ALAN WILSON
ATTORNEY GENERAL

July 12, 2017

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

RE: **Erick Hernandez, #352808 v. State of South Carolina**
Appellate Case No. 2016-001142
Lower Court Case No. 2013-CP-26-4030

Dear Mr. Shearouse:

Enclosed for filing are the original and six (6) copies of the **Return to Petition for Writ Certiorari** in the above-referenced case. By copy of this letter we are serving opposing counsel today.

Sincerely,

Johnny E. James Jr.
Assistant Attorney General
S.C. Bar No. 101260

JEJ/mm
Enclosures

cc: Wanda H. Carter, Esquire

STATE OF SOUTH CAROLINA
In the Supreme Court

CERTIORARI TO HORRY COUNTY
Court of Common Pleas
Thomas A. Russo, Circuit Court Judge

Appellate Case No. 2016-001142

ERICK HERNANDEZ, Petitioner,

vs.

STATE OF SOUTH CAROLINA, Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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ATTORNEYS FOR RESPONDENT

INDEX

RESPONDENT'S ISSUES PRESENTED

Is there any evidence to support the post-conviction relief court's finding that Petitioner failed to establish trial counsel was ineffective due to a conflict of interest where the alleged subject of the conflict had no substantive part in the charges to which Petitioner pled, and where Petitioner's motion to relieve counsel was granted by the Court and thereafter waived by him on the record in order to avoid trial and the possibility of a more severe sentence upon conviction?

STATEMENT OF THE CASE

On July 15, 2010, the Horry County Police Department sought and obtained five arrest warrants against Petitioner for various drug trafficking offenses: two charges of trafficking in cocaine, between 200 and 400 grams (M-506473, M-506477); two charges of trafficking in cocaine, between 28 and 100 grams (M-506475, M-506478); and one charge of trafficking in marijuana, between 10 and 100 pounds (M-506479). Petitioner was thereafter indicted at the August 2012 term of the Horry County Grand Jury for one count of trafficking in cocaine, between 200 and 400 grams (2012-GS-26-03381); two counts of distribution of cocaine (2012-GS-26-03382, -03384); one count of trafficking in cocaine, between 28 and 100 grams (2012-GS-26-03383); and possession with intent to distribute marijuana (2012-GS-26-03385). Fran Humphries, Esq. represented Petitioner, and Donna Elder, of the Fifteenth Circuit Solicitor's Office, prosecuted the case.

On October 8, 2012, Petitioner pled guilty to -03383 as indicted; all other indictments were dismissed *nolle prosequi*. Consistent with terms negotiated between Petitioner and the State, the Honorable Edward B. Cottingham sentenced Petitioner to imprisonment for a term of 15 years. Petitioner did not appeal his plea or sentence.

Petitioner filed his application for post-conviction relief on June 11, 2013 (2013-CP-26-4030). He alleged the following grounds for relief in his application:

1. Ineffective Assistance of Counsel
    a. Failure to quash indictment.
    b. Conflict of interest.
    c. Failure to file Notice of Appeal

Respondent made its return on October 24, 2013, and an evidentiary hearing into the matter was convened on November 13, 2015, before the Honorable Thomas A. Russo. Applicant was present at the hearing and represented by Tristan M. Shaffer, Esq. J. Croom Hunter, of the South

Carolina Attorney General's Office, represented Respondent. Petitioner testified on his own behalf, and Fran Humphries, Esq., also testified. By written order dated April 13, 2016, and filed April 21, 2016, Judge Russo denied and dismissed the application.

This petition follows.

STATEMENT OF THE FACTS

On June 2, 2012, agents with the United States Drug Enforcement Agency and officers with the Horry County Sheriff's Department recorded the transaction of a quarter kilo of cocaine between a wired confidential informant and "Codefendant Vargas" at a location on Clay Pond Road. Appx. 28, l. 25 – p. 29, l.6; p. 30, ll. 1-6. The narcotics were thereafter taken into custody, tested, and confirmed as cocaine. Appx. 29, ll.12-14; p. 30, ll. 4-6. Two weeks after the transaction, law enforcement recorded a phone conversation between the confidential informant and Petitioner wherein Petitioner demanded money for the drugs he had supplied to "Vargas," and which had in turn been supplied to the confidential informant. Appx. 29, ll.14-20.

