

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Greenville County
John C. Hayes, Circuit Court Judge

RECEIVED

APR 11 2017

S.C. SUPREME COURT

VICTOR NOE ORTIZ-DELVALLE,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2016-002414

APPENDIX

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I N D E X

(There were no witnesses called.)

E X H I B I T S

<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID.</u>	<u>EVD.</u>
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All Exhibits were retained by the Clerk of Court for Greenville County.

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(WHEREUPON, State's Exhibit No. 1 was marked for identification and admitted into evidence.)

THE COURT: Yes, ma'am.

MS. SUSTAKOVITCH: Thank you, Your Honor.

THE COURT: Ms. Sustakovitch.

MS. SUSTAKOVITCH: May it please the Court.

The State calls State v. Victor Noe Ortiz Devalle.

Your Honor, we have been notified by Defense Counsel, and this Defendant has signed a sentencing sheet, that he is going to plead as charged to criminal sexual conduct with a minor in the first degree under indictment 2013-GS-23-10605.

And the State would like to be heard on sentencing at the appropriate time.

THE CLERK: Your Honor, in the case of 2013-GS-23-10605, the State v. Victor Noe Ortiz Devalle, he's indicted for criminal sexual conduct in the -- with a minor in the first degree. He's pleading to the same. And, Your Honor, this is true billed.

Sir, would you, please, raise your right hand.

DEFENDANT VICTOR NOE ORTIZ DEVALLE: I swear to tell the truth, the whole truth, and nothing but the truth, so help me God.

WHEREUPON,

1 VICTOR NOE ORTIZ DEVALLE,
2 after first having been duly sworn, testified as follows:

3 THE CLERK: Thank you.

4 MS. SUSTAKOVITCH: Your Honor, if I may, from the
5 beginning, the issue of Mr. Ortiz's mental health has been
6 at issue in this case for quite sometime. I did want to
7 relay to the Court, I've marked as State's Exhibit No. 1,
8 and I'll pass up to the Court, a copy of his mental
9 evaluation.

10 In the report, Your Honor, there were references that
11 this Defendant suffered multiple personality disorder,
12 that he had blackouts. And in November of 2013, Judge
13 Letitia Verdin ordered that he be mentally evaluated. He
14 was mentally evaluated by the Department of Mental Health.
15 Dr. Elizabeth Horsley is present on the front row in the
16 courtroom, Your Honor.

17 And, during that evaluation for competency, I would
18 note on Page 6 of his mental evaluation, he was found to
19 be competent to stand trial. I would, also, note at the
20 bottom of Page 6 that Dr. Horsley noted that although
21 Mr. Ortiz did report that he had different personalities and
22 that he experienced auditory hallucinations, she did not
23 find any dissociative disorder or psychotic diagnosis that
24 would have been appropriate and should have been given to
25 him at the time. And I just wanted to relay that to the

1 Court.

2 THE COURT: Thank you, ma'am.

3 Okay. You're Victor Noe Ortiz Devalle?

4 DEFENDANT VICTOR NOE ORTIZ DEVALLE: Yes, sir.

5 THE COURT: How far did you go in school, sir?

6 DEFENDANT VICTOR NOE ORTIZ DEVALLE: Twelfth grade in
7 special ed.

8 THE COURT: And what kind of work have you done in
9 the past?

10 DEFENDANT VICTOR NOE ORTIZ DEVALLE: LongHorn
11 Steakhouse.

12 THE COURT: And what did you do there, sir?

13 DEFENDANT VICTOR NOE ORTIZ DEVALLE: I was a chef.

14 THE COURT: All right. And did you work there for --

15 DEFENDANT VICTOR NOE ORTIZ DEVALLE: Full-time,
16 almost a year.

17 THE COURT: Almost a year. Have you had any other
18 employment?

19 DEFENDANT VICTOR NOE ORTIZ DEVALLE: Yeah. I, also,
20 worked at Outback Steakhouse.

21 THE COURT: You cooked there, too?

22 DEFENDANT VICTOR NOE ORTIZ DEVALLE: Yes.

23 THE COURT: All right. And are you under the
24 influence of any alcohol, drugs, or medication, sir?

25 DEFENDANT VICTOR NOE ORTIZ DEVALLE: I'm currently on

1 medication at the court -- at the jailhouse.

2 THE COURT: And --

3 DEFENDANT VICTOR NOE ORTIZ DEVALLE: In Greenville
4 County.

5 THE COURT: Sir?

6 DEFENDANT VICTOR NOE ORTIZ DEVALLE: In Greenville
7 County, I'm on medication.

8 THE COURT: Okay. Does any of that medication affect
9 your ability to make rational decisions or to understand
10 what's happening here today?

11 DEFENDANT VICTOR NOE ORTIZ DEVALLE: To be honest, I
12 don't know, but I'm pretty sure I can understand.

13 THE COURT: Okay. Well, none of those medications
14 affect your ability to process information, do they?

15 DEFENDANT VICTOR NOE ORTIZ DEVALLE: No.

16 THE COURT: And, Mr. Cooke, or, Mr. Erwin, do you
17 have any questions about his competency to enter the plea?

18 MR. ERWIN: No, sir.

19 MR. COOKE: None, Judge.

20 THE COURT: And have you gentlemen had any difficulty
21 communicating with your client?

22 MR. ERWIN: No, sir.

23 THE COURT: Mr. Cooke?

24 MR. COOKE: None, Judge.

25 THE COURT: All right. Have you had enough time to

1 talk to your lawyers, sir?

2 DEFENDANT VICTOR NOE ORTIZ DEVALLE: Yes, sir.

3 THE COURT: Have you understood your conversations
4 with them?

5 DEFENDANT VICTOR NOE ORTIZ DEVALLE: Yes, sir.

6 THE COURT: Have they gone over with you the elements
7 of the crime that you're pleading guilty to here today and
8 that the State must prove beyond a reasonable doubt?

9 DEFENDANT VICTOR NOE ORTIZ DEVALLE: Yes, sir.

10 THE COURT: And have they discussed with you the
11 maximum sentence in this case?

12 DEFENDANT VICTOR NOE ORTIZ DEVALLE: Yes, sir.

13 THE COURT: And I'm just going to ask the Solicitor
14 to put on the record the maximum sentence, and any minimum
15 mandatory sentence that might be applicable.

16 MS. SUSTAKOVITCH: Your Honor, criminal sexual
17 conduct with a minor first degree has a 25-year mandatory
18 minimum, and it carries up to life in prison.

19 THE COURT: So do you understand that there is a
20 mandatory minimum sentence that must be imposed? And do
21 you understand the maximum sentence, sir?

22 DEFENDANT VICTOR NOE ORTIZ DEVALLE: Yes, sir.

23 THE COURT: Do you have any questions about that?

24 DEFENDANT VICTOR NOE ORTIZ DEVALLE: Yes.

25 I would like to say that I take full

1 responsibility --

2 MR. ERWIN: He's going to get to that. He's asking
3 if you have any questions about the minimum or maximum.
4 We're going to get to that in a minute.

5 DEFENDANT VICTOR NOE ORTIZ DEVALLE: Okay.

6 MR. ERWIN: Do you have any questions about the
7 minimum and the maximum?

8 DEFENDANT VICTOR NOE ORTIZ DEVALLE: No, sir.

9 THE COURT: All right. And do you understand that
10 this offense is classified as a violent offense and a most
11 serious offense under state law?

12 DEFENDANT VICTOR NOE ORTIZ DEVALLE: Yes, sir.

13 THE COURT: And do you understand the consequences of
14 pleading to a violent and a most serious offense, sir?

15 DEFENDANT VICTOR NOE ORTIZ DEVALLE: Yes, sir.

16 THE COURT: Do you understand that this offense,
17 because it's classified as a most serious, would be a
18 strike under the two strikes and three strikes law?

19 Do you understand that?

20 DEFENDANT VICTOR NOE ORTIZ DEVALLE: Yes, sir.

21 THE COURT: And do you understand that if you were
22 ever to be convicted again of a serious or most serious
23 offense, you could, given the fact you're pleading to this
24 guilty plea -- you're pleading to this offense here today,
25 you could be facing a mandatory life sentence without any

1 possibility or hope of parole?

2 Do you understand that?

3 DEFENDANT VICTOR NOE ORTIZ DEVALLE: Yes, sir.

4 THE COURT: Do you have any questions of me about the
5 two strikes or three strikes law?

6 DEFENDANT VICTOR NOE ORTIZ DEVALLE: No, sir.

7 THE COURT: Has anyone promised you anything to get
8 you to plead here today, or threatened you, or put any
9 pressure on you?

10 DEFENDANT VICTOR NOE ORTIZ DEVALLE: No, sir.

11 THE COURT: Are you entering this plea of your own
12 free choice and will?

13 DEFENDANT VICTOR NOE ORTIZ DEVALLE: Yes, sir.

14 THE COURT: And have you understood that you have the
15 right to a jury trial?

16 DEFENDANT VICTOR NOE ORTIZ DEVALLE: Yes, sir.

17 THE COURT: And do you understand we have a jury that
18 has been qualified here today, a pool that we could draw
19 from to find a panel of 12 citizens to hear the evidence
20 against you and hear any defenses you may have? And we
21 could start that trial here today.

22 DEFENDANT VICTOR NOE ORTIZ DEVALLE: Yes, sir.

23 THE COURT: And do you understand that at a jury
24 trial, you'd be presumed innocent, sir?

25 DEFENDANT VICTOR NOE ORTIZ DEVALLE: Yes, sir.

1 THE COURT: You wouldn't have to prove you were
2 innocent or prove you were not guilty.

3 Do you understand that?

4 DEFENDANT VICTOR NOE ORTIZ DEVALLE: Yes, sir.

5 THE COURT: In fact, the burden of proof would be
6 entirely on the State. And you could only be convicted if
7 all 12 jurors agreed the State had proven each and every
8 element of the crime beyond a reasonable doubt.

9 Do you understand that?

10 DEFENDANT VICTOR NOE ORTIZ DEVALLE: Yes, sir.

11 THE COURT: And, at your trial, you could see and
12 hear the witnesses. You could confront the evidence
13 against you. You could bring witnesses in using the
14 subpoena power of the Court. You could testify and
15 present any evidence you wished to, have your lawyers
16 assist you. You could challenge or contest any of the
17 evidence in the case, including any statements you may
18 have given to the police, any searches that might have been
19 made, or any testing that was done or should have been
20 done.

