

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas
Post-Conviction Relief

JUN 29 2018

S.C. SUPREME COURT

J. Derham Cole, Circuit Court Judge

CASE NO: 2018-000328

Ricardo Hernandez #348548,..... Petitioner,

vs.

State of South Carolina,Respondent.

APPENDIX

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STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG

COURT OF GENERAL SESSIONS

STATE OF SOUTH CAROLINA,
PLAINTIFF,
vs.
RICARDO GOMEZ-HERNANDEZ,
HORACIO RODRIQUEZ, and
BONIFACIA AGUILAR-CABERA,
DEFENDANTS.

TRANSCRIPT
OF
RECORD
2011-GS-42-420
2010-GS-42-6263
2011-GS-42-332

November 7th, 2011
Spartanburg, South Carolina

B E F O R E :

THE HONORABLE ROGER L. COUCH, Judge, and a jury.

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

RYAN MCCARTY
ASSISTANT SOLICITOR
Attorney for the State

~~ROBERT NEWTON
ESQ.
Attorney for Defendant Hernandez~~

TANYA JONES
Assistant Public Defender
Attorney for Defendant Rodriquez

ROBERT HALL
Assistant Public Defender
Attorney for Defendant Cabera

PAMELA E. GREEN
Circuit Court Reporter
Seventh Judicial Circuit

I N D E X O F W I T N E S S E S

(There were no exhibits marked during this hearing.)

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1 SOLICITOR McCARTY: May it please the Court, Your
2 Honor.

3 THE COURT: Let's, let's swear the defendants while
4 we're at it.

5 CLERK: Okay.

6 THE COURT: Madam Clerk, swear the defendants for me.

7 CLERK: You want me to swear all of them at the same
8 time?

9 THE COURT: Yes, you may. We're gonna swear all the
10 defendants at the same time.

11 (WHEREUPON, all defendants were placed under oath at
12 this time.)

13 THE COURT: All right. All defendants have been sworn.
14 You may call the cases.

15 SOLICITOR McCARTY: May it please the Court, Your
16 Honor.

17 Standing in front of you with Mr. Newton is Ricardo
18 Gomez-Hernandez. He's here on Indictment Number 2011-0420.
19 Your Honor, this was originally charged as trafficking in
20 cocaine more than 400 grams. He's pleading to the lesser
21 included offense of trafficking in cocaine 28 to 100 grams.
22 Your Honor, he comes before you with a negotiated sentence
23 of 12 years.

24 Your Honor, the remaining two defendants, standing with
25 Ms. Jones, is Horacio Rodriguez. He's here on Indictment

1 Number 2010-6263. Your Honor, he was originally charged
2 with trafficking cocaine more than 400 grams. He too is
3 pleading to the lesser included offense of trafficking in
4 cocaine 28 to 100 grams with a negotiated 12 year sentence.

5 And, Your Honor, standing next to Mr. Hall is Bonifacia
6 Aguilar-Cabera. He is here on Indictment Number 2011-332.
7 Your Honor, originally indicted as trafficking in cocaine
8 greater than 400 grams. He too is pleading to trafficking
9 in cocaine 28 to 100 grams with a negotiated sentence of 12
10 years, Your Honor.

11 THE COURT: All right. To all defendants, I'm going to
12 cover some things that will be common to all of your cases.

13 First of all, you're each charged with the same
14 offense. The State is willing to accept your plea to the
15 lesser included offense of trafficking in cocaine 28 to 100
16 grams. That is a first offense. That carries a potential
17 sentence of seven years, up to 25 years, and/or a fine of up
18 to \$50,000.

19 I will tell you that these crimes, even the lesser
20 included offense, are classified as violent and serious
21 offenses. As such, they will qualify as what is commonly
22 known as one of your strikes. In the future, if you were
23 found guilty of or pled guilty to other similarly classified
24 crimes, it could result in a sentence of life imprisonment
25 without the possibility of any parole.

1 Mr. Hernandez, do you understand the charges,
2 penalties, and possible consequences?

3 DEFENDANT HERNANDEZ: Yeah.

4 THE COURT: Mr. Rodriguez, do you understand those
5 things?

6 DEFENDANT RODRIQUEZ: Yes, sir.

7 THE COURT: And, Mr. Cabera, do you understand those
8 things?

9 DEFENDANT CABERA: Yes, sir.

10 THE COURT: Now, each of you appears before me today
11 with a negotiated sentence. I was not a party to those
12 negotiations. After I have reviewed the case, I have the
13 right to either accept the negotiations or reject them. If
14 I were to reject the negotiations, I will advise you of that
15 fact, and give you an opportunity to withdraw your plea at
16 that time.

17 Mr. Hernandez, do you understand how we will handle the
18 plea?

19 DEFENDANT HERNANDEZ: Yes, sir.

20 THE COURT: Mr. Rodriguez, do you understand how we
21 will handle this plea?

22 DEFENDANT RODRIQUEZ: Yes.

23 THE COURT: Mr. Cabera, do you also understand?

24 DEFENDANT CABERA: Yes, sir.

25 THE COURT: Each of you appears with your attorney.

1 Mr. Hernandez, are you satisfied with Mr. Newton's
2 services?

3 DEFENDANT HERNANDEZ: Yes, sir.

4 THE COURT: Is there anything else you feel that he
5 ought to do for you before we go forward?

6 DEFENDANT HERNANDEZ: No, everything is fine.

7 THE COURT: And is there anything else you need to
8 consult with him about?

9 DEFENDANT HERNANDEZ: No.

10 THE COURT: Mr. Rodriguez, you are here today with your
11 attorney, Ms. Jones.

12 Are you satisfied with her services?

13 DEFENDANT RODRIQUEZ: Yes, sir.

14 THE COURT: Is there anything else you need to discuss
15 with her at this time?

16 DEFENDANT RODRIQUEZ: No.

17 THE COURT: Is there anything else that she needs to do
18 for you at this time?

19 DEFENDANT RODRIQUEZ: No.

20 THE COURT: Mr. Cabera, you're here today with
21 Mr. Hall.

22 Are you satisfied with his services today?

23 DEFENDANT CABERA: Yes, sir.

24 THE COURT: Is there anything else that he needs to do
25 for you at this time?

1 DEFENDANT CABERA: No.

2 THE COURT: Is there anything other matters that you
3 need to consult with him about before we go forward?

4 DEFENDANT CABERA: No.

5 THE COURT: All right. Do any of you suffer from any
6 mental, physical, or nervous conditions that would affect
7 your ability to handle your plea today?

8 Mr. Hernandez.

9 DEFENDANT HERNANDEZ: well, I had an accident when I
10 was a young boy and I lost some memory.

11 THE COURT: Does that affect your ability to handle
12 your plea today?

13 DEFENDANT HERNANDEZ: well, the truth is yes, but
14 that's fine.

15 THE COURT: well, no, that's not fine.

16 sir, if you feel that you are unable to handle your
17 plea because of mental deficiencies I will have to stand
18 your plea down.

19 DEFENDANT HERNANDEZ: That's fine. I want to go.

20 THE COURT: well then I'm gonna turn to the counsel.

21 Mr. Newton, have you had any difficulty in dealing with
22 this gentleman?

23 MR. NEWTON: No, Your Honor. All my conversations have
24 obviously been through an interpreter, but I've detected no
25 sign of incompetency or any inability to understand the

1 situation and what's going on.

2 THE COURT: Has he been able to assist you in his
3 defense?

4 MR. NEWTON: Yes, Your Honor.

5 THE COURT: Has he properly answered the questions that
6 you've asked him?

7 MR. NEWTON: Yes, Your Honor, he has.

8 THE COURT: Has he been oriented as to time and place
9 and things of that nature?

10 MR. NEWTON: Yes, Your Honor, absolutely.

11 THE COURT: Mr. Hernandez, I would like for you to
12 specifically tell me how you feel this condition might
13 affect your ability to handle your plea.

14 DEFENDANT HERNANDEZ: No, I just want to go ahead and
15 be sentenced and be sent to prison.

16 THE COURT: Well, Mr. Hernandez, I can not consider a
17 problem you have if you can't discuss it with me.

18 So, are you not going to discuss this issue with me?

19 DEFENDANT HERNANDEZ: What's the use, I'm gonna -- I
20 already have the 12 years. If I get five or seven years
21 that's better, but --.

22 THE COURT: Well, sir, that's not my question. My
23 concern is about your ability to understand what we're doing
24 here today.

25 DEFENDANT HERNANDEZ: It doesn't affect me in anyway,

1 but sometimes when I'm doing things I do forget that I do.
2 Maybe it's because of too much thinking. I have a son in
3 Texas.

