appeals' rulings.

“A [trial court] or other sentencing authority is to be accorded very wide discretion in determining an appropriate sentence, and must be permitted to consider any and all information that reasonably might bear on the proper sentence for the particular defendant, given the crime committed.” State v. Hicks, 377 S.C. 322, 325, 659 S.E.2d 499, 500 (Ct. App. 2008). “A sentence will not be overturned absent an abuse of discretion when the ruling is based on an error of law or a factual conclusion without evidentiary support.” In re M.B.H., 387 S.C. 323, 326, 692 S.E.2d 541, 542 (2010). A trial court abuses its discretion in sentencing when it considers the fact that the defendant exercised his right to a jury trial. State v. Hazel, 317 S.C. 368, 370, 453 S.E.2d 879, 880 (1995).^{8]}

State v. Perez, No. 2015-UP-217 (S.C. Ct. App. filed May 18, 2015) see also Castro v. State, Op. No. 27648 (S.C.Sup.Ct. filed July 20, 2016) (Shearouse Adv.Sh. No. 29 at 19-20) (“When a trial judge considers the fact that the defendant exercised his or her constitutional right to a jury trial as a factor in sentencing the defendant, it is an abuse of discretion.”). A “factual conclusion without evidentiary support” as described above is a conclusion not based on “relevant, reliable and trustworthy” evidence. State v. Gulledge, 326 S.C. 220, 229, 487 S.E.2d 590, 594 (1997). Additionally, a sentence must be reversed when the sentencing judge acted with partiality, prejudice, or pressure. Garrett v. State, 320 S.C. 353, 356, 465 S.E.2d 349, 350 (1995).

The State first argues that “[t]he record is absolutely devoid of any evidence that the trial court based any part of its sentence on [Perez] exercising his right to go to trial.” (State’s Prin. Brief p. 14 – Sec. I.A.). The State’s first argument ignores the following facts:

⁸ A trial court may not impose a greater sentence on a defendant because the defendant exercised his constitutional right to stand trial rather than plead guilty. See e.g. Alabama v. Smith, 490 U.S. 794 (1989); Davis v. State, 336 S.C. 329, 520 S.E.2d 801 (1999). The South Carolina and United States Constitutions grant every criminal defendant the absolute right to plead not guilty and to be tried by a jury. U.S. Const. art. III, § 2; U.S. Const. amend. VI; S.C. Const. art. I, § 14.

- (a) Before trial began, the trial court (not the State) offered Perez a plea deal. The trial court's off-the-record plea negotiations were a violation of ABA Standard 14-3.3(f):

All discussions at which the judge is present relating to plea agreements should be recorded verbatim and preserved, except that for good cause the judge may order the transcript of proceedings to be sealed. Such discussions should be held in open court unless good cause is present for the proceedings to be held in chambers. Except as otherwise provided in this standard, the judge should never through word or demeanor, either directly or indirectly, communicate to the defendant or defense counsel that a plea agreement should be accepted or that a guilty plea should be entered.

Harden v. State, 276 S.C. 249, 255, 277 S.E.2d 692, 694-95 (1981). While this standard is not strictly the law of South Carolina, its reasoning is sound; further, it is persuasive and instructive. See State v. Blakely, 402 S.C. 650, 663, 742 S.E.2d 29, 36 (Ct. App. 2013).

- (b) Subsequent to Perez's rejection of the plea deal, the trial court ruled to allow Minor 2 to testify as to her allegations against Perez. Minor 2's accusations did not result in Perez's conviction for any crime, but their effect on the jury's perception of Perez should be self-evident.
- (c) Subsequent to Perez's rejection of the plea deal, the trial court *sua sponte* excluded any evidence regarding Mother 2's immigration status, which was relevant to the veracity of Minor 2's allegations and further crippled Perez's defense. Please see Section II.A of Perez's Principal Brief for more information on how the exclusion of Mother 2's testimony injured Perez's defense.
- (d) When charging the jury, the trial court, over Perez's trial counsel's objection, charged the jury a charge found unconstitutional (and thus reversible error) by this Court

months ago in State v. Stukes, Op No. 27633 (S.C.Sup.Ct. May 4, 2016) (Shearouse Adv.Sh. No. 18 at 25). (R. p. 526).

- (e) When the jury acquitted Perez of CSC, but convicted him of ABHAN and Lewd Act, the trial court sentenced Perez to the maximum sentences⁹ for both offenses and ordered they be served consecutively. Perez's trial counsel objected to this sentence as vindictive. This was the appropriate time for the trial court to place on the record its reasoning for the sentence. After making the statement "...it's the last time I will speak to you without a court reporter present" the trial made the following statements in support of Perez's sentence (from R. p. 556, re-formatted):

"This Court is of the opinion that the little girl was abused."

This is a statement of opinion, not fact, and is evidence of partiality and/or prejudice.