21 Do you understand that, sir?

22 DEFENDANT VICTOR NOE ORTIZ DEVALLE: Yes, sir.

23 THE COURT: And do you understand that at your trial,
24 you could, also, choose not to testify and remain silent?
25 And nobody could make you testify. And if you chose to

1 remain silent, the Court would tell the jury you have the
2 absolute right to do so guaranteed by the Constitution.
3 And they could not hold that against you or take it into
4 account whatsoever.

5 Do you understand that?

6 DEFENDANT VICTOR NOE ORTIZ DEVALLE: Yes, sir.

7 THE COURT: Understanding all of these rights and
8 understanding further that you must give up these rights
9 that you would, otherwise, have at a jury trial in order
10 to plead guilty here today, do you still wish to plead
11 guilty, sir?

12 DEFENDANT VICTOR NOE ORTIZ DEVALLE: Yes, sir.

13 THE COURT: Have you understood all my questions?

14 DEFENDANT VICTOR NOE ORTIZ DEVALLE: Yes, sir.

15 THE COURT: Do you have any questions of me?

16 DEFENDANT VICTOR NOE ORTIZ DEVALLE: No, sir.

17 THE COURT: All right. Listen carefully. The State
18 is going to set forth the facts in the case.

19 MS. SUSTAKOVITCH: Thank you, Your Honor.

20 May it please the Court.

21 The facts as would have been presented at trial
22 today, Your Honor, in the -- in March of 2013, Victin
23 Ortiz was four-and-a-half months old. She is the
24 biological child of this Defendant. Her mother is Natasha
25 Decosta, who's on the front row in pink, Your Honor.

1 Victim was a healthy, happy baby. She had just been
2 to her four-month appointments and everything was perfect.
3 She was meeting all her milestones. And there was nothing
4 wrong with her.

5 On the night of March 4th, 2013, Victim's mom went to
6 work. And Natasha worked at Panera Bread Company, Your
7 Honor. She left at 11:45 p.m. that night. She left
8 Victim in the care of this Defendant. This Defendant then
9 was in the sole custody and care -- Victim was in the sole
10 custody and care of this Defendant.

11 And at 8:00 in the morning, this Defendant called the
12 child's mother and said that Victim was not breathing. At
13 that point, Natasha told this Defendant to call 911. EMS
14 came to the scene. They tried to revive Victim. And she
15 died at the hospital a short time later. She was,
16 essentially, Your Honor, dead at the scene from what we
17 have gotten from the medical reports.

18 In the -- the scene was processed, Judge. And
19 evidence was taken in and collected. At autopsy, a sexual
20 assault kit was done on Victim. They took swabs from her
21 mouth, her vagina, and her rectum. On the swab from her
22 rectum, semen and sperm -- seminal fluid and sperm was
23 found. Also, on Victim onesie that she was wearing, this
24 Defendant's semen was found. And on the pants that she
25 was wearing, this Defendant's semen was found.

1 The profile that was in [Victim]'s rectum at the
2 Greenville DNA lab had to be sent to SLED, Your Honor, for
3 more specialized testing to be able to identify who that
4 profile belonged to. And during the more specialized
5 testing at SLED, it did come back that it was this
6 Defendant's sperm and semen inside the child.

7 Your Honor, this Defendant gave different stories
8 about what had happened. When he was interviewed, he
9 first stated he did not know. He said he didn't know how
10 [Victim] -- when he was confronted with how did your semen
11 get in her, he said he didn't know. Then he switched that
12 to he could not remember. If he had done something, he
13 didn't remember it. And he stated that he had blackouts.
14 And he had this mental problem where he blacks things out.

15 Finally, Your Honor, this Defendant called the
16 child's mother about eight days after he was in jail and
17 he explained to [Victim]'s mother that he had figured out
18 what had happened, that he has a multiple personality
19 named Lloyd. And that Lloyd had explained to him that one
20 of his other personalities had found the baby when she was
21 not breathing and had wiped a semen-laden rag over her
22 body when he found her so that he would only be facing a
23 sex charge and not murder. That was the substance of that
24 phone call, which the State would have introduced at
25 trial.

1 Your Honor, as far as the autopsy, it took about 10
2 months for Dr. Ward with the medical examiner's office to
3 come back with the autopsy report. He ruled that it was a
4 homicide and the cause of death was homicidal violence
5 during sexual assault. In that report, he stated that
6 there was petechial hemorrhaging to Victin's lungs. And
7 those would be the facts as presented at trial, if the
8 State proceeded today.

9 Thank you, Your Honor.

10 THE COURT: All right. Thank you.

11 Is that what happened, sir?

12 DEFENDANT VICTOR NOE ORTIZ DEVALLE: Yes.

13 THE COURT: And did you in Greenville County between
14 March 4th, 2013, and March 5th, 2013, commit a sexual
15 battery on C.O., who was less than 11 years of age.

16 DEFENDANT VICTOR NOE ORTIZ DEVALLE: I don't
17 understand what you're saying.

18 THE COURT: Well, you heard the facts that the
19 Solicitor just spoke of?

20 DEFENDANT VICTOR NOE ORTIZ DEVALLE: Yes.

21 THE COURT: And you told me you agreed with that
22 version; correct?

23 DEFENDANT VICTOR NOE ORTIZ DEVALLE: Yes.

24 THE COURT: All right. And you understand, sir, that
25 at the trial, if you had one, a jury trial, you could

1 present any defenses you may have, including any defenses
2 that might be related to your mental status, or mental
3 condition, or your criminal responsibility.

4 Do you understand that?

5 DEFENDANT VICTOR NOE ORTIZ DEVALLE: Yes, sir.

6 THE COURT: And you give up all those rights by
7 pleading guilty.

8 Do you understand that?

9 DEFENDANT VICTOR NOE ORTIZ DEVALLE: Yes, sir.

10 THE COURT: And that's still what you want to do?

11 DEFENDANT VICTOR NOE ORTIZ DEVALLE: I'm sorry.

12 THE COURT: Is that still what you want to do?

13 DEFENDANT VICTOR NOE ORTIZ DEVALLE: Yes, sir.

14 THE COURT: All right. I find there's a factual
15 basis for the plea. It's been entered into freely and
16 voluntarily, and with the assistance of skilled counsel.

17 And, Mr. Cooke, or, Mr. Erwin.

18 MR. COOKE: I'll start off.

19 THE COURT: Yes, sir.

20 MR. COOKE: And then Jake is going to have some --
21 going to talk a little bit about it.

22 Judge, I was originally appointed to represent
23 Victor -- it's probably been a couple years ago. He is
24 now 26 years of age.

25 Jake Erwin, who is with the public defender's

1 office -- I'm court appointed. And Jake agreed to help me
2 in the case. He's been an awful lot of help to me, as a
3 matter of fact. And I want to thank him right now.

4 But, Judge, my client was born in Rhode Island. He's
5 of Puerto Rican descent. He lived in Puerto Rico from the
6 age of five to 15 and -- but most of his life has been
7 spent in the United States.

8 Judge, he was a special ed student in Rhode Island.
9 He had been -- when he was around five years old, he had
10 been peppered with snowballs with rocks in them by his
11 stepbrothers. They feel like that probably had a lot to
12 do with his inability to learn as he should. He can't
13 read and write to this day. He still can't do that.
14 Judge, when he was -- and he did complete special ed in
15 high school, and got a diploma in the twelfth grade.

16 Judge, when he was five years of age, his stepfather
17 found his stepbrother on top of him sodomizing him. And
18 he was taken to the hospital and examined. And that's
19 something that happened very early in his life that it's
20 still there. I wanted the Court to know that.

21 Your Honor, his family -- his sister has called me.
22 She couldn't afford to come. She has no money. His
23 sister and his mother live in Rhode Island. His daddy --
24 he never knew his daddy. So he was reared by his mother
25 and sister.

1 Your Honor, he's worked at a couple of steakhouses
2 since he's been in the -- in South Carolina. And that was
3 a job that he had when this all occurred.

4 The -- he's been in jail for 21 months, almost 22
5 months now, Judge.

6 I'm going to let -- and he has been evaluated and
7 found competent to stand trial.

8 I'm going to let Jake kind of go over the evidence
9 that you -- some of the evidence that you probably would
10 have heard, or lack of evidence in this case. We,
11 honestly, felt like we might have had a -- well, first of
12 all, my -- our client has never ever told us that he had
13 anything to do with the death of his daughter. He's been
14 steadfast in that, the first statement he gave. He has
15 never admitted to that. And I don't even think the
16 evidence would show that, in my opinion. But that's my
17 opinion.

18 But I'm going to let Jake address that side of the
19 story. And what I would ask Your Honor to do -- he is a
20 young man. And he's had some problems in his life, no
21 question about it. But I know -- I know the State is
22 going to ask you to put him away for life, which I don't
23 think is the answer to this. I know he's going to have to
24 go to jail for however long you send him there. It's
25 85 percent. I assume you'd make it that long. I really

1 don't know in a situation like this.

2 But I'll just turn it over to Jake and let him finish
3 up with the rest of the story, Judge.

4 THE COURT: Thank you, Mr. Cooke.

5 MR. COOKE: Thank you.

6 THE COURT: Mr. Erwin.

7 MR. ERWIN: Thank you, Judge.

8 This is an awful case. Obviously, the facts are
9 really horrible. And with that being said, I commend
10 Victor for coming forth today to take responsibility for
11 his part in it.

12 The hang up has always been the death in this case.
13 And I think that this plea accurately reflects the facts
14 that would be presented. And Victor is willing to take
15 responsibility for the sexual aspect of this case, and the
16 things that he did do, and the things he's going to have
17 to pay for.

18 The reason we're here on the day of trial and we're
19 just now pleading is it's always been -- the death has
20 always been the hang up. And I don't think the
21 evidence -- I don't think they necessarily would have been
22 able to establish that at trial.

23 And I commend the Solicitor for coming to this
24 agreement and allowing Victor to take responsibility for
25 what it is that he did do. And I think there's something

1 to be said for that.

2 Judge, you know, as Larry said, I know the Prosecutor
3 is going to be asking for life in this case. And I just
4 ask you to consider that Mr. Ortiz is a young guy, and
5 that there is an opportunity here, knowing he's going to
6 do a significant amount of time in prison, that some day
7 down the road he could come out on the other end of this
8 and have an opportunity to be a productive member of
9 society, to live his -- live the right way.

10 Hopefully, he'll get some treatment and some help
11 when he's in prison. I know there are all kinds of
12 programs to help him out. And I know that he's eager to
13 take advantage of those.