4 THE COURT: well, that's not exactly what I'm asking.
5 Mr. Hernandez, again I'm going to ask you, do you -- do
6 you understand what we're doing here today?

7 DEFENDANT HERNANDEZ: Yes, I understand, but I've never
8 been in a court like this before.

9 THE COURT: Oh, I understand that.
10 Do you -- what are we doing here, Mr. Hernandez?
11 You explain to me what this process is.

12 DEFENDANT HERNANDEZ: I came to be sentenced.

13 THE COURT: Do you understand that this is, we're here
14 to accept a guilty plea from you?

15 INTERPRETER: What do you think, yes or no? He's
16 asking me directly.

17 MR. NEWTON: Your Honor, may I have a moment?

18 THE COURT: Yes, sir.

19 We're gonna stand everyone down at this point in time
20 and give you a chance to discuss this with Mr. Hernandez.

21 (WHEREUPON, a short recess was taken at this time in
22 these cases.)

23 THE COURT: All right. We're back on the record in
24 three please, Ricardo Gomez-Hernandez, Horacio Rodriguez,
25 and Boifacia Aguilar-Cabera.

1 All right. We were concerned or I was concerned about
2 Mr. Hernandez. He'd indicated he'd been injured as a child
3 in an accident, and it may have affected his ability to
4 handle the plea. My understanding is that he's met with his
5 attorney, Mr. Newton, and they have discussed this matter.

6 Mr. Newton, I'll be happy to hear from you at this
7 time.

8 MR. NEWTON: That is correct, Your Honor. I did talk
9 to him about that childhood incident. He says it was not,
10 in fact, very serious. It is not affecting his ability to
11 understand what's going on today.

12 THE COURT: All right.

13 MR. NEWTON: Judge, I think he slightly misunderstood
14 what you were asking him. So---

15 THE COURT: Well that's possible and I want to go back
16 to Mr. Hernandez.

17 Mr. Hernandez, are you, are you able to handle your
18 plea today?

19 DEFENDANT HERNANDEZ: Yes.

20 THE COURT: All right, sir. Do you understand what
21 we're doing?

22 DEFENDANT HERNANDEZ: Yes.

23 THE COURT: Mr. Hernandez, I would instruct you that if
24 at anytime during this plea if you have any problems in
25 understanding what we're doing or if you have any problems

1 in handling the plea, I would ask you to inform your
2 attorney or the Court.

3 Do you understand that, sir?

4 DEFENDANT HERNANDEZ: Yes, I understand.

5 THE COURT: All right. Now, as to you, Mr. Rodriquez,
6 do you suffer from any mental, physical, nervous conditions
7 that would affect your ability to be able to handle your
8 plea today?

9 DEFENDANT RODRIQUEZ: No.

10 THE COURT: And, Mr. Cabera, do you have anything---

11 DEFENDANT CABERA: No, sir.

12 THE COURT: ---along those lines?

13 DEFENDANT CABERA: No, sir.

14 THE COURT: Mr. Hernandez, have you taken or used any
15 drugs or other substances today that might have that effect?

16 DEFENDANT HERNANDEZ: I used to. Not today.

17 THE COURT: He did what?

18 DEFENDANT HERNANDEZ: I use to, not today.

19 THE COURT: The things running and I can't hear him.

20 DEFENDANT HERNANDEZ: I use to use before.

21 THE COURT: Have you used any drugs or medications or
22 substances that would affect your ability to handle your
23 plea today?

24 DEFENDANT HERNANDEZ: No.

25 THE COURT: All right. Mr. Rodriquez, have you used

1 any substances that might affect your plea?

2 DEFENDANT RODRIQUEZ: No.

3 THE COURT: Mr. Cabera, have you used any substances
4 that might---

5 DEFENDANT CABERA: No, sir.

6 THE COURT: ---affect your plea?

7 DEFENDANT CABERA: No, sir.

8 THE COURT: Thank you, sir.

9 Now, as to the charges, each of you has the right to
10 plead either guilty or not guilty to the charges.

11 Mr. Hernandez, how do you plead to this charge?

12 DEFENDANT HERNANDEZ: I want to plead guilty.

13 THE COURT: Mr. Rodriguez, how do you plead?

14 DEFENDANT RODRIQUEZ: Guilty.

15 THE COURT: Mr. Cabera, how do you plead?

16 DEFENDANT CABERA: Guilty.

17 THE COURT: Mr. Newton, you've had an opportunity to
18 discuss the plea with your client, is that correct?

19 MR. NEWTON: I have, Your Honor.

20 THE COURT: Are you satisfied that he's understood your
21 discussions with him?

22 MR. NEWTON: I am so satisfied, judge.

23 THE COURT: He's indicated to me that he's made the
24 decision to plead guilty with the negotiated sentence.

25 Do you agree with the decision on his part?

1 MR. NEWTON: I do.

2 THE COURT: And has he been able to assist you in his
3 defense?

4 MR. NEWTON: He has, Your Honor.

5 THE COURT: Ms. Jones, have you had an opportunity to
6 discuss this plea with Mr. Rodriguez?

7 MS. JONES: I have, Your Honor.

8 THE COURT: Are you satisfied that he's understood your
9 advice and consultations?

10 MS. JONES: Yes, sir.

11 THE COURT: He tells me that he's made the decision to
12 plead guilty.

13 Have I called on him for his plea yet?

14 He's pled guilty. He has.

15 Do you agree with the decision that he's made?

16 MS. JONES: Yes, sir.

17 THE COURT: And has he been able to assist in his
18 defense?

19 MS. JONES: He has, Your Honor.

20 THE COURT: Mr. Hall, have you also discussed this
21 matter with Mr. Cabera?

22 MR. HALL: I have, Your Honor.

23 THE COURT: Are you satisfied that he understood that
24 advice you've given to him?

25 MR. HALL: Yes, I do.

1 THE COURT: He's indicated he's wishing to plead
2 guilty.

3 Do you agree with the decision that he's made?

4 MR. HALL: Yes, I do agree with his decision.

5 THE COURT: And has he been able to assist you in his
6 defense?

7 MR. HALL: He has, Your Honor.

8 THE COURT: Now, has anyone in anyway threatened you,
9 coerced you, put pressure on you, tried to intimidate you,
10 or done anything else to try to force you or make you offer
11 a plea?

12 Mr. Hernandez, has that occurred?

13 DEFENDANT HERNANDEZ: No.

14 THE COURT: Mr. Rodriguez, has that occurred?

15 DEFENDANT RODRIQUEZ: No.

16 THE COURT: And, Mr. Cabera, has that occurred?

17 DEFENDANT CABERA: No, sir.

18 THE COURT: Do you feel that you've had enough time to
19 prepare a defense if you chose to do that, Mr. Hernandez?

20 DEFENDANT HERNANDEZ: Yes.

21 THE COURT: Mr. Rodriguez, do you feel that you've had
22 enough time to prepare a defense is you chose to do that?

23 DEFENDANT HERNANDEZ: Yes.

24 THE COURT: And, Mr. Cabera, have you had sufficient
25 time?

1 DEFENDANT CABERA: Yes, sir.

2 THE COURT: Has anyone made any promises, guarantees,
3 or assurances to you about any matters whatsoever in order
4 to get you to plead other than the negotiated sentence, Mr.
5 Hernandez?

6 DEFENDANT HERNANDEZ: No.

7 THE COURT: Mr. Rodriguez?

8 DEFENDANT RODRIQUEZ: No.

9 THE COURT: Mr. Cabera.

10 DEFENDANT CABERA: No.

11 THE COURT: When you plead guilty you waive or give up
12 your Constitutional rights. I have to be sure that you
13 understand them so that you have freely and voluntarily
14 waived those rights, and that you've done so knowingly and
15 intelligently. I'm going to explain your Constitutional
16 rights. When I finish I'll give you an opportunity to ask
17 any questions if you do not understand.

18 ~~First of all, you have a right to have your cases~~
19 ~~considered by a Grand Jury. That has already occurred.~~

20 You have a right to your attorney's representation.
21 Your attorneys are available at this time.

22 You have a right to a trial by a jury. At the trial
23 you would be presumed to be innocent until the State proved
24 your guilt beyond a reasonable doubt. The State, therefore,
25 has the only burden of proof at a criminal trial. A

1 defendant has no burden of proof. You are presumed to be
2 innocent.

3 At the trial and under the Constitution, there are
4 several things you would have the right to do. You would
5 have the right to have subpoenas issued to witnesses to
6 require their presence at trial. You would have the right
7 to confront or question anyone who testified during the
8 trial. You would have the right to present any defense that
9 you have to the charges at the trial. You'd be given the
10 right to try to suppress any and all evidence the State may
11 have against you including but not limited to statements
12 that you may have made prior to that time. You could do
13 that at the trial.