In July 2012, law enforcement executed a search warrant on the Clay Pond Road location and served one of the search warrants on one Karen Villamizar.[1] Appx. 30, ll.6-13; p. 64, ll.18-22. Petitioner was arrested at the scene and law enforcement secured utility bills indicating Petitioner's residence at the location. Id. Law enforcement seized documents and a cell phone in Petitioner's possession that together indicated the phone seized was the same as used to call the confidential informant to demand money for the drugs. Appx. 30, ll.10-16. In the course of developing the case, the State confirmed the cooperation of "Vargas," as well as co-conspirator Herman Diaz, who provided the drugs to Petitioner. Appx. 30, l. 16 – p. 31, l.8.

Petitioner retained attorney Frances A. Humphries ("Counsel"). Counsel promptly secured a cooperation agreement for Petitioner, and Petitioner provided substantial intelligence to facilitate the DEA's investigation. Appx. 57, l.16 – p.58, l. 15. In exchange, Petitioner was to receive "four to five years on one third parole eligible time and essentially be a turnaround sentence[.]" Appx. 60, ll. 3-5. However, against Counsel's advice, Petitioner instead posted

[1] Much of the PCR transcript, as well as Petitioner's Petition for Writ of Certiorari use the spelling "Viamizar." Respondent is of the firm belief that the recorder's phonetic spelling simply failed to capture the Spanish *yeísmo*: the pronunciation of "Viamizar" and "Villamizar" is almost the same.

bond and was taken into custody by U.S. Immigration and Customs Enforcement; the assistant solicitor assigned to the case thereafter informed Counsel that the action violated the cooperation agreement, as Petitioner was no longer available to cooperate. Appx. 60, l. 17 – p. 61, l. 25.

Upon Petitioner's service of federal time and return to the State's custody, Counsel secured a new plea offer of "13 years, 85 percent," on the basis that it was comparable to other co-defendants with a similar level of culpability. Appx. 62, ll. 3-13. Petitioner rejected the offer before the Honorable Benjamin H. Culbertson, who interpreted the rejection as a request for trial, and the relationship between Petitioner and Counsel deteriorated. Appx. 62, l. 14 – p. 63, l.13.

While reviewing an additional batch of discovery provided "maybe a month more or less before the trial date," Counsel recognized the name Karen Villamazar as a client and as the person who referred Petitioner to him for representation. Appx. 64, ll. 13-22. Upon two inquiries, the State informed Counsel that Ms. Villamazar was merely incidental to the charges brought against Petitioner and that she would not be a witness. Appx. 64, l. 23 – p. 65, l. 18; p. 71, ll. 5-22. Petitioner thereafter filed a motion to relieve Counsel on the grounds that she had a conflict of interest, among other reasons; Petitioner joined in the motion based on "potential conflict" and, importantly, her degraded relationship with Petitioner. Appx. 65, ll. 19-25; p. 72, ll. 16-19; pp. 100-104.

Petitioner appeared before the Honorable Edward B. Cottingham on October 8, 2012, four days before trial, and attempted to negotiate the Court down from an offer to plea to one count with a potential exposure of between 7 and 25 years incarceration; the Court declined to entertain the attempt. Appx. 4, l. 2 – p. 5, l. 12. Assistant Solicitor Donna Elder confirmed that the plea offer was scheduled to expire at the end of that day and that no further offers would be made in the case. Appx. 7, ll. 11-23. The Court then took up the matter of the alleged conflict of

interest and alternately determined there was a conflict and that "there's a vague possibility that [a conflict] exists[.]" Appx. 9, ll. 10-11; p.10, ll.7-10. Accordingly, the Court granted the motion to relieve counsel and indicated that it would appoint a public defender that same day. Appx. 10, ll. 5-18. The Court also excoriated Petitioner for "obviously playing with the Court by filing this motion four days before the case was set for trial." Appx. 12, ll. 2-4.