14 And I would ask you to consider not imposing a life
15 sentence, and consider the vast amount of time that he is
16 going to have to serve and the chance that maybe one day
17 he can come out and be a good person and live his life in
18 a productive, positive way.

19 Thank you, Your Honor.

20 THE COURT: Thank you, Mr. Erwin.

21 MR. COOKE: Judge --

22 MS. SUSTAKOVITCH: Your Honor --

23 MR. COOKE: Excuse me.

24 Could I just add one other thing in this case?

25 THE COURT: Certainly.

1 MR. COOKE: I talked with Dr. Ward in this case that
2 did the autopsy. And they -- in his examination, there
3 was -- the only sperm that was found was on the outside of
4 the little onesie and a little pair of pants. There was a
5 small amount of sperm on both those items on the outside.
6 And there was sperm -- his sperm -- it had to be a minute
7 amount because they had to figure out how in the world to
8 test it. And they, finally, came up with a new test and
9 decided it was his.

10 My client would have testified that when this baby
11 was in trouble in her crib, he took her clothes off. And
12 she was not responsive.

13 So he took her clothes off and removed the onesie,
14 removed everything, I think, but the diaper and threw them
15 in the floor. He wiped her off. She was perspiring. He
16 took her to the -- well, he called 911. He took her to
17 the bathroom. And they tried -- he tried to resuscitate
18 her. As a matter of fact, the -- when the paramedics got
19 there, they attempted the same thing. I think that that
20 would have caused a certain amount of bleeding from the
21 arteries, as I talked with the doctor about it.

22 He -- and I, also, asked him this question. I asked
23 him -- I said, if it hadn't been for that little bit of
24 sperm that they found on the onesie and the pants, none
25 was found on her body at all, Judge, except the anal area,

1 which could have been wiped there when he wiped her off.
2 It could have happened.

3 But I asked him what his conclusion would be, if any,
4 taking away the semen in the situation. And he said
5 probably -- he said they don't call it infant death
6 syndrome anymore. They call it something else so the
7 statistics, I think, look a little better.

8 But he said, basically, that's what you would have to
9 conclude if you didn't have any other evidence. But
10 because they had this additional evidence, that kind of
11 pushed us where we are today.

12 And we have no explanation. I mean, we've tried this
13 thing every way you could try it, Judge. We've talked
14 with our client. We've looked at the evidence. We've
15 done everything we can. And we just can't figure it out.

16 But I just want to let you know there was no real
17 trauma to this child like she was -- there was no tearing.
18 There was nothing in the physical part of the evidence
19 that would indicate she was traumatized at all, and -- or
20 hit or beaten, or anything. There was no tearing of the
21 anus, nothing wrong with her whatsoever. So no bruising,
22 none of that sort of thing.

23 So I just wanted Your Honor to know that, that this
24 didn't happen in some violent situation. And I want you
25 to understand that. He's not a violent person, Judge.

1 THE COURT: Thank you.

2 MR. COOKE: So thank you very much.

3 MS. SUSTAKOVITCH: Your Honor, if I may respond
4 briefly. I believe that does require a response.

5 The State's evidence is that there is -- there's
6 sperm and seminal fluid inside the body of this child. It
7 is not there accidentally. I'm a little confused about
8 what Mr. Cooke is arguing.

9 This Defendant, my understanding, is here to plead
10 today because he is taking responsibility for a sexual
11 battery, penetration, however slight, into the anal cavity
12 of his daughter, not a mistake, not an accident. He's
13 here to take responsibility. And, by some of the
14 recitation I just heard, I'm concerned about that.

15 I would say as to -- as Your Honor knows, we filed
16 pre-trial briefs in this case. At trial, we would have
17 presented another victim who would have --

18 MR. COOKE: Whoa. Now, I don't think you get into
19 that. But let me --

20 MS. SUSTAKOVITCH: Well, let me just this --

21 MR. COOKE: No. Wait a minute. Wait a minute.

22 Now, I just want to say something now.

23 MS. SUSTAKOVITCH: Yeah. Sure.

24 MR. COOKE: I never said -- I never said that's what
25 happened. I said that would have been our side of the

1 story --

2 MS. SUSTAKOVITCH: Okay.

3 MR. COOKE: -- if the case had gone to trial.

4 MS. SUSTAKOVITCH: All right.

5 MR. COOKE: So --

6 MS. SUSTAKOVITCH: I got you.

7 MR. COOKE: -- you misunderstood me.

8 MS. SUSTAKOVITCH: And I apologize.

9 MR. COOKE: Okay.

10 MS. SUSTAKOVITCH: Your Honor, we just wanted to make
11 sure there's a clear acknowledgment of guilt as to the
12 fact that there is a sexual battery with penetration,
13 however slight. The semen did not get there by accident.
14 It was deposited there into Victim's rectum.

15 And a few final notes, Your Honor, as far as this
16 Defendant's sanity, I did want to put on the record that
17 Defense Counsel has never raised sanity. I believe they
18 would state to Your Honor that they believe their client
19 is sane.

20 Is that correct?

21 MR. ERWIN: Oh, yes, Your Honor, it is, absolutely.

22 MS. SUSTAKOVITCH: And I did -- Mr. Cooke did relay
23 to the Court a lot information about this Defendant's
24 mental background. This Defendant is smart. The record
25 that we have, Your Honor, is replete with the fact that

1 this Defendant has tried to malingering and fake multiple
2 personality disorder. So I did feel that the Court should
3 know that.

4 And is it the appropriate time to address the Court
5 on sentencing, Your Honor?

6 THE COURT: Well, I mean, he's going to have to -- I
7 know he said he agreed with the recitation. But in light
8 of the arguments I'm hearing, he's going to have to make
9 some acknowledgement about -- that this -- what is alleged
10 in this indictment is, in fact, what happened.

11 Do you want to confer with him about that?

12 MR. COOKE: I thought -- in response to
13 Ms. Sustakovitch, I thought he said -- you said, Is that
14 what happened? And my client said, Yes.

15 THE COURT: Okay. Well, I just want to clarify it
16 from him.

17 (Pause.)

18 THE COURT: Does he need a copy of it?

19 MR. COOKE: No, sir.

20 (Pause.)

21 MR. ERWIN: Judge, if you'd like to ask him some
22 questions, I think he's ready.

23 THE COURT: So I'm going to hand you the original
24 indictment, criminal sexual conduct with a minor first
25 degree, sir. And I know you've read it. I know you've

1 seen it. But I'm just going to ask you, is that what
2 you're pleading guilty to?

3 (WHEREUPON, Defense Counsel conferred with Defendant
4 Victor Noe Ortiz Devalle.)

5 DEFENDANT VICTOR NOE ORTIZ DEVALLE: I committed a
6 sexual battery to the victim.

7 THE COURT: Okay, sir.

8 Now, you want to be heard on the sentencing?

9 MS. SUSTAKOVITCH: Yes, sir, just very briefly.

10 Your Honor, when the State first received this case
11 in March of 2013, I sent Defense Counsel a notice of
12 proposed disposition. At that point, the autopsy was
13 pending. The State, frankly, had no idea if a manner and
14 a cause of death would ever be assigned to this case.

15 And I did tell Mr. Cooke, at the time, that just
16 based on the sexual battery on this four-month-old child,
17 the State felt independent of whether a homicide charge
18 ever came that the appropriate sentence under this fact
19 scenario was a life sentence. We advised them of that two
20 years ago.

21 And then today, as we walked into court, we did
22 advise them that we would be asking the Court for that
23 same recommendation that we had almost two years ago when
24 this case started.

25 Thank you.

1 And I know [Victim]'s mother would like to address the
2 Court at the appropriate time.

3 THE COURT: Okay. I reaffirm my finding. There's a
4 factual basis for the plea.

5 Yes. Just tell me your name. And I'll be glad to
6 hear anything you'd like to say.

7 If you could just spell your name for the record,
8 too, ma'am.

9 MS. NATASHA DECOSTA: Sure. It's Natasha Decosta,
10 N-A-T-A-S-H-A, D-E-C-O-S-T-A.

11 Your Honor, I just wanted to say I loved my daughter
12 very much. I miss her every day. From March of -- I've
13 been a wreck. I've done nothing but cry. And my heart is
14 filled with heart break. No matter what -- how the
15 outcome comes today, however it turns out, nothing is ever
16 going to bring her back to me.

17 I just wanted -- I've been waiting for this day to
18 come to where I could just, finally, put this behind me
19 and be able to move on with my life with the best memories
20 I could have of her.

21 I believe that -- I hope he takes advantage of all
22 the programs he takes -- that's available in jail. And
23 whether he comes out 25 years from now or if he's there
24 for life, I just want him to always remember what he did
25 to me, and that he took my daughter away.

1 I'm sorry. That's all I've got.

2 THE COURT: All right. Thank you, ma'am.

3 Yes, sir. Anything you'd like to say, Mr. Devalle?

4 DEFENDANT VICTOR NOE ORTIZ DEVALLE: Your Honor, I
5 take full responsibility of what I've done. And I'm very
6 sorry for what's happened.

7 She is my daughter, too. And I've suffered as much
8 pain as she feels, too. Every day, I think about how my
9 daughter has passed away.

10 So I just want to say I take full responsibility of
11 what I'm pleading to, Your Honor.

12 THE COURT: All right. Anything further?

13 MR. ERWIN: None from the Defense, Your Honor.

14 MR. COOKE: None here.

15 THE COURT: Okay. Well, you've been fortunate to
16 have two fine lawyers who, obviously, have spent a lot of
17 time and effort on this case on your behalf. And I
18 understand that you are pleading guilty and accepting
19 responsibility. That may be the only redeeming thing out
20 of this whole sorted event. But it can't outweigh the
21 unspeakably horrific crime that occurred.

22 So the sentence is you be committed to the Department
23 of Corrections for life.

24 Thank you.

25 *****END OF TRANSCRIPT OF RECORD*****

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CERTIFICATE OF REPORTER

STATE OF SOUTH CAROLINA)
COUNTY OF GREENVILLE)

I, HOLLIE JENKINS, Official Court Reporter for the Thirteenth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete Transcript of Record of the proceedings had and the evidence introduced in the captioned case, relative to appeal, in the Court of General Sessions for Greenville County, South Carolina, on the 2nd day of February, 2015.

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

October 26, 2015

Hollie M. Jenkins

Hollie M. Jenkins, Court Reporter

My Commission Expires: 09/24/20

FORM 5

STATE OF SOUTH CAROLINA)
County of Greenville)

IN THE COURT OF COMMON PLEAS

Victor Noe Ortiz-DelValle #362880)
Full name and prison number (if any) of Applicant)

2015-CP-23- 04723

v.)