"This Court is also of the opinion that there was penetration, digital penetration based upon her sworn testimony."

As set forth below, if the jury had found the State had proven digital penetration it would have to had found Perez guilty of CSC.

"The jury has found her not guilty."

This statement is puzzling and irrelevant, and is evidence of partiality and/or prejudice.

"The Court's of the opinion he's guilty of all the charges from the testimony I've heard."

⁹ The State contends that the trial court's sentence of ten years for ABHAN and fifteen years for Lewd Act was "less than the statutory maximum", but the State is mistaken. (State's Prin. Brief p. 15). "ABHAN is a common law misdemeanor punishable by *up to ten years* in prison." State v. Fennell, 340 S.C. 266, 274, 531 S.E.2d 512, 516 (2000) (emphasis added). Further, "[a] person violating the provisions of this section [Lewd Act] is guilty of a felony and, upon conviction, must be fined in the discretion of the court or imprisoned *not more than fifteen years*, or both." S.C. Code § 16-15-140 (Supp. 2010) (emphasis added).

This is a statement of opinion and/or a repetition of the belief that there was digital penetration.

Most of these statements do not refer to any evidence at all, much less “relevant, reliable and trustworthy” evidence. However the statements do refer to partiality, prejudice, pressure, or a desire to punish Perez for his choice to proceed to a jury trial.

The State next argues that the Court of Appeals’ citation of the trial court’s opinion there was digital penetration “overlook[ed] the context in which the statement was made[.]” (State’s Prin. Brief p. 17 – Sec. I.B). Perez agrees that the statement needs to be examined in context. However, when examined in the context of a structurally unfair trial (described above), the trial court’s statements becomes a *stronger* indicator of a decision-making process guided by partiality, prejudice, pressure, and punitive motive.

The State next argues that even if the trial court had considered digital penetration, the jury could have found there was digital penetration and nonetheless found Perez guilty of ABHAN. (State’s Prin. Brief Sec. I.C). This assertion is incorrect.

The State’s argument does not comport with the charge given by the trial court:

The defendant is charged with first degree criminal sexual conduct with a minor. The State must prove beyond a reasonable doubt that the defendant engaged in a sexual battery with the victim.

A sexual battery is sexual intercourse, cunnilingus, fellatio, anal intercourse or any intrusion, however slight, of any part of a person’s body or any object into the genital or anal openings of another person’s body except when the intrusion is accomplished for medically recognized treatment or diagnostic purposes.

The State must prove beyond a reasonable doubt that the victim was less than 11 years old at the time of the sexual battery.

...

If you find that the State has failed to prove that the defendant is not guilty of criminal sexual conduct first degree you must then decide whether the State has proven the defendant’s guilt of assault and battery of a high and aggravated nature.

In order to prove assault and battery of a high and aggravated nature the State must prove beyond a reasonable doubt that the defendant committed an assault and battery with a circumstance of aggravation. A circumstance of aggravation can be the taking of indecent liberties or familiarities with a female.

(R. p. 523 l. 24 – p. 525 l. 4). The law charged to the jury states that if they find “sexual battery” (i.e. digital penetration), then CSC is appropriate. However, the inverse of this charge is equally true: if the jury does *not* find “sexual battery” (i.e. digital penetration), then CSC is *inappropriate*. This is consistent with South Carolina case law:

The critical factual issue is whether an attempted sexual battery occurred. Sexual battery is defined as “...sexual intercourse, cunnilingus, fellatio, anal intercourse, or any intrusion, however slight, into any part of a person's body...”. S.C. Code Ann. § 16–3–651(h) (Supp.1985). If the jury had believed appellant “did not want to do anything” with the victim, they could have concluded there was no attempted sexual battery and found him guilty of ABHAN.

State v. Drafts, 288 S.C. 30, 34, 340 S.E.2d 784, 786 (1986). The trial court’s consideration of digital penetration, a necessary element of a crime of which Perez had been acquitted, was inappropriate. While a court may consider acquitted conduct when fashioning a sentence, this conduct must be proven by a preponderance of the evidence. United States v. Watts, 519 U.S. 148, 157 (1997). The record does not reflect such finding. The record does reflect, however, that the trial court considered conduct the jury believed did not occur; in light of the trial court’s other statements, this is evidence of bias, partiality, or pressure.

The State next argues that if resentencing is proper, it is only proper as to ABHAN, and not Lewd Act. (State’s Prin. Brief Sec. I.D). This argument is based on an erroneous belief the Court of Appeals’ opinion held only the ABHAN sentence was vindictive. This contradicts the plain language of the Court of Appeals. (R. p. 656). Even

if this reading of the Court of Appeals' opinion was correct, the entire sentence must be set aside. Mere consideration of a defendant's choice to seek a jury trial so taints the process that reversal is necessary. Castro, *supra*. The State presents no case or framework how by this taint may apply to only part of a sentence and not another. Finally, common sense dictates that the sentences for ABHAN and Lewd Act in this action are so intertwined and interrelated it is a practical impossibility to set aside one without setting aside the other.