14 At all times you have the right to remain silent. At a
15 trial, if you chose to remain silent, the judge is required
16 to instruct the jury that your silence could not be used
17 against you.

18 Mr. Hernandez, do you understand the rights I've
19 explained?

20 DEFENDANT HERNANDEZ: Yes.

21 THE COURT: Mr. Rodriguez, do you understand those
22 rights?

23 DEFENDANT RODRIQUEZ: Yes, sir.

24 THE COURT: Mr. Cabera, do you understand those rights?

25 DEFENDANT CABERA: Yes, sir.

1 THE COURT: when you plead guilty you waive or give up
2 all of those rights with the exception of the right of
3 having your lawyer represent you until your plea is
4 completed.

5 Do you understand that fact, Mr. Hernandez?

6 DEFENDANT HERNANDEZ: Yes.

7 THE COURT: Mr. Rodriguez, do you understand that fact?

8 DEFENDANT RODRIQUEZ: Yes.

9 THE COURT: Mr. Cabera, do you understand that fact?

10 DEFENDANT CABERA: Yes, sir.

11 THE COURT: Now, if there's any of the rights that you
12 would not want to give up in connection with a plea today,
13 please tell me.

14 Mr. Hernandez, any of those rights that you do not wish
15 to waive in connection with a plea?

16 DEFENDANT HERNANDEZ: No.

17 THE COURT: Mr. Rodriguez, are there any of the rights
18 that I've explained that you would not want to give up in
19 connection with a plea today?

20 DEFENDANT RODRIQUEZ: No, sir.

21 THE COURT: Mr. Cabera.

22 DEFENDANT CABERA: No, sir.

23 THE COURT: All right. Now, Mr. Hernandez, are you
24 pleading guilty today because you are guilty of the crime to
25 which you're pleading?

1 DEFENDANT HERNANDEZ: Yes, sir.

2 THE COURT: Mr. Rodriguez, are you pleading guilty
3 today because you're guilty to the crime to which you're
4 pleading?

5 DEFENDANT RODRIQUEZ: Yes, sir.

6 THE COURT: Mr. Cabera, are you also guilty of the
7 crime to which you're pleading?

8 DEFENDANT CABERA: Yes, sir.

9 THE COURT: I'm going to have the solicitor go over the
10 facts in your cases. Please listen carefully. I will be
11 asking you about these facts.

12 Mr. McCarty.

13 SOLICITOR MCCARTY: If it may please the Court, Your
14 Honor.

15 Your Honor, a confidential reliable informant working
16 with the Spartanburg County Sheriff's Office met with
17 Bonifacia Aguilar-Cabera and another individual in reference
18 to discussing purchasing a quantity of cocaine from them.

19 Your Honor, the confidential informant was contacted, and
20 told that the cocaine was in route to Greer, South Carolina.

21 On September 14th, 2010, the CI, the CRI received a
22 phone call. The deal was set up, and, Your Honor, the
23 incident location was put under surveillance by the
24 Spartanburg County Sheriff's Office.

25 These three defendants, along with a fourth

1 codefendant, arrived at the location. Mr. Rodriguez was
2 observed getting into the back of a SUV. He carried a black
3 bag out from the back of the SUV, and handed it to the
4 confidential reliable informant. The confidential reliable
5 informant was holding the bag and removed what appeared to
6 be a compressed square package wrapped in duct tape.

7 Spartanburg County Sheriff's Office investigators then
8 detained all four suspects. They were Mirandized in
9 Spanish, and the compressed package was seized, field
10 tested, and appeared to contain cocaine, Your Honor. Your
11 Honor, the package itself was 1,001.80 grams of powder
12 cocaine.

13 Your Honor, after Miranda, Mr. Rodriguez told
14 investigators that he left Texas on the 13th driving to
15 Greer to bring the cocaine. Your Honor, he -- when the deal
16 was set up, again, all three of these codefendants arrived.
17 There was some folks acting as a middle man to facilitate
18 this transaction when this all went down. It actually
19 occurred in Reidville, South Carolina, but in Spartanburg
20 County, Your Honor.

21 THE COURT: Mr. Hernandez, did you understand the facts
22 as related to me by the solicitor?

23 DEFENDANT HERNANDEZ: Yes.

24 THE COURT: Is that information true?

25 DEFENDANT HERNANDEZ: Yes.

1 THE COURT: Mr. Rodriquez, did you understand the facts
2 as stated by the solicitor?

3 DEFENDANT HERNANDEZ: Yes.

4 THE COURT: Is that information true?

5 DEFENDANT HERNANDEZ: Yes.

6 THE COURT: Mr. Cabera, did you understand the facts as
7 related by the solicitor?

8 DEFENDANT CABERA: Yes, sir.

9 THE COURT: Is that information true?

10 DEFENDANT CABERA: Yes, sir.

11 THE COURT: All right. Mr. -- now, I'll tell -- I'll
12 explain to all three of you, I do not know your immigration
13 status. I will advise you that a plea in this case could
14 adversely affect that status and ultimately could result in
15 a deportation.

16 Mr. Hernandez, are you aware of that possibility?

17 DEFENDANT HERNANDEZ: Yes.

18 ~~THE COURT: Does that fact in anyway affect your plea?~~

19 DEFENDANT HERNANDEZ: No.

20 THE COURT: Mr. Rodriquez, do you understand that that
21 is a possibility?

22 DEFENDANT RODRIQUEZ: Yes.

23 THE COURT: Does that fact in anyway change your plea?

24 DEFENDANT RODRIQUEZ: No.

25 THE COURT: Mr. Cabera, do you understand that that is

1 a possibility?

2 DEFENDANT CABERA: Yes.

3 THE COURT: And does that in anyway change your plea?

4 DEFENDANT CABERA: No, sir.

5 THE COURT: Mr. Hernandez, have you told me the truth
6 today?

7 DEFENDANT HERNANDEZ: Yes.

8 THE COURT: Did anyone tell you how to answer my
9 questions today?

10 DEFENDANT HERNANDEZ: No.

11 THE COURT: So, the answers I've received from you, did
12 they come from you?

13 DEFENDANT HERNANDEZ: Yes.

14 THE COURT: Are you satisfied with your interpreter's
15 services?

16 DEFENDANT HERNANDEZ: Yes.

17 THE COURT: Mr. Rodriquez, have you told me the truth
18 today?

19 DEFENDANT RODRIQUEZ: Yes, sir.

20 THE COURT: Did anyone tell you how to answer my
21 questions?

22 DEFENDANT RODRIQUEZ: No, sir.

23 THE COURT: So, the answers I've received were your own
24 answers, is that correct?

25 DEFENDANT RODRIQUEZ: Yes, sir.

1 THE COURT: Are you satisfied with your interpreters's
2 services?

3 DEFENDANT RODRIQUEZ: Yes.

4 THE COURT: Mr. Cabera, have you told me the truth
5 today?

6 DEFENDANT CABERA: Yes, sir.

7 THE COURT: Has anyone told you how to answer any of my
8 questions?

9 DEFENDANT CABERA: No, sir.

10 THE COURT: The answers that I've received from you,
11 were they your own answers?

12 DEFENDANT CABERA: Yes, sir.

13 THE COURT: Are you satisfied with your interpreter's
14 services?

15 DEFENDANT CABERA: Yes, sir.

16 THE COURT: In all cases I will find that the pleas
17 have been freely and voluntarily given, that the defendants
18 are aware of the charges, and aware of the penalties, that
19 they've had the advice of attorneys that they're satisfied
20 with. It's my finding there's a factual basis for the pleas
21 to be offered.

22 At this time I'll be happy to hear from counsel.

23 First of all for Mr. Hernandez.

24 Mr. Newton.

25 MR. NEWTON: Yes, Your Honor. My client is 34 years of

1 age. For the record, he's been in jail since he was
2 arrested on this charge. He was -- actually been in jail
3 shortly after midnight since September 15th of 2010. So,
4 over a year. I've explained to him he's entitled to credit
5 for that, of course.

6 Your Honor, my client -- and the State's evidence shows
7 that -- I know -- under the law, the hand of one is the hand
8 of all and I've explained that to my client. But as far as
9 the actions that were actually undertaken, he played a
10 lesser role in this than some of the other people. He was
11 basically along for the ride. However, he did know what
12 they were up to and what they were doing, and I've explained
13 to him that that makes him culpable in the eyes of the law.
14 He has one child who's in Texas, but he was living in South
15 Carolina before his arrest.