APPLICATION FOR)

State of South Carolina)

POST-CONVICTION RELIEF)

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WIGENSIMER
2015 JUN 30 PM 10 35

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.

1. Place of detention Lieber Correctional Inst. P.O. Box 205
Ridgeville, S.C. 29472
2. Name and location of Court which imposed sentence Greenville County
Courthouse 305 East North Street Greenville, S.C. 29601
3. Name(s) of co-defendant(s) (if any) N/A
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
(a) 2013-GS-23-10605 CSC with a minor first degree

- (b) _____
- (c) _____

5. The date upon which sentence was imposed and the terms of the sentence:

- (a) 02-02-15 Life with out parole
- (b) _____
- (c) _____

6. Check whether a finding of guilty was made:

- (a) after a plea of guilty 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. N/A
 - ii. _____
 - iii. _____
- (b) the result in each such Court to which you appealed:
 - i. N/A
 - ii. _____
 - iii. _____
- (c) the date of each such result:
 - i. N/A
 - ii. _____
 - iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
 - i. N/A
 - ii. _____
 - iii. _____

9. If you answered "no" to (7), state your reasons for not so appealing:

- (a) Counsel did not file Counsel was Ineffective

- (b) _____
- (c) _____

10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

- (a) 4th, 5th, 6th, 14th Amendment violation; Due Process violation
- (b) subject matter Jurisdiction
- (c) Fraud upon the court; Ineffective Assistance of counsel and failure to investigate DNA reco

11. State concisely and in the same order the facts which support each of the grounds set out in (10):

- (a) Memorandum of Law will follow
- (b) _____
- (c) _____

12. Prior to this application have you filed with respect to this conviction:

- (a) any petition in a State Court under South Carolina Law? NO
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? NO
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? NO
- (d) any other petitions, motions or applications in this or any other Court? NO

13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:

- (a) the specific nature thereof:
 - i. N/A
 - ii. _____
 - iii. _____
 - iv. _____
- (b) the name and location of the Court in which each was filed:
 - i. N/A
 - ii. _____
 - iii. _____

iv. _____

(c) the disposition thereof:

i. N/A

ii. _____

iii. _____

iv. _____

(d) the date of each such disposition:

i. N/A

ii. _____

iii. _____

iv. _____

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

i. N/A

ii. _____

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?

NO

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

(a) which grounds have been presented:

i. N/A

ii. _____

iii. _____

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

i. N/A

ii. _____

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) N/A
- (b) _____
- (c) _____

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

- (a) your arraignment and plea? N/A
- (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? I didn't know I can file

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. Larry H. Cooke 13th Circuit Public Defender Greenville
County Courthouse 305 E. North street, Suite 123 Greenville, S.C. 29601

- ii. _____
- iii. _____

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

- i. Sentence
- ii. _____
- iii. _____

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

Sentence and Conviction vacated; Name removed from any derogatory files and DNA; All monies paid returned

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

NO

Revised 3/2003

STATE OF SOUTH CAROLINA)
County of Greenville)

VERIFICATION

I, Victor Ortiz #362880, 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.

Victor Ortiz

SWORN to and subscribed before me this 21st day of July, 2015.

Ludrean Bryant (L.S.)
Notary Public

My Commission Expires: May 26, 2020

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

I, Victor Octic #362880, 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.

Victor Octic
Applicant

SWORN or affirmed to and subscribed before me this
21st day of July, 2015.

Ludhean Bryant
Notary Public

My Commission Expires: May 26, 2020

STATE OF SOUTH CAROLINA)
)
 COUNTY OF GREENVILLE)
)
 Victor Noe Ortiz-Delvalle,)
 S.C.D.C. No. 362880,)
)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
)
 Respondent.)

IN THE COURT OF COMMON PLEAS
 C.A. No. 2015-CP-23-4723

RETURN

In response to the post-conviction relief application filed July 30, 2015 the Respondent would show this Court:

I.

The Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the Greenville County Clerk of Court's orders of commitment. The Greenville County Grand Jury indicted the Applicant at the November 2013 term of General Sessions for First-Degree Criminal Sexual Conduct with a Minor (2013-GS-23-10605). Larry H. Cooke, Esquire and John K. Erwin, Jr., Esquire represented the Applicant.

On February 2, 2015, the Applicant pled guilty as indicted. The Honorable D. Garrison Hill sentenced the Applicant to life imprisonment. The Applicant did not appeal.

Attached herewith and incorporated herein by reference are the records of the Greenville County Clerk of Court regarding the subject conviction, the Applicant's records from the South Carolina Department of Corrections, and the guilty plea transcript.

II.

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

1. Ineffective assistance of counsel.
2. "4th, 5th, 6th, 14th Amendment violation; Due Process violation."
3. Subject Matter Jurisdiction
4. Fraud upon the court
5. Failure to investigate DNA record

III.

The Respondent asserts the Applicant's allegation that his attorney was ineffective is without merit. The Respondent asserts the Applicant's attorney rendered effective assistance well within the standard of "reasonableness within professional norms" for a defense attorney.

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 on as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 2064 (1984); Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume counsel "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Strickland, 466 U.S. at 690, 104 S. Ct. at 2066. The Applicant must overcome this presumption in order to receive relief. See Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove counsel's performance was deficient. Under this prong, attorney

performance is measured by its “reasonableness under prevailing professional norms.” Cherry v. State, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688, 104 S. Ct. at 2065). 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. “A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial.” Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984)).

The Respondent submits the Applicant cannot satisfy either requirement of the Strickland v. Washington test. However, the allegation of ineffective assistance of counsel probably raises questions of fact that cannot be conclusively refuted by the record. The Respondent requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 265, 305 S.E.2d 247, 248 (1983) (citing Norman v. State, 276 S.C. 278, 277 S.E.2d 707 (1981)).

IV.

The Respondent submits the Applicant’s assertion that the court lacked subject matter jurisdiction is without merit. The true test of the sufficiency of an indictment is not whether it could be made more definite and certain, but whether it contains the necessary elements of the offense intended to be charged and sufficiently apprises the defendant of what he must be prepared to meet. State v. Gentry, 363 S.C. 93, 103, 610 S.E.2d 494, 500 (2005). The Respondent further notes that indictments are not evidentiary or jurisdictional documents – they are merely notice documents. Id. at 102, 610 S.E.2d at 500. The indictment in this case was true-billed and clearly sufficient to put the Applicant on notice of the charge he was facing. See

STATE OF SOUTH CAROLINA)
)
 COUNTY OF GREENVILLE)
)
)
)
 VICTOR NOE ORTIZ-DELVALLE, 362880)
)
 Applicant,)
)
 vs)
)
 STATE OF SOUTH CAROLINA,)
)
 Respondent.)
 _____)

IN THE COURT OF COMMON PLEAS

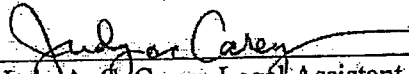
2015-CP-23-4723

AFFIDAVIT OF SERVICE BY MAIL

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:

**Victor Noe Ortiz-Delvalle, 362880
 Lieber Correctional Institution
 Post Office Box 205
 Ridgeville SC 29472**

DATED this 29th day of January, 2016.


 Judy A. C. Carey, Legal Assistant
 For Respondent

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STATE OF SOUTH CAROLINA)	
)	IN THE COURT OF COMMON PLEAS
COUNTY OF GREENVILLE)	
Victor N. Ortiz-)	TRANSCRIPT OF RECORD
Delvalle,)	2015-CP-23-4723
)	
Applicant,)	
-vs-)	
)	
The State,)	
)	October 25, 2016
Respondent.)	Greenville, South Carolina

B E F O R E:

HONORABLE JOHN C. HAYES, III, JUDGE

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

BRIAN P. JOHNSON, ESQUIRE
Attorney for the Applicant

PATRICK L. SCHMECKPEPER, ESQUIRE
Attorney for the Respondent

Margaret A. Woods
Circuit Court Reporter

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Certificate of reporter 30

NO EXHIBITS INTRODUCED

1 MR. SCHMECKPEPER: May it please the Court, Your Honor,
2 this is Victor Ortiz-Delvalle, 2015-CP-23-4723. The applicant
3 was indicted in November of 2013 for first degree criminal
4 sexual conduct with a minor, he was represented by Larry Cooke
5 and Jack Erwin. February 22nd twenty-fif -- on February 22nd
6 2015 the applicant pled guilty as indicted, he was sentenced
7 t -- by Judge Hill to life imprisonment, the applicant did not
8 appeal. This application was filed on July 30th 2015, this
9 time I turn matters over to opposing counsel.

10 THE COURT: All right.

11 MR. JOHNSON: Thank, Your Honor, may it please the Court.
12 Uh, essentially we're here today, uh, Mr. Ortiz is essentially
13 alleging that his guilty plea was not given intelligently and
14 voluntarily, knowingly. Uh, the, uh, at the time of the plea
15 they submitted a, uh, valuation that showed him competent to
16 stand trial and he was also medicated at the time and he's
17 prepared today testify to explain the circumstances by which,
18 uh, his plea was involuntary. Uh, Your Honor, I have a copy
19 of the, uh, mental eval. if you'd like to review it, it does
20 say -- state he's competent, I do think it's relevant in that
21 it kinda shows some of his or his mental health background as
22 well as, uh, a a disability that he gained when he was
23 younger, uh, and I ask that the Court, uh, ---

24 THE COURT: Any ---

25 MR. JOHNSON: --- take a ---

VICTOR ORTIZ-DELVALLE - DIRECT EXAMINATION BY MR. JOHNSON

1 THE COURT: --- objection?

2 MR. JOHNSON: --- look at that.

3 MR. SCHMECKPEPER: None, Your Honor, I believe it's in
4 the record as a a State's exhibit during the guilty plea.

5 THE COURT: All right, I'll I'll accept it.

6 THE APPLICANT: Thank you, sir.

7 MR. JOHNSON: Yes, sir, Your Honor, but at at this time
8 I'm gonna, uh, call my client to the stand, Your Honor,
9 whenever you're ready, Judge, of course.

10 THE COURT: I'm ready.

11 MR. JOHNSON: Okay, I'll call Victor Ortiz.

12 (Whereupon, the applicant came forward.)