Despite the grant of the motion, Counsel requested the Court permit her to remain on the case until the end of the day in case Petitioner changed his mind regarding the plea offer; the Court granted that request. Appx. 13, l. 25 – p. 14, l.4. Petitioner was returned to courthouse detention, where he requested Counsel speak with him, and asked her to secure a deal for 15 years. Appx. 18, l. 25 – p. 19, l. 21; p. 67, ll. 4-10. Counsel did so achieve a negotiated plea offer of 15 years and Petitioner again appeared before Judge Cottingham. Id. In an exceedingly thorough colloquy between the Court and Petitioner, Petitioner indicated that he understood Counsel had been relieved, affirmed that he wanted Counsel restored as his attorney, that Counsel explained everything to him, that he was entering his plea freely and voluntarily, that he did not wish to go to trial, and that he was totally and completely satisfied with Counsel's services. Appx. 20, l. 19 – p. 28, l. 15. Of particular note, the Court affirmatively expressed its belief that the alleged conflict did not cause any deficiency on the part of Counsel:

> **THE COURT:** Does that alleged conflict in any way affect your ability as his lawyer today under these proceedings?
>
> **[COUNSEL]:** I do not believe so.
>
> **THE COURT:** I don't either based on the record.

Appx. 22, ll. 16-19. Petitioner pled guilty and was sentenced to 15 years. Appx. 34, ll. 8-9; p. 36, l. 1.

Though Counsel indicated and the Court agreed that clear waiver on the record was sufficient, the Court ordered that a written waiver of the conflict be produced "in an abundance of precaution[.]" Appx. 22, l. 20 – p. 23, l. 12. Petitioner subsequently refused to sign the written waiver provided and, the following day, Judge Cottingham found him in contempt of court. Appx. 69, ll. 3-12.

At the evidentiary hearing, Counsel testified that throughout the process, Petitioner never wished to go to trial, but always desired a better deal. Appx. 63, ll. 3-5, p. 77, ll. 17-22. Petitioner again informed the Court that he pled guilty because he didn't want to go to trial and because he was afraid of receiving a more severe sentence if convicted. Appx. 87, ll. 9-19, p. 89, ll. 10-13. Petitioner then claimed he lied to the Court during his guilty plea proceeding when asked if he was satisfied with Counsel. Appx. 87, l. 20 – p. 88, l.4.

STANDARD OF REVIEW

The post-conviction relief court's findings of fact and conclusions of law receive great deference during appellate review. Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000). The proper standard of review of a post-conviction relief decision is whether "any evidence of probative value" exists to sustain the lower court's findings. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989). However, appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

In a post-conviction relief action, an applicant has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRCP; Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant alleges ineffective assistance of counsel as a ground for relief, he or she must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. 441, 334 S.E.2d 813. The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. "There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case." Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007). The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). Judicial scrutiny of counsel's performance must be highly deferential, as it is all too tempting for a defendant to second guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular

act or omission of counsel was unreasonable. Strickland, 466 U.S. at 689. "[E]very effort be made to eliminate the distorting effects of hindsight" and to evaluate counsel's decisions at the time they were made. Strickland, 466 U.S. at 689. Accordingly, courts must be wary of second-guessing counsel's tactics. Whitehead v. State, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 466 U.S. 668.

ARGUMENT

I. THE PCR COURT PROPERLY DENIED RELIEF BECAUSE PETITIONER INTRODUCED NO PROBATIVE EVIDENCE TO SHOW EITHER AN ACTUAL CONFLICT OF INTEREST OR ANY DEFICIENCY THEREFROM AND BECAUSE THE IMPENDING EXPIRATION OF THE STATE'S PLEA OFFER COULD NOT AMOUNT TO COERCION AS TO EITHER THE PLEA OR THE WAIVER

The PCR Court's Order of Dismissal easily meets the "any evidence" standard because Petitioner failed to establish either that he lacked a full understanding of the consequences of his plea or of the charges against him, or with any specificity establish the actual conflict of interest he alleged against Counsel.

A. Petitioner introduced no probative evidence to show any actual conflict at any point in time, nor any deficiency therefrom on the part of Counsel, but relies entirely on speculation.

"To establish a violation of the Sixth Amendment right to effective counsel due to a conflict of interest arising from multiple representation, a defendant who did not object at trial must show an actual conflict of interest adversely affected his attorney's performance." Thomas v. State, 346 S.C. 140, 143, 551 S.E.2d 254, 256 (2001) (citing Jackson v. State, 329 S.C. 345, 354, 495 S.E.2d 768, 773 (1998)). An actual conflict of interest occurs where an attorney owes a duty to a party whose interests are adverse to the defendant's. Fuller v. State, 347 S.C. 630, 633-34, 557 S.E.2d 664, 665 (2001). Where a defendant demonstrates that counsel actively represented conflicting interests *and* that an actual conflict of interest adversely affected his lawyer's performance, prejudice is presumed. Gonzales v. State, 419 S.C. 2, 10, 795 S.E.2d 835, 839 (2017) (citing Strickland, 466 U.S. at 692) (emphasis added). However, "[t]he mere possibility of a conflict of interest is insufficient to impugn a criminal conviction." Fuller at 634, 557 S.E.2d at 665.