16 Judge, I do think it's an appropriate negotiation for
17 12 years under the facts in this case and the fact that my
18 client has no significant prior record. And I would, I
19 would just urge that Court to accept that negotiation.

20 THE COURT: Mr. Hernandez, do you wish to say anything
21 on your own behalf?

22 DEFENDANT HERNANDEZ: No.

23 THE COURT: All right. Mr. Rodriguez's attorney, Ms.
24 Jones, you may speak for your client.

25 MS. JONES: Thank you, Your Honor.

1 THE COURT: Yes, ma'am.

2 MS. JONES: We are respectfully requesting that you
3 follow the negotiation.

4 Your Honor, my client is or was, at the time of this
5 incident, living in Texas. As you heard, he was the one who
6 drove the cocaine up here, Your Honor, and it's been a very
7 hard year for him to be separated from his family. He's got
8 a nine year old, a fourteen year old, and a newborn I think
9 March 2010 all still living in Texas.

10 I have explained to him obviously the implications of
11 this plea. In fact, immigration already has a hold on him,
12 and I suspect, at the conclusion of his sentence, he will be
13 deported. He understands that. He is ready to go back to
14 Mexico, Your Honor. Mr. McCarty and I, as well as Mr. Hall,
15 worked hard on this negotiation. We do also believe that it
16 is a fair resolution, Your Honor. So, we respectfully
17 request that you follow that recommendation.

18 Thank you.

19 THE COURT: All right. Sir, do you wish to say
20 anything in your own behalf, Mr. Rodriguez?

21 DEFENDANT RODRIQUEZ: No, sir.

22 THE COURT: Mr. Hall.

23 MR. HALL: Please the Court, Your Honor.

24 Mr. Cabera is 34 years old. He is from the Central
25 Highlands of Mexico he's told me. He has at least one child

1 that lives in Mexico. He does have other family there
2 including, including an 83 year old father.

3 As he told me, he made a big mistake being here. He's
4 told me he would like to get home to see his father before
5 he passes on. He understands whatever happens here,
6 evidently he would be deported and what would happen if he
7 did come back. But he says he has no intentions of coming
8 back. He wants to go back home to Mexico where he does have
9 family.

10 We would ask also that, if you would, accept the
11 negotiated sentence.

12 THE COURT: Mr. Cabera, do you wish to speak on your
13 own behalf?

14 DEFENDANT CABERA: I'm sorry that this happened. I'm
15 sorry that I have to be here.

16 THE COURT: All right. Prior record from the State?

17 SOLICITOR McCARTY: For Mr. Hernandez, in 2006, driving
18 without a license and operating uninsured vehicle.

19 For Mr. Rodriguez, I, I show a 2001 conviction in
20 Federal Court for illegal entry. I don't know if it's the
21 same person, but that's what it shows.

22 THE COURT: I understand.

23 SOLICITOR McCARTY: And for Mr. Aguilar-Cabera, no
24 criminal record.

25 THE COURT: All right. The Court will accept the

1 negotiated sentence. In each case the Sentence is 12 years.
2 I will have any credit for time served calculated by the
3 Department of Corrections.

4 Good luck to you, gentlemen.

5 MR. NEWTON: Thank you, Your Honor.

6 MR. HALL: Thank you, Your Honor.

7

8 *** END OF REQUESTED TRANSCRIPT OF RECORD***

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C E R T I F I C A T E

I, Pamela E. Green, Official Court Reporter for the Seventh 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 evidence introduced in the trial of the captioned case, relative to appeal, in the Court of General Sessions for Spartanburg County, South Carolina, on the 7th day of November, 2011.

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

April 10th, 2012

Pamela E. Green

PAMELA E. GREEN, Court Reporter

M-750119

County/ Municipality of
Spartanburg

AFFIDAVIT

April 21, 2003
SCCA 519

STATE OF SOUTH CAROLINA

County/ Municipality of
Spartanburg 9-17-10
67084

Personally appeared before me the affiant Matt Hutchins who
being duly sworn deposes and says that defendant Ricardo Gomez Hernandez
did within this county and state on or about 09/14/2010 violate the criminal laws of the
State of South Carolina (or ordinance of County/ Municipality of Spartanburg)
in the following particulars:

THE STATE
against
Ricardo Gomez-Hernandez

DESCRIPTION OF OFFENSE Drugs / Trafficking in cocaine, 400 g or more

Address Carey Ave
Greer, SC 29651-

I further state that there is probable cause to believe that the defendant named above did commit
the crime set forth and that probable cause is based on the following facts:

Phone (864)277- SSN: _____
Sex M Race: H Height: _____ Weight: _____
DL State: _____ DL #: _____
DOB 5/18/ Agency ORI #: SC0420000
Prosecuting Agency Spartanburg County Sheriff
Prosecuting Officer: Matt Hutchins - 0712
Offense Drugs / Trafficking in cocaine, 400 g or more

That on September 14, 2010, in the county of Spartanburg, the defendant did knowingly sell, manufacture, deliver, bring into this
state and/or possess over 400 grams of cocaine, a schedule II controlled substance, without authority to do so.
Affiant's belief is based upon police investigation.

Offense Code 0281
Code/Ordinance Sec 44-53-0370(e)(2)

This warrant is CERTIFIED FOR SERVICE in the
 County/ Municipality of _____
The accused
is to be arrested and brought before me to be
dealt with according to the law.

Signature of Affiant
STATE OF SOUTH CAROLINA
 County/ Municipality of
Spartanburg

Affiant's Address 8045 Howard Street
Spartanburg, SC 29303-
Affiant's Telephone _____

SEARCHED
SERIALIZED
INDEXED
FILED
M. HUGHES - CLERK
SEP 17 2010
CLERK'S OFFICE
SPARTANBURG, SC

(L.S.)
Signature of Judge
Date _____

ARREST WARRANT

TO ANY LAW ENFORCEMENT OFFICER OF THIS STATE OR MUNICIPALITY OR ANY CONSTABLE OF THIS COUNTY:

It appearing from the above affidavit that there are reasonable grounds to believe that

RETURN
A copy of this arrest warrant was delivered to
defendant Ricardo Hernandez
on 9/15/10
H. Ann L. W.
Signature of Constable/Law Enforcement Officer

on or about 9/14/2010 defendant Ricardo Gomez Hernandez
did violate the criminal laws of the State of South Carolina (or ordinance of
 County/ Municipality of Spartanburg) as set forth below

DESCRIPTION OF OFFENSE: Drugs / Trafficking in cocaine, 400 g or more

Having found probable cause and the above affiant having sworn before me, you are empowered and directed to arrest the said defendant and bring him or
her before me forthwith to be dealt with according to law. A copy of this Arrest Warrant shall be delivered to the defendant at the time of its execution, or as
soon thereafter as is practicable
Sworn to and subscribed before me

RETURN WARRANT TO:
General Sessions
180 Magnolia Street
P O Box 3483
Spartanburg, SC 29304

on 09/15/2010 Judge's Address Spartanburg County Judicial Center
Spartanburg, SC 29306-2335
Judge's Telephone (864)596-3424
Issuing Court: Magistrate Municipal Circuit
Judge Code 5674

ORIGINAL

ORIGINAL

ORIGINAL

ORIGINAL

ORIGINAL

ORIGINAL

ORIGINAL

Judge _____
 on _____
 Type and Amount: _____
 Name of Surety: _____

PRELIMINARY HEARING held by

Judge _____
 on _____
 Defendant Attorney: _____

Decision _____

DISPOSITION before

Judge _____
 on _____
 by _____
 (indicate jury trial, bench trial, plea, nol. pros., etc.)