13 THE CLERK: Mr. Ortiz-Devalle, is that how you pronounce
14 it? Delvalle?

15 THE APPLICANT: Delvalle.

16 THE CLERK: Please place your left hand on the Bible and
17 raise your right hand.

18 VICTOR ORTIZ-DELVALLE, having been
19 first duly sworn, testified as follows:

20 THE CLERK: Thank you, you may be seated.

21 DIRECT EXAMINATION BY MR. JOHNSON:

22 Q. All right, Mr. Ortiz, uh, you are currently in in in the
23 South Carolina Department of Corrections, correct?

24 A. Lieber.

25 Q. In Lieber?

VICTOR ORTIZ-DELVALLE - DIRECT EXAMINATION BY MR. JOHNSON

1 A. (Nodded in the affirmative.)

2 Q. Oh, you're gonna have to just answer yes or no
3 whenever ---

4 A. Yes, sir.

5 Q. Okay. Um, and you're serving, uh, what sort of
6 sentence?

7 A. I was told I'm servin' a life sentence without parole.

8 Q. And for what, what's the underlying charge of the the
9 that you're serving the sentence for?

10 A. To a criminal sexual conduct first degree in a minor.

11 Q. And this was from a guilty plea?

12 A. Yes, sir.

13 Q. And who was your attorneys durin' this time?

14 A. It was Larry Cooke and Jake Erwin.

15 Q. You were represented by both people?

16 A. Yes, sir.

17 Q. Now, uh, your sentence was given as a result of a guilty
18 plea, correct, not a trial?

19 A. Yes, sir.

20 Q. Okay. Um, and your guilty plea took place in February of
21 2015, is that correct, does that sound correct to you?

22 A. Yes, sir.

23 Q. February 2nd 2015? All right, you've alleged ineffective
24 assistance of of counsel essentially alleging that your guilty
25 plea wasn't given voluntarily, did you understand what you

VICTOR ORTIZ-DELVALLE - DIRECT EXAMINATION BY MR. JOHNSON

1 were doing at the time you gave the guilty pleas?

2 A. No, 'cause I kept denying it, I didn't wanna sign the
3 papers ---

4 Q. Okay.

5 A. --- but he kept tellin' me that it was best I sign it,
6 not take it to trial 'cause if I take it to trial I will get
7 life.

8 Q. Okay, so that was your understanding, uh, and and why you
9 would eventually pled guilty.

10 A. Um-hum.

11 Q. Now, you gotta say yes or no, I'm sorry.

12 A. Yes, sir.

13 Q. Okay. Now during the course of the guilty plea the judge
14 asked you several questions, didn't he?

15 A. Yes.

16 Q. Okay. Uh, he asked you, uh, if you understood what you
17 were doing among other things and things of that nature, is
18 that correct?

19 A. Yes.

20 Q. Okay. Uh, did you understand what you were doin'?

21 A. No.

22 Q. Uh, why did you answer the questions in the way that you
23 did, uh, in the affirmative, uh, basically, uh, allowing the
24 judge to accept the plea if you didn't understand what you
25 were doin'?

VICTOR ORTIZ-DELVALLE - DIRECT EXAMINATION BY MR. JOHNSON

1 A. 'cause I was trusting the lawyers that I had to answer
2 the questions they told me to answer.

3 Q. So so they -- clarify what you're sayin' to the Court,
4 what -- why'd you answer the questions that way?

5 A. What I didn't understand they just told me basically say
6 yeah and what I, and when they tell me say no, I say no.

7 Q. Now, uh, you have a a history of a brain injury, is that
8 correct?

9 A. I was like 4 or 5-years-old.

10 Q. All right, tell the, tell the Court what happened and how
11 that affected you.

12 A. That affected me of learnin', readin', spellin',
13 understandin' and when someone talks to me it's kinda takes a
14 while for it to process for me to understand and when I don't
15 understand I ask them to help me understand. Also, I, during
16 the process of growing up, I grew up with a lotta anger
17 problem blackouts.

18 Q. Uh, and did you also have a history of mental health
19 issues?

20 A. Yes, I have but growin' up my mom didn't have money to
21 have me see a psychiatrist or a doctor or any so I just had to
22 grow up, I guess learn to have control it.

23 Q. Do you have a a current, uh, uh, situation with mental
24 health? Do you have a current mental health status?

25 A. Yes, when I was in the county jail, I was seen by mental

VICTOR ORTIZ-DELVALLE - DIRECT EXAMINATION BY MR. JOHNSON

1 health there 'cause I always hurt myself, always attacked
2 other inmates, I tried killin' myself hanging myself. Uh,
3 I've fought with few police, I blackout plenty a times and
4 then end up seein' Dr. Martin, he diagnosed me as
5 schizophrenic affect disorder and bipolar and he's given me
6 six, seven different medications that's I guess to calm me
7 down or control me.

8 Q. At the time you entered a guilty plea, were you under the
9 influence of any medications?

10 A. I was under all the medication they gave me, every night
11 they give 'em.

12 Q. Okay, now did that affect your ability to understand
13 or did it help you?

14 A. Affected it because I was drug high, I don't know how to
15 say it, basically I was under my medication.

16 Q. Okay, so that the the medication make you docile or or or
17 makes you, uh, do what you're told or does medicine make you,
18 help you understand better, what what affect does it have on
19 you?

20 A. It's more easy for me to accept what you're sayin' and
21 agree with you than to choose what I wanna do.

22 Q. Now at some point in time, uh, you underwent a a a mental
23 evaluation, uh, at the South Carolina Department of Mental
24 Health, do you, do you recall that?

25 A. Uh, at Department of Corrections?

VICTOR ORTIZ-DELVALLE - DIRECT EXAMINATION BY MR. JOHNSON

1 Q. Yes.

2 A. Yes.

3 Q. Okay. Do you remember doin' that in in in April 2014, do
4 you remember that doing ---

5 A. Doin' ---

6 Q. --- a ---

7 A. --- a test?

8 Q. Yeah, doing an evaluation.

9 A. Yeah, they had to help me understand everything they were
10 saying 'cause I didn't understand nothin' they were saying.

11 Q. Okay, as part a the Court's file, uh, there is a a copy
12 of of the evaluation, I'm gonna show you a copy, do you
13 remember this (indicating)? Have you ever seen this before,
14 see Competency To Stand Trial Evaluation, you ever seen that
15 before?

16 A. No, not that I can remember.

17 Q. You don't remember seein' that? You don't know the
18 contents of it?

19 A. Nah, wouldn't even understand it even if you tri -- you
20 tried to have me read it right now.

21 Q. Okay, can you read?

22 A. I can't read that even if I tried. I'll be able to read
23 the little words, not the big ones.

24 Q. Okay. Um, did your attorneys tell you that they, that
25 that you were being eval -- valuated for competency to stand

VICTOR ORTIZ-DELVALLE - DIRECT EXAMINATION BY MR. JOHNSON

1 trial, did they explain that to you?

2 A. No, they told me, Larry Cooke told me that I was gonna go
3 to Columbia and speak to people to evaluate me, to show that
4 if I have mental health problems and when I went over there
5 they had me talk to two women, uh, they were basically
6 disagreein' with the answers that I would give 'em and they
7 were ma -- they will repeat the answer until they got the
8 answer they were lookin' for.

9 Q. Now, uh, the time period or time period I I believe you
10 stated that that you remember you doing that at around, uh,
11 April of 2014 and then about, uh, eight, about ten months
12 later is when you pled guilty in February of 2015, is that
13 correct, so there was a period a time between your evaluation
14 and your guilty plea, does that sound right to you? Okay, ---

15 A. I guess.

16 Q. Um, so are you tellin' the Court now that if, um, if you
17 weren't on that medicine that a affected your ability to, uh,
18 uh, to accept or deny things, you would not have pled
19 guilty?

20 A. Yes, I also woulda not pled guilty if I was told I was
21 pleadin' to a life sentence.

22 Q. What was your understanding of that you were pleading to?

23 A. That I was gonna get 25 years.

24 Q. Um, and this was through communication you had with, um,
25 uh, both attorneys or one attorney or ---

VICTOR ORTIZ-DELVALLE - DIRECT EXAMINATION BY MR. JOHNSON

1 A. One attorney.

2 Q. Which attorney?

3 A. They both would come in, uh, I was talkin' to Larry
4 Cooke, Jake Erwin will come in and out and talk to the
5 solicitor.

6 Q. Okay, and you wouldn't a pled guilty and you would have
7 wanted to go to trial, to a jury trial.

8 A. I wanted to go to trial but he kinda feared me, put fear
9 in me tellin' me that if I take it to trial and we lose you're
10 gonna get life ----

11 Q. That now ---

12 A. --- verdict.

13 Q. --- the the guilty plea itself, uh, was it appealed?

14 A. No, I didn't know I was able to appeal.

15 Q. Okay, and you don't ---

16 A. I understand the ignorance of the law there's no excuse,
17 I don't know nothin' about the law. If I knew about the law
18 like I know now that I try studyin' like Larry Cooke told me
19 to do or Jake Erwin told me to do, go to prison, go into law
20 library, study the law the best you can and file a PCR and
21 that's what I did.

22 Q. Okay.

23 A. I had studied the best I can, I struggled and I paid
24 people to help me and I filed a PCR and I'm here today.

25 Q. Um, if if you'd a known about your right to an appeal,

VICTOR ORTIZ-DELVALLE - CROSS-EXAMINATION BY MR. SCHMECKPEPER

1 would you have filed an appeal?

2 A. Yes.

3 Q. Um, please answer any questions that the attorney general
4 has, okay?

5 A. Okay.

6 CROSS-EXAMINATION BY MR. SCHMECKPEPER:

7 Q. Good mornin', Mr. Ortiz.

8 A. Good mornin'.

9 Q. Now I'm just gonna try and clarify the issue for a little
10 bit. Now you're out alleging that you just didn't understand
11 what was going on during your guilty plea?

12 A. I didn't.

13 Q. So you didn't understand anything at all.

14 A. I didn't understand that how you gonna tell me I was
15 gonna get 25 years and I come in here and get life anyways.

16 Q. That's not, and that's not exactly what I'm referring to.
17 I guess what I'm talking about is the judge asked you several
18 questions during your guilty plea, is that ---

19 A. Yeah.

20 Q. --- correct?

21 A. Yes.

22 Q. Do you remember those questions at all?

23 A. No.

24 Q. You don't have any memory of anything that happened
25 during the guilty plea?

VICTOR ORTIZ-DELVALLE - CROSS-EXAMINATION BY MR. SCHMECKPEPER

1 A. I remember memories but I'm not gonna remember it word by
2 word.

3 Q. But but generally, um, let me, let me ask you a specific
4 question about the transcript. Now the judge asked you during
5 the guilty plea whether or not your medication affected your
6 ability to make rational decisions or to understand what's
7 happening and you said, I don't know but I'm pretty sure I can
8 understand, and the judge clarified, Okay, well none a those
9 medications affect your ability to process information, do
10 they, and you said no.