In this matter, Fuller is dispositive. The entirety of Petitioner's allegation of a conflict of

interest is that Counsel represented both Petitioner and Villamizar on separate drug charges, and that a search warrant on the Clay Pont Road location was served on Villamizar. No evidence was introduced to show that Villamizar's legal troubles intersected in any way beyond that incidental role. No evidence was introduced to show that Villamizar could have offered any testimony either favorable or detrimental to Petitioner.[2] To the contrary, the consistent evidence introduced at the evidentiary hearing *and* at the plea proceeding was that Villamizar was not a witness for Petitioner's coming trial, had no connection to the charges, and that the potential conflict did not affect Counsel's performance.

Petitioner seeks certiorari on the basis of assertions of fact[3] and "inferences"[4] that run plainly contrary to the facts introduced at the evidentiary hearing. The speculative nature of Petitioner's argument can only at best conjure the "mere possibility of a conflict of interest," which is insufficient to merit relief. Fuller at 634, 557 S.E.2d at 665.

Furthermore, assuming for the sake of argument that there was an actual conflict of

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[2] Villamizar did not testify at the evidentiary hearing; it is therefore hardly appropriate to estimate what her testimony may or may not have been. See Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998).

[3] "In the case at bar, trial counsel represented petitioner and [Villamazar], both of whom were charged as participants in the same drug conspiracy ring." Petition for Writ of Certiorari at 7. There is *no basis in the record* for this assertion, but to the contrary, repeated indications that Villamazar had no part to play in Petitioner's looming trial. See Appx. 32, ll. 20-24 (Villamazar not listed as a witness of concern by Counsel); p. 65, ll. 13-18 (State informed Counsel Villamazar was not a witness); p. 71, ll. 5-22 (State informed Counsel Villamazar would not be a witness in any case that they tried); p. 72, ll. 4-15 (Villamazar was served the search warrant and either Villamazar or Petitioner called the other to ask why the police were at the house). No evidence regarding Villamazar's charges was introduced other than the vague description of "drug charges." Appx. 70, ll. 1-14.

Petitioner further argues that "the argument by the solicitor that the charge petitioner pled to was not connected to any of the charges against [Villamazar] cannot stand because the case and facts **surely bled over boundary lines** and blended into each other's cases. [Appx. 71, ll. 13-22]." Petition for Writ of Certiorari at 7-8 (emphasis added). There is *no basis in the record* for this bald assertion, and Petitioner's associated citation refers to Counsel's recollection of the State stating the exact opposite of the above quoted assertion. Counsel, at the end in lines 21-22, merely expresses her reservation and why she wisely took the time to look into the matter.

[4] "Therefore, the inference was that [Villamazar], who was represented by petitioner's counsel also, would most likely have testified against petitioner as well if a trial had been held on petitioner's behalf." Petition for Writ of Certiorari at 8. Again, there is *no basis in the record* for this "inference." Every bit of evidence points to the absolute opposite conclusion.

interest, Petitioner failed to show what, if any, adverse effect that conflict had on Counsel's performance. Again, all evidence points to the contrary—Counsel achieved three separate plea deals for Petitioner despite Petitioner's continual refusal to follow the advice of counsel or cooperate in the preparation of his defense.

B. Petitioner had no constitutional right to the plea offer set to expire on October 8, 2012, and that it was set to expire at the end of that day did not and could not amount to coercion sufficient to invalidate the guilty plea or his waiver of the alleged conflict.