Disposition: _____
 Sentence _____

JURORS

Name: _____
 Address: _____
 Telephone: _____

Name: _____
 Address: _____
 Telephone: _____

Name: _____
 Address: _____
 Telephone: _____

Name: _____
 Address: _____
 Telephone: _____

Name: _____
 Address: _____
 Telephone: _____

Name: _____
 Address: _____
 Telephone: _____

Name: _____
 Address: _____
 Telephone: _____

Name: _____
 Address: _____
 Telephone: _____

CODEFENDANTS

M750119

00030

STATE OF SOUTH CAROLINA

IN THE COURT OF GENERAL SESSIONS

COUNTY OF SPARTANBURG VS. STATE

INDICTMENT/CASE#: 2011GS4200420

Ricardo Gomez Hernandez

A/W#: M750119

Race: Sex: M Age: 34

Date of Offense: 9/14/2010

DOB: 05-18- SS#: none

S.C. Code § : 44-53-0370(e)(2)(e)

Address: none

CDR Code #: 0281

City, State, Zip: none

DL#: SID#:

SENTENCE SHEET

*CDL Yes No CMV Yes No Hazmat Yes No

In disposition of the said indictment comes now the Defendant who was CONVICTED OF or PLEADS

TO: Drugs / Trafficking in cocaine 28-100 grams, 1st Offense (7-25 years & \$50,000)

in violation of § 44-53-0370(e)(2)(b)1 of the S.C. Code of Laws, bearing CDR Code # 2359

The charge is: As Indicted, Lesser Included Offense, Defendant Waives Presentment to Grand Jury

The plea is: Without Negotiations or Recommendation, Negotiated Sentence, Recommendation by the State

ATTEST: MCCARTY, RYAN F SC Bar# 69423 Defendant Ricardo Gomez Hernandez SC Bar# 8893 Attorney for Defendant Robert Newton SC Bar#

WHEREFORE, the Defendant is committed to the State Department of Corrections, County Detention Center, for a determinate term of 12 days/months/years or under the Youthful Offender Act not to exceed years and/or to pay a fine of \$; provided that upon the service of days/months/years and/or payment of \$; plus costs and assessments as applicable*; the balance is suspended with probation for

months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

CONCURRENT or CONSECUTIVE to sentence on: The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied by the State Department of Corrections. The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code § 17-25-135.

Pursuant to 18 U.S.C Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

RESTITUTION: Deferred, Def. Waives Hearing, Ordered PTUP Total: \$ plus 20% fee: \$ Payment Terms: Set by SCDPPPS

Recipient: *Fine: § 14-1-206 (Assessments 107.5 %) \$ § 14-1-211(A)(1) (Conv. Surcharge) \$100 \$ 100.00 § 14-1-211(A)(2) (DUI Surcharge) \$100 \$ § 56-5-2995 (DUI Assessment) \$12 \$ § 56-1-286 (DUI Breath Test) \$25 \$ Proviso 47.9 (Public Def/Prob) \$500 \$ 150.00 § 14-1-212 (Law Enforce. Funding) \$25 \$ 25.00 § 14-1-213 (Drug Court Surcharge) \$150 \$ § 50-21-114(BUI Breath Test Fee) \$50 \$ § 56-5-2942(J) (Vehicle Assessment) \$40/ca \$ Proviso 90.5 (SCCJA Surcharge) \$5 \$ 5.00 3% to County (if paid in installments) \$ \$ 40 TOTAL \$ 288.40

days/hours Public Service Employment Obtain GED Attend Voc. Rehab. or Job Corp. May serve W/E beginning Substance Abuse Counseling Random Drug/Alcohol testing Fine may be pd. in equal, consecutive weekly/monthly pmts. of \$ beginning \$ paid to Public Defender Fund Other:

Appointed PD or appointed other counsel, § 47.12 requires \$500 be paid to Clerk during probation.

Clerk of Court/ Deputy Clerk Court Reporter SCCA/217 (03/2011) Presiding Judge Judge Code: 2135 Sentence Date: 11/7/11

00031

AFFIDAVIT

M-750119

County/ Municipality of Spartanburg

STATE OF SOUTH CAROLINA County/ Municipality of Spartanburg

Personally appeared before me the affiant Matt Hutchins being duly sworn deposes and says that defendant Ricardo Gomez Hernandez did within this county and state on or about 09/14/2010 violate the criminal laws of the State of South Carolina (or ordinance of County/ Municipality of Spartanburg) in the following particulars:

THE STATE against Ricardo Gomez-Hernandez Address: Carey Ave Greer, SC 29651-

DESCRIPTION OF OFFENSE Drugs / Trafficking in cocaine, 400 g or more

Phone: (864)277- SSN: M Race: H Height: Weight: Date: 5/18 DL #: Agency ORI #: SC0420000 Issuing Agency: Spartanburg County Sheriff Issuing Officer: Matt Hutchins - 0712 Offense: Drugs / Trafficking in cocaine, 400 g or more

I further state that there is probable cause to believe that the defendant named above did commit the crime set forth and that probable cause is based on the following facts: That on September 14, 2010, in the county of Spartanburg, the defendant did knowingly sell, manufacture, deliver, bring into this state and/or possess over 400 grams of cocaine, a schedule II controlled substance, without authority to do so. Affiant's belief is based upon police investigation.

Case Code: 0281 Ordinance Sec. 44-53-0370(e)(2) Warrant is CERTIFIED FOR SERVICE in the County/ Municipality of The accused to be arrested and brought before me to be with according to the law

Signature of Affiant STATE OF SOUTH CAROLINA County/ Municipality of Spartanburg Affiant's Address 8045 Howard Street Spartanburg, SC 29303- Affiant's Telephone

Handwritten notes and stamps including 'M. Hutchins' and '9-17-10'.

00032

(L.S.)

ARREST WARRANT

TO ANY LAW ENFORCEMENT OFFICER OF THIS STATE OR MUNICIPALITY OR ANY CONSTABLE OF THIS COUNTY: It appearing from the above affidavit that there are reasonable grounds to believe that on or about 9/14/2010 defendant Ricardo Gomez Hernandez did violate the criminal laws of the State of South Carolina (or ordinance of County/ Municipality of Spartanburg) as set forth below.

DESCRIPTION OF OFFENSE: Drugs / Trafficking in cocaine, 400 g or more

Having found probable cause and the above affiant having sworn before me, you are empowered and directed to arrest the said defendant and bring him or her before me forthwith to be dealt with according to law. A copy of this Arrest Warrant shall be delivered to the defendant at the time of its execution, or as soon thereafter as is practicable Sworn to and subscribed before me

RETURN Copy of this arrest warrant was delivered to defendant Ricardo Hernandez 9/15/10 Signature of Constable/Law Enforcement Officer

on 09/15/2010 Judge's Address Spartanburg County Judicial Center Spartanburg, SC 29306-2533 Judge's Telephone (864)596-3424 Issuing Court Magistrate

RETURN WARRANT TO: General Sessions 180 Magnolia Street P O Box 3483 Spartanburg, SC 29304

ORIGINAL

ORIGINAL

ORIGINAL

ORIGINAL

ORIGINAL

ORIGINAL

WITNESSES

SPTG CO SHERIFF'S OFFICE

REPORT MADE

INDEXED

CHECKED

INDEXED

CHECKED WARRANTS

CHECKED SIGNATURE

INDEXED AND

FILED WARRANT NUMBER

INDEXED VICTIM'S COPY

M750119

ACTION OF GRAND JURY

Foreperson of Grand Jury

Date:

VERDICT

Foreperson of Petit Jury

Date:

DOCKET NO.

11-GS-42-04/20

The State of South Carolina

County of Spartanburg

Barry J. Barnette, Solicitor

COURT OF GENERAL SESSIONS

TERM

THE STATE

VS.

RICARDO GOMEZ-HERNANDEZ

Indictment for

TRAFFICKING IN COCAINE

SC Code: 44-53-370

M. HOPE BLACKLEY

2011 FEB 28 AM 11:46

FILED
CLERK OF COURT
SPARTANBURG COUNTY

66000

STATE OF SOUTH CAROLINA)
)
COUNTY OF SPARTANBURG)

INDICTMENT

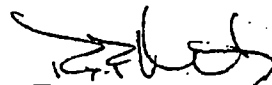
FEB 18 2011

At a Court of General Sessions, convened on _____, the
Grand Jurors of Spartanburg County present upon their oath:

TRAFFICKING IN COCAINE

That Ricardo Gomez-Herandez did in Spartanburg County on or about
September 14, 2010, knowingly sell, manufacture, cultivate, deliver, purchase or bring
into this State, or did provide financial assistance or did otherwise aid, abet, attempt, or
conspire to sell, manufacture, cultivate, deliver, purchase or bring into this State, or did
knowingly actually or constructively possess or did knowingly attempt to become in
actual or constructive possession of more than (400) four hundred grams of Cocaine, a
schedule II controlled substance, in violation of §44-53-370 , *THE CODE OF LAWS OF*
SOUTH CAROLINA, (1976), as amended.

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



ASSISTANT SOLICITOR

756

2012-CP-42-0056

FORM 5

STATE OF SOUTH CAROLINA

County of Spartanburg

Ricardo Gomez Hernandez

Full name and prison number (if any) of Applicant
(#348548)

v.

State of South Carolina

IN THE COURT OF COMMON PLEAS

APPLICATION FOR

POST-CONVICTION RELIEF

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2012 JAN -6 AM 9:42
M. HOPE BLACKLEY

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 Kirkland Cor. Inst. (South Carolina Dept. of Corrections) 4344 Broad River Rd, Columbia, SC 2921
2. Name and location of Court which imposed sentence Spartanburg Co. Ct. of Gen. Sess.
3. Name(s) of co-defendant(s) (if any) Yes, Not known by me fully. (Exact/whole Name)
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) Not known currently, yet please
 - (b) see Case History for Warrant #M750119.