11 THE COURT: What page and line?

12 MR. SCHMECKPEPER: It's page 6, Your Honor.

13 THE COURT: Okay.

14 BY MR. SCHMECKPEPER:

15 Q. Does that sound like a fair characterization what
16 happened?

17 A. I was just followin' what they told me to say.

18 Q. All right, so when when the judge asked you if you had
19 had enough time to talk to your lawyers you said yes, you were
20 just following what they were, what they were or that your
21 lawyers were telling you to say.

22 A. Yes.

23 Q. So when the judge asked you if you understood that s
24 --criminal sexual conduct with a minor first degree has a
25 25-year mandatory minimum and goes all the way up to life and

VICTOR ORTIZ-DELVALLE - CROSS-EXAMINATION BY MR. SCHMECKPEPER

1 you said you understood, that's on page 7, you were just
2 following what your attorneys were saying.

3 A. Yes, 'cause they told me that it car -- they told me that
4 it carried 25 to life if I'm correct. If my memory, if I
5 remember correctly I think they did tell me that.

6 Q. And the judge asked you if you had any questions about
7 the minimum and maximum on page 8 and you said, No, is that
8 fair to say?

9 A. I don't understand.

10 Q. I'll move on far as that.

11 A. Why ---

12 Q. Now you said your, you said your attorneys told you you'd
13 get how long, how long a sentence?

14 A. He said he was gonna give me 25 years and if I take it to
15 trial I'll get life.

16 Q. Now on page 9 when the judge asked you if anybody had
17 promised you anything or threatened you or put pressure on
18 you, you said, No, sir.

19 A. I did say that.

20 Q. So why not tell the judge then that your attorneys had
21 told you what to say?

22 A. 'cause I was just followin' what they told me to say.

23 Q. Even though the judge had already told you that you could
24 get a life sentence even if you pled guilty.

25 A. I don't remember him sayin' that.

VICTOR ORTIZ-DELVALLE - CROSS-EXAMINATION BY MR. SCHMECKPEPER

1 Q. And the re, uh, the the record reflect that the judge
2 actually did tell him that. So on page 11 the judge asked you
3 whether or not you wanted to waive your right to plead guilty
4 and you said yes, sir, is is that, is that a, is that a fair?
5 You you did tell the judge you wanted to plead guilty?

6 A. Even though I didn't want to.

7 Q. But but you did tell him you wanted to.

8 A. Yes 'cause my lawyer told me to plead guilty as . . .

9 Q. And did you a -- did you apologize for this crime?

10 A. Yes, I apologized to sumtin' I didn't do 'cause I was
11 told to make a statement sayin' that I did it.

12 Q. You accepted res -- well you you told the judge you
13 accepted responsibility, is that correct?

14 A. Yes, 'cause I was told to make a statement and accept the
15 responsibility of sumtin' I didn't do.

16 Q. Okay, but you did understand what, so you understood what
17 y -- you at least understood what you were supposed to do,
18 that was to agree with everything the judge said.

19 A. I understood to repeat what my lawyers told me to say and
20 to do what they told me to say but I know better now so if I
21 have another opportunity it will be different.

22 MR. SCHMECKPEPER: Your Honor, I have no further
23 questions.

24 MR. JOHNSON: I have no redirect, Your Honor.

25 THE COURT: You step back down with your attorney, thank

LARRY HOLMES COOKE - DIRECT EXAMINATION BY MR. SCHMECKPEPER

1 ya.

2 THE APPLICANT: Thank you, sir.

3 (Whereupon, the applicant left the stand.)

4 THE COURT: Anything else from the applicant?

5 MR. JOHNSON: No, sir, Your Honor, that's the
6 applicant's, uh, case.

7 THE COURT: All right, State.

8 MR. SCHMECKPEPER: Your Honor, the State state calls
9 Larry Cooke, one of the applicant's tri -- or plea counsels.

10 (Whereupon, the witness came forward.)

11 THE COURT: Glad to see some of my ---

12 THE WITNESS: You too.

13 THE COURT: --- classmates still laboring in the venue.

14 THE WITNESS: Good to see you.

15 THE CLERK: Mr. Cooke, ---

16 THE COURT: You be sworn in.

17 THE CLERK: --- place your left hand on the Bible and
18 raise your right hand.

19 LARRY HOLMES COOKE, having been
20 first duly sworn, testified as follows:

21 THE CLERK: Please state your full name for the record.

22 THE WITNESS: Larry Holmes Cooke.

23 DIRECT EXAMINATION BY MR. SCHMECKPEPER:

24 Q. Mornin', Mr. Cooke.

25 A. Mornin'.

LARRY HOLMES COOKE - DIRECT EXAMINATION BY MR. SCHMECKPEPER

1 Q. Just got a couple questions for you this morning. Um,
2 just to start off with if you could briefly describe your
3 experience in the practice of criminal law.

4 A. Uh, 46 years practicin' law, uh, on my own, uh, in
5 Greenville, went to University of South Carolina undergraduate
6 and law school, mostly practiced with criminal law.

7 Q. And in the, over the course of of of of your experience
8 practicing criminal law, have you had the opportunity to
9 represent clients you felt might have competency issues?

10 A. I'm sorry?

11 Q. Over the course of your career have you represented
12 clients who you felt may not be competent to stand trial?

13 A. Uh, a few, yes.

14 Q. And what did you do in those situations?

15 A. Well most of 'em we we have 'em evaluated. In this case
16 the State, the State, uh, evaluated Victor and then I had him
17 privately evaluated by Dr. Price here in Greenville, Dr. David
18 Price.

19 Q. And what what was the result of that evaluation?

20 A. All felt he was, he was competent and could, uh, assist
21 me and, uh, he knew what was going on, uh, as far as, uh, the
22 the law was concerned, the trial process and this, that and
23 the other.

24 Q. How di -- how -- you remember roughly how many times did
25 you meet with the applicant?

LARRY HOLMES COOKE -- DIRECT EXAMINATION BY MR. SCHMECKPEPER

1 A. You know, I I re -- sometimes I would pull in when I
2 hadn't even planned on pullin' and I might be down there
3 talkin' to other people but they would have a record of it but
4 many times.

5 Q. More than one, right?

6 A. Oh, yeah, and and lotta letters that he had written me
7 and and honestly, I don't know if he wrote 'em or not but
8 they're well-written but quite a number of letters.

9 Q. So you ha -- you had the opportunity to observe his
10 demeanor and how he operated in person.

11 A. Oh, yeah. I didn't, I didn't see anything wrong with him
12 quite honestly. He was always very, uh, upfront with me and a
13 matter a fact, uh, that he he, uh, he was most of the time
14 tellin' me how to try the case and what to do and, uh, I
15 never, never thought that he had any mental problems or issue.

16 Q. Now you you you you said he was telling you how to try
17 the case, what were the facts of the case?

18 A. Uh, well they that pretty much, uh, as the, uh, solicitor
19 had, uh, read to the Court on the guilty plea, uh, they found,
20 uh, that he called 911 and, uh, he had told them that he found
21 his his daughter unresponsive and that, uh, he was ---

22 Q. How old was---

23 A. --- tr ---

24 Q. --- his daughter?

25 A. Uh, gosh, I don't remember, she was in diapers, I I can't

LARRY HOLMES COOKE - DIRECT EXAMINATION BY MR. SCHMECKPEPER

1 remember her exact age, she was still in a crib, baby crib,
2 but a very -- less than one as I recall, uh, anyhow, uh, so he
3 called 911, they came and they testified that af, as I recall
4 he either had her in the bathtub or had her in the bathroom
5 tryin' to to revive her and claimed that, uh, that, uh, that
6 when he had taken a shower and when he awoke that she was
7 unresponsive and that's why he was doing all that and, uh, so
8 that's kind of it. The, uh, after the investigation the, uh,
9 the investigating officers, uh, found, uh, some strange fluid
10 in one thing and another on the bed sheets and on her onesie
11 and they did some, uh, further investigation and determined
12 that, uh, that it was, uh, in fact, uh, uh, his his fluid, his
13 his sperm, uh, uh, and, uh, to even found some in her rectum,
14 uh, as well as in her onesies the semen was smeared with with,
15 well it was smeared with semen, that semen was all over the
16 bed sheets and it was determined, uh, to be his. Now the
17 original, the original test on the, uh, semen in the rectum or
18 the sperm in the rectum was inconclusive and that was done by
19 the Greenville County, uh, uh, crime lab, it was later
20 determined that there was a new test available, uh, that SLED
21 could conduct to determine whether the sperm was attributed to
22 to Mr. Ortiz, that test was done at SLED and it came back that
23 it in fact was his, uh, found in the anal canal, uh, so that's
24 kinda, that's kinda facts.

25 Q. Did the victim in fact die?

LARRY HOLMES COOKE - DIRECT EXAMINATION BY MR. SCHMECKPEPER

1 A. Oh, yes, victim died. The victim was dead, uh, when they
2 arrived at the, at the scene unresponsive.

3 Q. So after hearing these facts and there was a, there were,
4 so there are two mental, we have competency evaluations.

5 A. Oh, yes, and . . .

6 Q. Um, and that you said, I think you said respondent
7 initially or the applicant initially wanted to go to trial,
8 what was he facing if he went to trial?

9 A. Well he was facin' life in prison, up to life in prison.

10 Q. And did you explain to him those potential sentences?

11 A. Uh, yeah, we, yeah, we talked about that, Jake and I both
12 talked to him about that and, uh, yes, we did.

13 Q. And did you explain to him what the potential sentences
14 could be if he pled guilty instead of proceeding to trial?