The State's final argument is a hyper-technical "Hail Mary", claiming that because Perez's trial counsel did not specifically request resentencing, the appellate court may only consider an objection to consecutive sentences. (State's Prin. Brief Sec. I.D). Perez believes that trial counsel's objection fairly encompassed a request for resentencing, as well as for a new trial. Accusing a trial judge of vindictiveness is an act fraught with peril, as confirmed the trial judge's comments in this case. Any further discussion of sentencing would have served no useful purpose and could have placed Perez, or his counsel, in jeopardy. To the extent any ground for appeal for vindictiveness appears unpreserved, it squarely falls under the "futility" exception for preservation:

To preserve a challenge to sentencing, an appellant must raise the issue to the trial court. State v. Johnston, 333 S.C. 459, 510 S.E.2d 423 (1999). Higgenbottom objected to his original sentence and received a higher sentence on resentencing. If Higgenbottom objected to his sentence in this resentencing scenario, surely he would place himself in a perilous posture. The "rule of futility" should save Higgenbottom from the clutches of Johnston. In State v. Pace, 316 S.C. 71, 447 S.E.2d 186 (1994), the Supreme Court enunciated a "rule of futility" in certain trial scenarios. Pace edifies: "As to counsel's failure to raise an objection, the tone and tenor of the trial judge's remarks concerning her gender and conduct were such that any objection would have been futile." Id. at 74, 447 S.E.2d at 187. State v. McDaniel, 320 S.C. 33, 462 S.E.2d 882 (Ct.App.1995), amplifies the dilemma of a defense attorney: "So long as the judge had an opportunity to rule on an issue, and did so, it was 'not incumbent upon

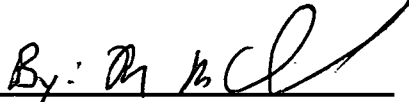
defense counsel to harass the judge by parading the issue before him again.’ ” *Id.* at 37, 462 S.E.2d at 884. Apodictically, the tone and tenor of the judge revealed the futility of an objection.

State v. Higgenbottom, 337 S.C. 637, 640–41, 525 S.E.2d 250, 251 (Ct. App. 1999), *rev'd on other grounds*, 344 S.C. 11, 542 S.E.2d 718 (2001). Further, requiring Perez to enumerate every minute element of his objection exalts form over substance and signals a return to a “...primitive stage of formalism, when the precise word was the sovereign talisman and every slip was fatal.” Wood v Duff-Gordon, 222 N.Y. 88, 91, 118 N.E. 214 (N.Y. 1917) (Cardozo, J.) *see also* Toole v. Toole, 260 S.C. 235, 240, 195 S.E.2d 389, 390-91 (1973) (“an exercise in semantics without any significance of substance”).

CONCLUSION

The trial court had an opportunity to place on the record how Perez’s sentence was not a product of bias, partiality, or pressure. The trial court instead provided evidence establishing bias, partiality, or pressure; the State largely ignores this evidence in its argument. The record supports the Court of Appeals’ decision to reverse Perez’s sentencing, and this Court should affirm this particular holding.

September 7, 2016

By: 

Jason Scott Luck
jluck@seibelsfirm.com
SEIBELS LAW FIRM, P.A.
38 Broad Street, Suite 200
Charleston, SC 29401
843.722.6777 (phone)
843.722.6781 (telefax)

and

Robert M. Dudek
rdudek@sccid.sc.gov
S.C. Commission on Indigent Defense
1330 Lady St., Suite 401
Columbia, SC 29201
803.734.1330 (phone)

**Attorneys for Petitioner/Respondent
Venancio Diaz Perez**

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED

SEP 07 2016

Appeal from Charleston County

S.C. SUPREME COURT

Honorable J.C. Nicholson, Circuit Court Judge

STATE OF SOUTH CAROLINA,

RESPONDENT/PETITIONER,

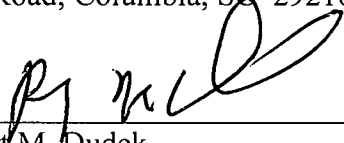
V.

VENANCIO DIAZ PEREZ,

PETITIONER/RESPONDENT

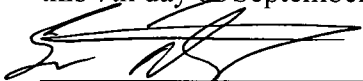
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Response Brief of Petitioner/ Respondent in the above referenced case has been served upon Amie L. Clifford, Esquire, at the S.C. Commission on Prosecution Coordination, PO Box 5010, Columbia, SC 29250-5010; and a copy of the Brief of Petitioner/Respondent have been served on Venancio Diaz Perez, #353944, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 7th day of September, 2016.


Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 7th day of September, 2016.


(L.S)

Notary Public for South Carolina
My Commission Expires: October 30, 2022.