00035

11-0020

(c) Trafficking in Cocaine, 400g or more.

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

(a) November 7, 2011

(b) 12 (Twelve) years.

(c) _____

6. Check whether a finding of guilty was made:

✓ (a) after a plea of guilty Affirmative.

(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: N/A

i. N/A

ii. _____

iii. _____

(b) the result in each such Court to which you appealed: N/A

i. _____

ii. _____

iii. _____

(c) the date of each such result: N/A

i. _____

ii. _____

iii. _____

(d) if known, citations of any written opinion or orders entered pursuant to such results: Not Applicable.

i. _____

ii. _____

iii. _____

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

(a) I entered a Plea of Guilty

(b) which was not entered during

FILED
CLERK OF COURT
2012 JAN -6 AM 9:42
M. HOPE BLACKLEY

(c) Course of Trial by Jury Proceedings
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

- (a) Ineffective Assistance of Counsel
- (b) Plea of Guilty Not knowingly and
- (c) Voluntarily Entered — Cont on Attache.

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

- (a) Please see Attached Sheet
- (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? N/A
- (b) any petition in State or Federal Courts for habeas corpus or post-conviction relief? No.
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? N/A.
- (d) any other petitions, motions or applications in this or any other Court? N/A.

13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application: Not Applicable.

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

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2017 JAN - 6 AM 9:42
M. HOPE BLACKLEY

(c) the disposition thereof: *N/A*

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

(d) the date of each such disposition: *N/A*

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

(e) if known, citations of any written opinions or orders entered pursuant to such disposition: *N/A*

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

FILED
 CLERK OF COURT
 SHERMAN COUNTY
 2017 JAN -6 AM 9:42
 MHOPE BLACKLEY

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: *N/A*

(a) which grounds have been presented: *N/A*

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

(b) the proceedings in which each ground was raised: *N/A*

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

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

To be given An Evidentiary Hearing, A lawyer to freely Represent me on PCR, to enter a plea to 5 (five) years for Conspiracy to Traffic 400+g of Coke or Trial on Con-
Spiracy.

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

No.

FILED
BENCH OF COURT
SPARTANBURG COUNTY

2012 JAN -6 AM 9:42

M. HOPE BLACKLEY

STATE OF SOUTH CAROLINA

County of Spartanburg

VERIFICATION

348548,

1. Ricardo Gomez Hernandez, 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.

Ricardo Gomez Hernandez

SWORN to and subscribed before me this 3rd day of January, 2012.

[Signature] (L.S.)
Notary Public

My Commission Expires

My Commission Expires: October 8, 2014

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

Ricardo Gomez Hernandez #348548

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.

Ricardo Gomez Hernandez
Applicant

SWORN or affirmed to and subscribed before me this
3rd day of January, 2012

[Signature]
Notary Public

My Commission Expires
My Commission Expires: October 8, 2014

FILED
CLERK OF COURT
STANTONBURG COUNTY
2012 JAN -6 AM 9:42
M. HOBE BRACKLEY

* Attached Sheets

Continued:

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

(a) Ineffective Assistance of Counsel —

(b) Plea Not Knowingly And Voluntarily

Given With Consequences of the Plea

Where I believe I was Pleading to Coast

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

FILED
CLERK OF COURT
SPARTANBURG COUNTY
JAN 6 AM 9:42
HOPE BLACKLEY

— Statement of the Case —

The defendant was convicted on the charge of Trafficking Cocaine 400 grams or more.

This is his very first drug offense, not his second, third, etc. Counsel for the defendant informed him that he would get very little time if convicted, since Counsel acknowledged or knew Mr. Hernandez

valid are:

* Strickland v. Washington,
Case Number 466 U.S. at 65

Boykin v. Alabama (Supra)

[In]

Troedel v. Wainwright, 667 F. Supp. 1456, states that a lawyer per law has a duty and obligation to investigate a defendants case, interview witnesses on their clients behalf that could speak for him, ect.

In the case of Thompson versus Wainwright, the Court made the very same ruling. My Attorney failed to investigate my case and had lied. I would be sentenced under 10 years. He took my hard earned money, \$3,000 (Three Thousand Dollars) as down payment and did not perform in my defense at getting the best possible results in violation of my 6th Amendment Right to Effective Assistance of Counsel and my 14th Amendment Right to [Due Process] was violated.

FILED
CLERK OF COURT
SPARTANBURG COUNTY

2012 JAN - 6 AM 9:43

M. HOPE BLACKLEY

General Sessions
CASE HISTORY FOR CASE M750119

The State of South Carolina VS Ricardo Gomez Hernandez

STATUS: Pled Guilty

FILED DATE: 9/17/2010

CASE TYPE: GS/180 Day Track

JUDGE: Gowan, Eber Charles Jr.

ARRESTING AGENCY: Spartanburg County Sheriff

CASE PARTIES:

Defendant Gomez Hernandez, Ricardo
 Greer, SC 29651

Officer Hutchins, Matt
 Spartanburg, SC 29303

Defendant Attorney Desai, Monty D
 ATTORNEY AT LAW, P.O. BOX 5192, Greenville, SC 29606

Solicitor McCarty, Ryan Frederick
 Seventh Circuit Solicitors Office, 180 Magnolia St, Spartanburg, SC 29306

Defendant Attorney Newton, Robert L
 611 North Main Street, Greenville, SC 29601

FILED
 CLERK OF COURT
 SPARTANBURG COUNTY
 2012 JAN -6 AM 9:43
 M. HOPE BLACKLEY

CASE HISTORY FOR CASE M750119

Gomez Hernandez, Ricardo

Age: 34
 DL#:

DOB:
 SSN: 000-00-0000

Greer, SC 29651

CHARGE	VIOL. DATE	DISPOSITION	DISP. DATE
0281 Drugs / Trafficking in cocaine, 400 g or more	9/14/2010	Pled Guilty	11/7/2011

SENTENCING

Sentenced - 12 yrs

COST	ORIGINAL	BALANCE DUE	DISBURSED	PAY PRIORITY
Charge: Drugs / Trafficking in cocaine, 400 g or more	\$0.00	\$0.00	\$0.00	999
Fine to State 44%	0.00	0.00	0.00	999
Fine to General Fund	0.00	0.00	0.00	999
Victim Services Asm 38.0013% / 5.783	100.00	100.00	0.00	999
Victim Conviction Surcharge \$100 / \$2	25.00	25.00	0.00	999
Law Enforcement Funding Surcharge \$	150.00	150.00	0.00	999
PCC Surcharge	5.00	5.00	0.00	999
SC Criminal Justice Adacemy Training	0.00	0.00	0.00	999
State Assessment	8.40	8.40	0.00	3
Collection Fee 3%				
Total:	\$288.40	\$288.40	\$0.00	

Print Date: 12/20/2011
 Print Time: 8:41:18AM
 Requested By: CSMITH

CaseHistory.rpt

00044

STATE OF SOUTH CAROLINA)
)
COUNTY OF SPARTANBURG)

IN THE COURT OF COMMON PLEAS

C/A No. 2012-CP-42-00056

RICARDO G. HERNANDEZ, #348548,)

Applicant,)

vs.)

State of South Carolina,)

Respondent.)

AMENDED APPLICATION FOR
POST-CONVICTION RELIEF

Under Rule 15(a), South Carolina Rules of Civil Procedure, and South Carolina Code §17-27-50, the Applicant moves to amend the original pleadings filed with this court in order to more fully conform the pleadings with the evidence.

The Applicant would respectfully show this Court that Applicant's conviction, sentence, and custody are in violation of the Constitution and laws of the United States, and were obtained through violations of Applicant's Sixth and Fourteenth Amendment Rights to the effective assistance of counsel. These rights, made applicable to the states through the doctrine of incorporation, are fully outlined in Gideon v. Wainwright, 83 S.Ct. 792 (1963), and its progeny.

The Fourteenth Amendment Due Process Clause and the Sixth Amendment Right to Counsel Clause have been recognized as important elements to a criminal defendant's fundamental rights to a fair and impartial trial. See, e.g., Powell v. Alabama, 87 U.S. 45 (1932). Access to a reasonably competent attorney is necessary in order for an accused, who has no knowledge of the law and the rules of evidence, to have "ample opportunity to defend himself. Adams v. United States ex rel. McCann, 7 269, 275 (1942).