15 A. Well, no, uh, he, we had Judge Hill and, uh, we never
16 told him that he would get any any absolute guarantee of a
17 sentence with Judge Hill. The only thing that Jake and I ever
18 discussed with him, he he, we were ready to go to trial, uh,
19 he knew the evidence was overwhelming, we had discussed this
20 with him many times and rather than go to trial he wanted to
21 talk about a guilty plea and and we told him quite frankly
22 there's no guarantee of what a judge might give him as far as
23 his sentence on the guilty plea. Uh, we we told him that it
24 was a gamble if we pled guilty, uh, because it, and I said the
25 judge may give you the benefit of a plea by not putting the

LARRY HOLMES COOKE - DIRECT EXAMINATION BY MR. SCHMECKPEPER

1 the the Court through a a trial and your wife, uh, through it,
2 she was here, and, uh, we said, Judge Hill may give you some
3 benefit for that and not give you life in prison but there's
4 no guarantee, he could give you from 25 to life but there is
5 no guarantee so, uh, after we told him that he said, Well
6 let's go ahead and try it so, uh, not go to trial but let's go
7 ahead and try the the plea so that's what we did.

8 Q. Well and and in preparation for the the guilty plea, did
9 you tell Mr. Ortiz how to answer the judge's questions or no?
10 Did you encourage him to give specific answers?

11 A. No, no, you you pretty much go through all that with a
12 client, you pretty much tell them what's gonna happen, the
13 solicitor's gonna tell her side the story, the judge is gonna
14 ask you guilty or not guilty and that you have a right to a
15 trial, yes, we go through all those things with 'em.

16 Q. And did you tell him to lie to the judge?

17 A. No.

18 Q. Um, the last thing I kinda wanna touch base on is is if
19 during the guilty plea you had suspected that he was impaired
20 or didn't understand what was going on, what would you have
21 done?

22 A. Let me tell ya, he understood everything we were doin' in
23 my opinion, we -- I I had a long relationship with, uh,
24 Mr. Ortiz from the time we were appointed. He was arrested,
25 uh, 4/13 of nine -- of 2013, uh, and we o -- we opened this

LARRY HOLMES COOKE - CROSS-EXAMINATION BY MR. JOHNSON

1 file, uh, 8/20 of, uh, 2012 so, uh, well, I don't think those
2 dates are right but I'd -- I we -- accordin' to this we were
3 appointed 8/20 of 2012 so I had, I had many, many, uh, times
4 to discuss this case with him, as a matter of fact, he
5 complained to the, uh, uh, to Columbia about me not doing some
6 things: not givin' him his file, not givin' him all this
7 discovery and we gave him, we gave him discovery after
8 discovery and I don't know what happened to it but but
9 finally, we finally just said, Okay, we're gonna do this one
10 more time, I even got Mr. Mauldin involved in it who's the
11 head sol -- uh, public defender and we finally said we're
12 gonna do this one more time and there's an awful lot of it and
13 and we had to go to a printer to get it all, he had every bit
14 of it, he knew exactly every issue in the case, uh, no no
15 question about it.

16 Q. Thank you, Mr. Cooke, I don't have anymore questions, ---

17 A. Thank you.

18 Q. --- please answer questions from Mr. Johnson.

19 CROSS-EXAMINATION BY MR. JOHNSON:

20 Q. Mr. Cooke, do you you recall whether you went over these
21 evaluations with, uh, Mr. Ortiz?

22 A. I did, uh, I have, yes, yes, I did, as a matter a fact,
23 the the one by Dr. Price that that I hi -- that we hired and
24 paid for was not good at all, uh, that he said he was
25 malingerin', uh, he said that that one time he he a -- he said

LARRY HOLMES COOKE - CROSS-EXAMINATION BY MR. JOHNSON

1 that he had multiple personalities, uh, this was not proven,
2 uh, in any way, uh, he, uh, that Dr. Price felt like that he
3 was not telling the truth about that, he was usin' that as a,
4 as a way to possibly get in a a mental institution rather than
5 prison. Uh, the State evaluation was the same, they didn't
6 see any out, as I recall they didn't see any evidence of
7 multiple personality disorder, uh, so Judge [sic] Price said
8 he thought he was fakin' it quite frankly.

9 Q. Do do you recall whether or not, uh, uh, you you knew
10 that he was medicated at the time a the plea, do you recall?

11 A. Uh, yeah, I, yeah, I, yeah, yeah, I did, I knew he was
12 under medication.

13 Q. Did you know whether or not, uh, how that specific
14 medication might have affected him, do you know?

15 A. Let me tell ya, at no time did I ever feel like that he
16 was not competent to talk to me and to, and to carry on with
17 good conversation and and answered questions, I never at any
18 time, uh, did I feel that way.

19 Q. During the the plea itself, uh, there were a couple times
20 was that ya'll took a pause, do you recall whether or not
21 ya'll had to have conversations with Mr. Ortiz on the plea or
22 do you, do you remem -- I know it's a long time ago, you
23 probly don't remember, do you remember at all what discussions
24 may have been had when takin' pauses durin' the plea, things
25 of that nature?

LARRY HOLMES COOKE - CROSS-EXAMINATION BY MR. JOHNSON

1 A. I'm sorry, I didn't -- I can't hear ya.

2 Q. There were a couple of pauses durin' the, durin' a plea,
3 uh, do you recall whether or not ya'll had to have discussions
4 with Mr. Ortiz about, uh, plea process itself or do you know
5 what that was about, ---

6 A. That uh-uh.

7 Q. --- don't recall?

8 A. Uh, I don't think we'd a handled it any differently we
9 have handled any other client about the process of a guilty
10 plea and the fact the judge is gonna ask you, ya know if
11 you're guilty, uh, and ya know if ya either are ya aren't and
12 ya aren't, we go to trial and we're ready to go, I mean, Jake
13 and I spent a lotta time on this case and I really spent
14 probly more time than Jake 'cause I was principle lawyer
15 involved in it from the beginning, court-appointed, and Jake
16 Jake, uh, helped me out on the case.

17 Q. Since -- then last question do you recall whether or not
18 that, uh, ya'll talked about an appeal or if there were any
19 grounds for an appeal?

20 A. Uh, you know, I don't remember. All I, all I do remember
21 is if he had ever asked us to appeal his case, we woulda done
22 that, the judge told him that he had ten days if he wanted to
23 appeal the that the plea, uh, I don't recall ever getting
24 anything from him or any communications, maybe Jake does, a
25 lotta times I'm not up there in the office because I'm a part-

LARRY HOLMES COOKE - CROSS-EXAMINATION BY MR. JOHNSON

1 time PD and I I take a, I try to work two weeks and take off a
2 couple weeks and do my own private stuff so, uh, it coulda
3 been he mighta called Jake, I don't have any idea Jake recalls
4 that or not but I did -- I don't recall hearing from him.

5 Q. Thank you. I have no further questions, Your Honor.

6 THE WITNESS: Thank you.

7 MR. SCHMECKPEPER: Nothing further from the State, Your
8 Honor.

9 THE WITNESS: Thank you, Judge.

10 THE COURT: Thank you. Good to see you, you're excused.

11 THE WITNESS: You too.

12 (Whereupon, the witness left the stand.)

13 MR. SCHMECKPEPER: And, Your Honor, the State calls Jack
14 Erwin -- Jake Erwin.

15 THE COURT: Okay.

16 (Whereupon, the witness came forward.)

17 THE CLERK: Mr. Erwin, please place your left hand on the
18 Bible, raise your right hand.

19 JOHN KENNETH ERWIN, JR., having
20 been first duly sworn, testified as follows:

21 THE CLERK: Thank you, you may be seated, you'll please
22 state your full name for the record.

23 THE WITNESS: Full name is John Kenneth Erwin, Jr., I go
24 by Jake.

25 DIRECT EXAMINATION BY MR. SCHMECKPEPER:

JOHN K. ERWIN, JR. - DIRECT EXAMINATION BY MR. SCHMECKPEPER

1 Q. Afternoon, Mr. Erwin, I just have a couple brief
2 questions.

3 A. Okay.

4 Q. Um, I understand that, uh, Mr. Cooke said he was the
5 principle attorney in this but you also represented
6 Mr. Ortiz, ---

7 A. Right.

8 Q. --- and could you briefly go over your experience as a
9 criminal attorney.

10 A. Yeah, um, I have been a attorney in the public defender's
11 office here in Greenville for six years now and in in doing
12 that have dealt with all manner of criminal cases from murder
13 on down to the pettiest crime you can imagine, um, multiple
14 times.

15 Q. And that the only question I really have for you, uh, did
16 Mr. Ortiz ever ask you to file a direct appeal?

17 A. Yeah, I I don't remember. Um, I'll tell you that, uh, as
18 as Larry said it it it's, with a plea it's it's my practice
19 that if the client asks for to appeal a plea I will file it,
20 um, but, uh, generally on a plea there's normally not any
21 appealable issues and this plea in particular I don't remember
22 seeing any appealable issues, I mean, the plea colloquy the
23 judge reads is kind of designed to to cut those off and and
24 make sure that that doesn't happen, um, so I didn't see any
25 appealable issues and he, I guess he didn't ask me, if he had

JOHN K. ERWIN, JR. - DIRECT EXAMINATION BY MR. SCHMECKPEPER

1 I would have filed that.

2 Q. And how how much time d'you get to spend with Mr. Ortiz?

3 A. Uh, over the course a the case, uh, not as much as Larry
4 but but a good bit. I probably met with him four or five
5 times including the day of, uh, what ultimately ended up being
6 a plea but we walked in there Monday morning thinking it was
7 gonna be a trial so leading up to that and that morning I
8 spent a good deal a time.

9 Q. Now what would you have done if you'd gotten there Monday
10 morning and you you had felt that Mr. Ortiz didn't understand
11 what was going on or wasn't able to proceed because of his
12 competency issues?

13 A. Um, you can do what's called a a "Blair Hearing", um,
14 where you can request that the Court order him to be
15 evaluated, um, again for competency because competency can
16 develop over the course of a case and course he had been, he
17 had been evaluated previously but if there had been more
18 issues, and this has happened before, sometimes the day of
19 trial you don't feel like someone is competent you can ask the
20 Court to order to have him evaluated or and and to have the
21 doctor who does that evaluation puts, you know, testimony on
22 the record as to their opinion as to his competency.

23 Q. And do you feel there were any issues?

24 A. I did not.

25 Q. I have no further questions, please answer any questions

JOHN K. ERWIN, JR. - CROSS-EXAMINATION BY MR. JOHNSON

1 by Mr. Johnson.

2 CROSS-EXAMINATION BY MR. JOHNSON:

3 Q. Uh, uh, Mr. Erwin, Mr. Ortiz, has, uh, testified I
4 believe you heard, uh, and alleged that, uh, ya'll may have
5 encouraged him to say certain answers to the judge's
6 questions, do you, do you remember doing anything like that?

7 A. I do not remember telling him what to answer.

8 Q. Okay. Uh, do you recall whether or not he, uh,
9 understood your conversations that you had with him and
10 everything, do you recall?