A defendant has no constitutional right to plea bargain. State v. Chisolm, 312 S.C. 235, 237, 439 S.E.2d 850, 852 (1994) (citing Weatherford v. Bursey, 429 U.S. 545 (1977)). The decision whether to offer a plea bargain is a matter wholly within the solicitor's discretion. State v. Whipple, 324 S.C. 43, 49, 476 S.E.2d 683, 686 (1996) (citing Chisolm at 238, 439 S.E.2d at 852). Accordingly, the State may establish an expiration date for any plea offer it may make, and, but for some deficiency in communicating that offer to a defendant, that expiration is a matter within the State's discretion. See, generally Hyman v. State, 397 S.C. 35, 723 S.E.2d 375 (2012) (affirming denial of PCR where petitioner refused to accept a plea offer before expiration because he wished to watch a videotape of a confidential informant, which the State had already disclosed to counsel); Davie v. State, 381 S.C. 602, 675 S.E.2d 416 (2009) (finding counsel was ineffective for not objecting upon late discovery of a plea offer after its expiration, where it was mailed to the wrong address).

The conditions and time limitations of a plea offer simply cannot amount to coercion upon a defendant, however strong a motivating factor it may be, and do not play a role in the determination of the voluntariness of a plea—"[a]ll that is required to knowingly and voluntarily enter a plea of guilty is that a defendant have a full understanding of the consequences of his plea and of the charges against him." Gustine v. State, 325 S.C. 123, 128, 480 S.E.2d 444, 446

(1997) (citing Simpson v. State, 317 S.C. 506, 455 S.E.2d 175 (1995)). To that end, Petitioner knowingly and voluntarily pled guilty. The record demonstrates Petitioner fully understood the charges against him, the consequences of pleading guilty, and that Counsel effectively addressed any and all questions he had. Petitioner ultimately demonstrated understanding of the charges against him, the elements necessary to prove those charges, and the potential punishment he faced if convicted. Petitioner was granted the assistance of an interpreter, despite his strong command of the English language as evident in Counsel's testimony and his handwritten motion to relieve counsel. Petitioner's motivation to avoid trial and a much more severe sentence, as he affirmed at the PCR hearing, neither impacts the relevant question under Gustine, nor amounts to any other constitutional infraction.[5] That Petitioner "felt pressured to waive a conflict of counsel issue"[6] in order to gain the benefit of a favorable plea bargain is of no consequence, especially when there is no indication in any part of the record that Petitioner would have been prohibited from turning around and accepting the offer *pro se*.

The same reasoning applies to the question of whether the waiver was knowing and voluntary. A conflict of interest on the part of counsel can be waived by a defendant. See Thomas at 144, 551 S.E.2d at 256; Jordan v. State, 406 S.C. 443, 450, 752 S.E.2d 538, 541 (2013); State v. Stanko, 402 S.C. 252, 270, 741 S.E.2d 708, 719 (2013); Fuller at 635 n. 5, 557 S.E.2d at 666 n. 5. Waiver must be done knowingly, intelligently, and voluntarily. Id. Petitioner knew the parameters of the potential conflict, achieved the relief he desired, and then firmly reversed course in open court. Nothing additional was necessary.

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[5] Petitioner notes that he did not sign the written waiver as required by Judge Cottingham. Petition for Writ of Certiorari at 8-9 (citing Appx. 68, l. 12 – p. 69, l. 12). Given the clarity of the transcript, and Petitioner's inconsistent representations as to his English proficiency, Petitioner's refusal to sign the written waiver after he pled can only support Judge Cottingham's conclusion that Petitioner is "playing games with the Court." Appx. 9, l. 24.

[6] Petition for Writ of Certiorari at 9.

CONCLUSION

Because Petitioner cannot show an actual conflict of interest, a deficiency therefrom, or that either his plea or waiver were involuntary, this Court should deny this Petition for a Writ of Certiorari. Should this Court grant the petition, the State seeks permission to more fully brief the issues herein.

Respectfully submitted,

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Senior Assistant Deputy Attorney General

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S.C. Bar No. 101260
Assistant Attorney General

By: Johnny E. James Jr.
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12 July, 2017

STATE OF SOUTH CAROLINA
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ERICK HERNANDEZ, Petitioner,

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PROOF OF SERVICE

I, Johnny Ellis James Jr., certify that I have served the within **Return to Petition for Writ of Certiorari** on Petitioner by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Wanda H. Carter, Esquire
P.O. Box 11589
Columbia, South Carolina 29211-1589

I further certify that all parties required by Rule to be served have been served.

This 12 day of July, 2017.

Johnny E. James Jr.

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