FILED
CLERK OF COURT
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HOPE BRAXLEY

STATE OF SOUTH CAROLINA)
)
 COUNTY OF SPARTANBURG)
)
 Ricardo Gomez Hernandez, #348548,)
)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
)
 Respondent.)
 _____)

IN THE COURT OF COMMON PLEAS
 SEVENTH JUDICIAL CIRCUIT

2012-CP-42-0056

RETURN

The Respondent, making its Return to the application for post conviction relief (PCR) filed January 6, 2012, would respectfully show this Court:

I.

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Spartanburg County Clerk of Court. The Applicant was indicted at the February 2011 term of the Spartanburg County Grand Jury for trafficking in cocaine more than 400 grams (11-GS-42-0420). He was represented by Robert L. Newton, Esquire. On November 7, 2011, the Applicant pled guilty to the lesser included offense of trafficking in cocaine 28-100 grams, 1st offense. He was sentenced by the Honorable Roger L. Couch, pursuant to a negotiated sentence, to confinement for a period of twelve (12) years. The Applicant did not appeal his guilty plea or sentence.

Attached herewith and incorporated herein are the records of the Spartanburg County Clerk of Court regarding the subject conviction(s), the Applicant's records from the South Carolina Department of Corrections, and the guilty plea transcript. The Respondent reserves the right to amend this Return upon receipt of any relevant materials.

II.

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

1. Ineffective assistance of counsel
2. Involuntary guilty plea, in that;
 - a. Applicant was told he was pleading guilty to conspiracy
3. Violation of due process

III.

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

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

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of plea counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland. Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable

probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. With respect to guilty plea counsel, the Applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed. 2d 203 (1985).

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

IV.

Respondent submits that the Applicant's allegation that his guilty plea was involuntary is without merit. In PCR cases, a defendant asserting a constitutional violation must frame the issue as one of ineffective assistance of counsel. Al-Shabazz v. State, 338 S.C. 354, 527 S.E.2d 742 (1999). A defendant who pleads guilty on the advice of counsel may collaterally attack the plea only by showing that (1) counsel was ineffective and (2) there is a reasonable probability that but for counsel's errors, the defendant would not have pled guilty and would have insisted on going to trial. Roscoe v. State, 345 S.C. 16, 546 S.E.2d 417 (2001). A defendant alleging that his guilty plea was induced by ineffective assistance of counsel must prove that counsel's advice was not "within the competence demanded of attorneys in criminal cases." Hill v. Lockhart, 474 U.S. 52, 56, 106 S. Ct. 366, 369 (1985). A guilty plea is a solemn, judicial admission of the truth of the charges against the defendant. Statements made during the plea should be considered conclusive unless the defendant

presents reasons why he should be allowed to depart from the truth of those statements. Crawford v. U.S., 519 F.2d 347 (4th Cir. 1975); Edmonds v. Lewis, 546 F.2d 566 (4th Cir. 1976).

Respondent submits that the record fully supports the knowing and voluntary nature of the Applicant's plea. However, allegations regarding ineffective assistance of counsel and the voluntariness of the plea may raise a question of fact that is not conclusively refuted by the record. Accordingly, Respondent requests an evidentiary hearing on this allegation. Sharper v. State, 305 S.E.2d 247.

V.

The Applicant further alleges that he was denied due process of law. However, the Applicant fails to set forth with specificity the grounds upon which these constitutional violations are based. The Uniform Post-Conviction Procedure Act requires that the Applicant must "... specifically set forth the grounds upon which the application is based." S.C. Code § 17-27-50 (2003). In an application for post-conviction relief, it is incumbent upon the Applicant to make at least a *prima facie* showing which would entitle him to relief before an evidentiary hearing will be scheduled and held. Welch v. MacDougall, 246 S.C. 258, 143 S.E.2d 455 (1965); Blandshaw v. State, 245 S.C. 385, 140 S.E.2d 784 (1965). Since the Applicant has failed to make even a *prima facie* showing, the Respondent would submit that this allegation should be dismissed for failing to meet the requirements of the Uniform Post-Conviction Procedures Act. This allegation is so vague that it is impossible for the State to respond.

VI.

Each and every allegation contained within the application not hereinbefore expressly admitted, qualified or explained is hereby denied.

VII.

WHEREFORE, having made its Return, the State requests that an evidentiary hearing be held.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Senior Assistant Deputy Attorney General

SUZANNE H. WHITE
Assistant Attorney General

By: 
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
Telephone: (803) 734-3737

November 29, 2012.

STATE OF SOUTH CAROLINA)
COUNTY OF SPARTANBURG)

IN THE COURT OF COMMON PLEAS
SEVENTH JUDICIAL CIRCUIT

Ricardo Gomez Hernandez,)

2012-CP-42-0056

Applicant,)

v.)

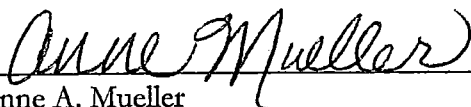
CERTIFICATE OF SERVICE BY MAIL

State of South Carolina,)

Respondent.)

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the Respondent's Return in the above-captioned matter on the following person(s) by depositing same in the United States mail, postage prepaid:

Steven A. Hammett, II, Esquire
Noon & Hammett, LLC
248 N. Church Street
Spartanburg, South Carolina 29306



Anne A. Mueller
Legal Assistant for the Respondent

DATED this 29th day of November, 2012.

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STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG

IN THE COURT OF COMMON PLEAS

Richardo Gomez-Hernandez,
Applicant,

TRANSCRIPT OF RECORD
2012-CP-42-0056

-vs-
The State.

January 11, 2013
Spartanburg, South Carolina

B E F O R E :

HONORABLE J. DERHAM COLE, JUDGE

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

JOHN KEVIN OWENS, ESQUIRE
Attorney for the Applicant

SUZANNE H. WHITE, ESQUIRE
Attorney for the State

Linda D. Moffitt
Circuit Court Reporter

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WITNESSES

PAGE

RICARDO GOMEZ-HERNANDEZ (AW)

Direct examination by Mr. Owens

Cross-examination by Ms. white

3

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No exhibits entered into evidence.

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M. HOPE BLACKLEY

Ricardo Gomez-Hernandez
Direct examination by Mr. Owens

1 (Marie Bustamante, interpreter for the applicant.)

2 MS. WHITE: Your Honor, this is the case of Ricardo
3 Gomez-Hernandez, Case No. 2012-CP-42-0056.

4 He's represented today by Mr. Kevin Owens.

5 Mr. Hernandez was indicted February of 2011 for
6 trafficking in cocaine over 400 grams. He pled guilty
7 represented by Robert Newton to the lesser included offense
8 of trafficking cocaine 28 to a hundred grams first offense
9 and a negotiated sentence of 12 years.

10 He's filed this application and raised ineffective
11 assistance of counsel, involuntary guilty plea, due process
12 violations and claims that he was told he was pleading
13 guilty to a conspiracy charge.

14 And at this point I will turn it over to Mr. Owens.

15 THE COURT: Okay. Mr. Owens.

16 MR. OWENS: Your Honor, I'd like to call
17 Mr. Hernandez.

18 RICARDO GOMEZ-HERNANDEZ,

19 having been first duly sworn, testified as follows:

20 DIRECT EXAMINATION BY MR. OWENS

21 Q Mr. Hernandez, you heard the attorney general discuss
22 the charges that were originally brought against you.

23 A Uh-huh.

24 THE INTERPRETER: Yes.

25 Q On those charges you were represented by an attorney,

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M. HOPE BLACKLEY
SPECIAL AGENT
OFFICE

1 Robert Newton.

2 THE INTERPRETER: Yes. That was my attorney.

3 Q Did you pay Mr. Newton for representing you on those
4 charges?

5 THE INTERPRETER: I paid \$3,000 as a down payment.

6 Q And you have filed in this court an application for
7 post conviction relief.

8 THE INTERPRETER: Yes.

9 Q Okay. And you understand that I have -- I have told
10 you that the decision that the court will be making today
11 is whether Mr. Newton effectively represented you.

12 THE INTERPRETER: The truth is he didn't represent me
13 the way he should have.

14 Q Okay.

15 THE INTERPRETER: He never -- he never informed me of
16 the charges. There was four of us together, and I was not
17 fully aware of the charges.

18 Q I'm going to ask you questions about what you say he
19 did wrong, but I want you to understand now that as a
20 result of this hearing there will be no reduction in your
21 sentence. It is only to determine whether Mr. Newton
22 effectively represented you.

23 THE INTERPRETER: He didn't inform me that I would be
24 sentenced the day that he visited me at jail.

25 Q Okay. Well, Mr. Gomez or Mr. Hernandez, let me ask

1 you this. You've alleged ineffective assistance of
2 counsel. Can you tell the Court in your own words what you
3 feel Mr. Newton did wrong?