11 A. Um, you know, it seemed to me like he did and that's
12 really all I can go on, I mean, obviously it's pretty fraught,
13 um, atmosphere when you're dealing with, uh, you know, s -- a
14 serious sentence like this, um, but it seemed to me that he
15 understood.

16 Q. Do you recall, uh, uh, knowing type of medicine he was,
17 knowing that he was on medicine at the time of his plea and
18 thinking that it affect him negatively or positively?

19 A. At the time I knew that he had mental health issues, I
20 knew that he was being medicated for that, um, I knew those
21 issues were more complicated than what I could understand
22 really, um, and and I knew that he certainly was taking
23 medication, um, again, I I don't remember anything happening
24 that morning that would have made me think that he was not
25 competent to go forward.

JOHN K. ERWIN, JR. - CROSS-EXAMINATION BY MR. JOHNSON

1 MR. JOHNSON: I have no further questions, Your Honor.

2 MR. SCHMECKPEPER: Nothing from the State, Your Honor,
3 that's the State's case.

4 THE COURT: All right, you can step down be excused.

5 THE WITNESS: Thank Your Honor.

6 THE COURT: Thank you for your time. All right, let's
7 take a -- is that all on this case?

8 MR. JOHNSON: Yes, Your Honor.

9 THE COURT: All right, let's take about a 10-minute
10 break.

11 MR. JOHNSON: Thank Your Honor.

12 (Whereupon, the Court took the case under advisement.)

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CERTIFICATE OF REPORTER

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I, Margaret A. Woods, Court Reporter in and for the State of South Carolina at Large, hereby certify that I reported the preceding case on October 25, 2016 at the time and place heretofore set forth; and that the foregoing pages numbered from 3 through 29, inclusive, constitute a true and accurate transcription of my stenographic notes of the said proceeding.

I further certify that I am neither attorney nor counsel for, nor related to or employed by any of the parties connected to the action, nor am I financially interested in the action.

February 9, 2017

Margaret A. Woods

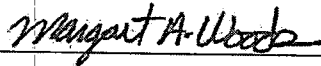
Margaret A. Woods, Court Reporter
in and for the State of South Carolina at Large.

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14 February 9, 2017

15 

16 Margaret A. Woods, Court Reporter
17 in and for the State of South Carolina at Large.

STATE OF SOUTH CAROLINA)
)
 COUNTY OF GREENVILLE)
)
 Victor Noe Ortiz-Delvalle,)
 #362880,)
)
 Applicant,)
)
 vs.)
)
 State of South Carolina,)
)
 Respondent.)

IN THE COURT OF COMMON PLEAS
 THIRTEENTH JUDICIAL CIRCUIT

C.A. No.: 2015-CP-23-4723

ORDER

ENTERED COMPUTED

FILED-CLERK OF COURT
 GREENVILLE CO. S.C.
 PAUL D. WICKENSIMMER
 2016 NOV 18 AM 11:52

Applicant filed this Post-Conviction Relief application July 30, 2015. The matter was heard October 25, 2016. Applicant was represented by Brian P. Johnson, Esq. The State was represented by Patrick Schneckpeper, Esq.

The Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the Greenville County Clerk of Court's orders of commitment. The Greenville County Grand Jury indicted the Applicant at the November 2013 term of General Sessions for First-Degree Criminal Sexual Conduct with a Minor (2013-GS-23-10605). Larry H. Cooke, Esquire and John K. Erwin, Jr., Esquire represented the Applicant.

On February 2, 2015, the Applicant pled guilty as indicted. The Honorable D. Garrison Hill sentenced the Applicant to life imprisonment. The Applicant did not appeal.

In his application for post-conviction relief, the Applicant alleged several reasons his present incarceration is unlawful. Those presented at the hearing are discussed below. Any "reason" set forth in Applicant's application and not presented at the hearing is deemed abandoned.

The Applicant's allegation is that trial counsel was ineffective as further discussed herein below.

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 on as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 2064 (1984); *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 814 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume counsel "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Strickland*, 466 U.S. at 690, 104 S. Ct. at 2066. The Applicant must overcome this presumption in order to receive relief. See *Cherry v. State*, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under prevailing professional norms." *Cherry v. State*, 300 S.C. at 117, 386 S.E.2d at 625 (quoting *Strickland*, 466 U.S. at 688, 104 S. Ct. at 2065). 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. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." *Johnson v. State*, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984)).

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 (1985).

Applicant testified that his plea of guilt was involuntary and that he did not understand what he was doing. He testified that he signed (I assume he meant his sentencing sheet) because he was told he would receive a life sentence if he did not. He testified that he answered the trial judge's questions as he had been directed to do by trial counsel, answering yes or no if he did not understand the question.

Applicant testified he was slow in processing and needs help to process things (a fact supported by trial counsel's testimony). He testified he had a brain injury as a child, experienced blackouts, and had "mental issues." He testified he was medicated while in the county jail as he would try to kill himself and attack others. He testified he has been diagnosed as bi-polar and has been prescribed six or seven medications. Applicant testified he was on medication at the time he entered his plea and was "drugged." He testified the medication made it easier for him to accept what was being said to him rather than doing what he wants to do.

Applicant acknowledged he was evaluated for mental competency, but claimed the evaluation was done by two women who would keep repeating his answers until they got the answers they wanted.

Applicant testified he thought he was going to receive a twenty-five year sentence and did not know he would get a life sentence. He testified that trial counsel (Cooke) scared him and told Applicant he would receive a life sentence if he was convicted at trial.

JDH #3

Applicant testified he would have appealed his plea and sentence had he know he could do so.

The plea transcript reflects that Applicant told the trial judge he was on medication and, while not in the most affirmative way, acknowledged the medications did not "affect [his] ability to process information." (Plea Trial Record p. 5, l. 23 through p. 6, l. 15). Immediately after this exchange with the trial court, trial counsel indicated they had no question about Applicant's competency to enter a plea (Plea Trial Record p. 6, ll. 16-19). The transcript also reflects that he had been told by trial counsel the maximum sentence he faced and he understood the minimum and maximum sentence attached to the charge to which he was pleading (Plea Trial Record p. 2, l. 13 through p. 9, l. 6). At his plea, Applicant acknowledges he had not been promised anything in exchange for his plea at the time (Plea Trial Record p. 9, ll. 7-13). At his plea, Applicant acknowledged he understood his constitutional rights and wished to go forward with his plea (Plea Trial Record p. 11, ll. 7-11) and told the trial judge he had no questions for the court (Plea Trial Record p. 11, ll. 15-16).

Larry Cooke, one of Applicant's trial counsel, testified that he did have Applicant evaluated for competence. He testified that the State also had applicant evaluated for competence. Mr. Cooke further testified that both evaluations found Applicant competent. Mr. Cook also testified that the private evaluation determined that Applicant was malingering and found no evidence that Applicant had multiple personalities as he claims.

Trial counsel Cooke testified that he never told Applicant that any sentence was guaranteed but that he though the trial judge would give Applicant some benefit based on his willingness to plead.

JC. H. A

Trial counsel Cooke also testified that he knew applicant was on medication at the time of the plea, but testified that he, Cooke, never felt at any time he could not carry on a meaningful conversation.

Both of Applicant's trial counsel testified that they do not recall that Applicant requested that they file an appeal and would have done so if such a request had, in fact, been made.

Both of Applicant's trial counsel testified they did not coach Applicant as to how to answer the questions posed to him by the trial judge.

Trial Counsel Erwin testified he saw no appealable issues arising from the plea, that he knew that at the time of the plea Applicant had mental issues, and that Applicant was on medication at the time of the plea. Trial counsel testified that he saw no mental competence issues at the time of the plea and, had he felt mental competence was an issue, he would have requested a *Blair*¹ hearing.

Based on the above, the Court finds that trial counsel represented Applicant well within prevailing professional norms. Therefore, Applicant's application for Post-Conviction Relief is denied and dismissed with prejudice.

This Court hereby advises Applicant that he must file and serve a Petition for Writ of Certiorari within thirty (30) days of the service of this Order to secure appellate review. See Rules 203 and 243, South Carolina Appellate Court Rules (SCACR). The Applicant's attention is directed to Rule 243, SCACR, for the procedures following the filing and service of the Petition.

IT IS SO ORDERED.

¹ *State v. Blair*, 275 S.C. 529, 273 S.E.2d 536 (1981).

PC H
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October 31st, 2016
Greenville, South Carolina

John C. Hayes, III
John C. Hayes, III
Presiding Judge

#6

010605

DOCKET NO. 2013-GS-23-
CLK

The State of South Carolina

County of Greenville

COURT OF GENERAL SESSIONS

November

TERM 2013

THE STATE

vs.

VICTOR NOE ORTIZ DELVALLE

WITNESSES

W.t. Campbell



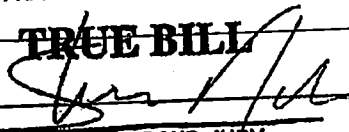
Greenville County Sheriffs Office

4/12/2013

ARREST WARRANT NUMBER
2013A2330202925

ACTION OF GRAND JURY

TRUE BILL



FOREMAN GRAND JURY

Foreperson of Grand Jury

VERDICT

Indictment for

0385

CRIMINAL SEXUAL CONDUCT WITH A MINOR
FIRST DEGREE

VIOLATION § 16-03-0655(A)(1)

Foreperson of Petit Jury

Date:

ENTERED
ACCT

STATE OF SOUTH CAROLINA)
COUNTY OF GREENVILLE)

INDICTMENT FOR
CRIMINAL SEXUAL CONDUCT WITH A MINOR FIRST DEGREE

At a Court of General Sessions, convened on

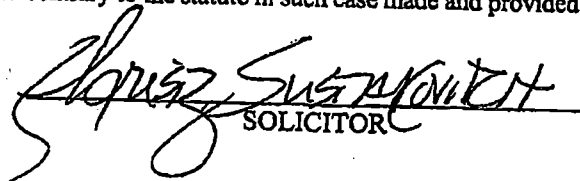
NOV 26 2013

the Grand Jurors of Greenville

County present upon their oath:

That VICTOR NOE ORTIZ DELVALLE did in Greenville County, between March 4, 2013 and March 5, 2013, commit a sexual battery on C. O., who was less than eleven years of age. This is in violation of §16-03-0655(A)(1)[formerly 16-3-655(1)] of the South Carolina Code of Laws (1976) as amended.

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


SOLICITOR