4 THE INTERPRETER: First of all, he did not read my
5 charges to me to inform me that we were going to court. He
6 did mention we were going to court, but he did not mention
7 that I would be sentenced.

8 Q How many times did you meet with Mr. Newton prior to
9 the plea?

10 THE INTERPRETER: He only came to see me once when I
11 was in jail. And it was on a Friday.

12 Q Okay. Was that the Friday before you pled?

13 THE INTERPRETER: Yes.

14 Q Did he ever advise you that you would be obtaining
15 less than a 12-year sentence?

16 THE INTERPRETER: He said that he was going to try to
17 find a better deal or plea agreement than the others that
18 were charged.

19 Q Did Mr. Newton ever make any representations that you
20 would receive a lesser sentence?

21 THE INTERPRETER: All he said was that he was going to
22 try to find or try to get me a better deal than the ones
23 that were arrested with me.

24 I also signed the paperwork, but I was not aware that
25 the sentencing was going to be that same date. But I had

M. HOPE D. JACKLE
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1 already signed the paperwork.

2 Q How long did you spend discussing the plea with
3 Mr. Newton before entering it?

4 THE INTERPRETER: Very little time.

5 Q Approximately how long?

6 THE INTERPRETER: Between ten and fifteen or twenty
7 minutes.

8 Q Did you plead guilty based on the representations from
9 Mr. Newton?

10 THE INTERPRETER: I didn't have another option but to
11 plead guilty.

12 MR. OWENS: That's all the questions I have, Your
13 Honor.

14 CROSS-EXAMINATION

15 BY MS. WHITE

16 Q Mr. Hernandez, you pled guilty to a reduced charge of
17 trafficking cocaine 28 to a hundred grams first offense, is
18 that correct?

19 THE INTERPRETER: Yes. I pled guilty because I had no
20 other option.

21 Q But you had been charged with trafficking in cocaine
22 over 400 grams.

23 THE INTERPRETER: I understand, but I also was on
24 drugs, and I wasn't using my common sense.

25 Q And the Court on the day of your sentencing, the Court

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1 went over with you your right to a jury trial?

2 THE INTERPRETER: Yes.

3 Q And you would have gone to trial most likely on the
4 trafficking over 400 grams.

5 THE INTERPRETER: Yes.

6 Q And they also went over with you the negotiations of a
7 12-year sentence.

8 THE INTERPRETER: That's what we ended up agreeing on,
9 and that's the paperwork that I signed, because before the
10 attorney had mentioned that I would get 25 years or life.
11 So he mentioned that 25 years was what they were offering
12 and that would be the maximum that they would give me
13 when I signed the paperwork, that's when the judge
14 mentioned 12 years.

15 Q And when the solicitor talked about the facts of the
16 case the Court asked you if you understood and agreed with
17 those facts.

18 THE INTERPRETER: Yes. I said it was okay.

19 Q And you had an interpreter that day, correct?

20 THE INTERPRETER: Yes, I did, but she spoke softly and
21 I didn't understand much or could hear well what she was
22 saying.

23 Q But you did tell the Court that you were guilty and
24 that you were pleading freely and voluntarily?

25 THE INTERPRETER: Of course I did, and that's why I

1 declared to be guilty because, if not, then they was going
2 to give me more time.

3 Q And so you are aware that if you were to go back and
4 win the P.C.R. you could potentially go to trial on the
5 over 400 grams.

6 THE INTERPRETER: That's fine.

7 Q Okay. Thank you.

8 MS. WHITE: That's all I have, Your Honor.

9 MR. OWENS: Nothing further, Your Honor.

10 THE COURT: You may step down.

11 Anything further?

12 MR. OWENS: Nothing, Your Honor.

13 MS. WHITE: The state has nothing further, Your Honor.

14 THE COURT: I will review the record and issue an
15 order.

16 END OF REQUESTED TRANSCRIPT OF RECORD

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CERTIFICATE

I, the undersigned Linda D. Moffitt, Official Court Reporter for the Seventh Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of all the proceedings had and evidence introduced in the trial of the captioned cause, relative to appeal, in the Court of General Sessions for Spartanburg County, South Carolina, on the 11th day of January 2013.

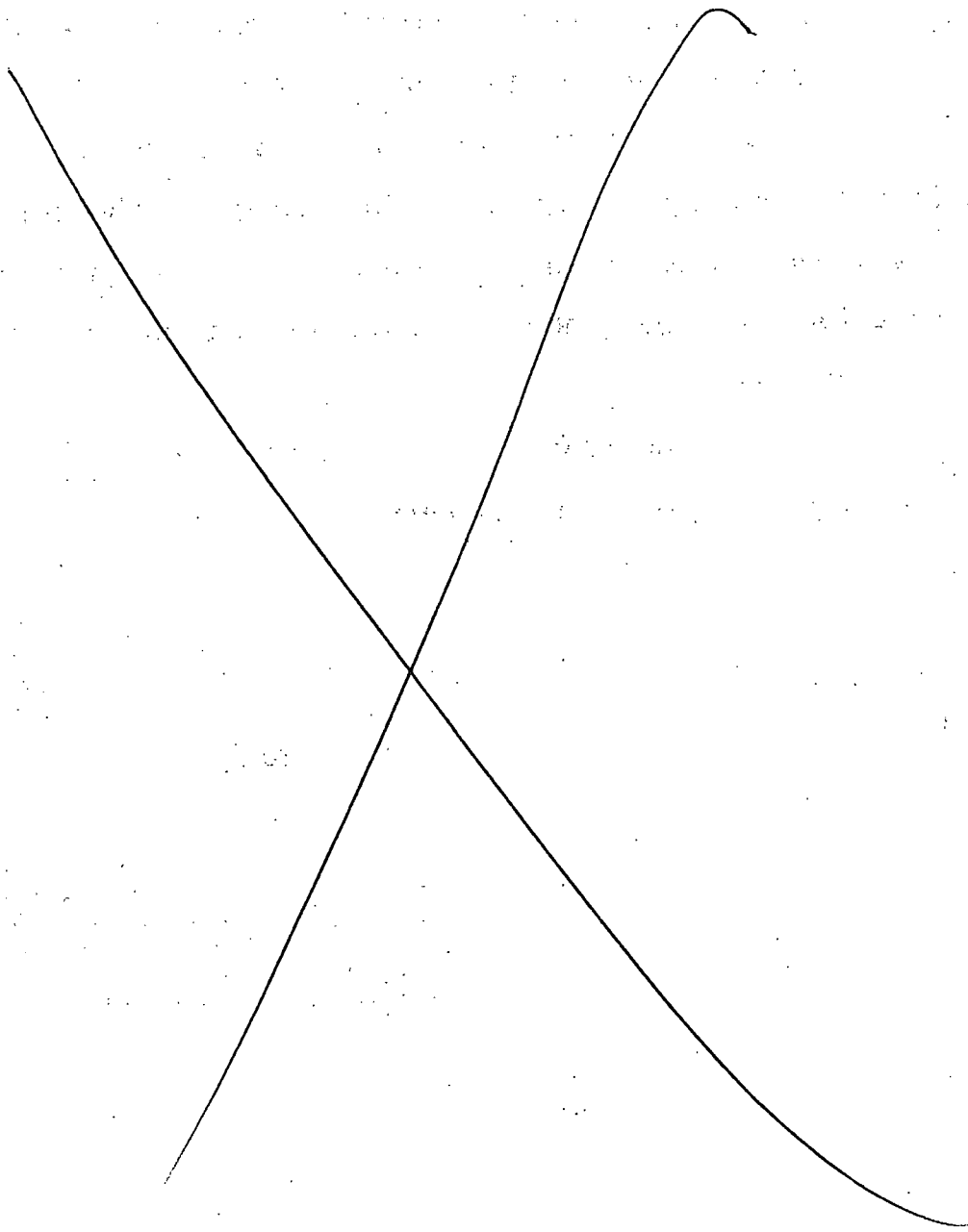
I do further certify that I am neither of kin, counsel nor interest to any party hereto.

April 5, 2017



Linda D. Moffitt
Circuit Court Reporter

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M. HOPE BLACKLEY



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STATE OF SOUTH CAROLINA)
)
COUNTY OF SPARTANBURG)
)
Ricardo Gomez Hernandez, #348548,)
)
Applicant,)

IN THE COURT OF COMMON PLEAS
SEVENTH JUDICIAL CIRCUIT

2012-CP-42-0056

v.)
)
State of South Carolina,)
)
Respondent.)

ORDER OF DISMISSAL

This matter comes before the Court by way of an Application for Post-Conviction Relief filed January 6, 2012. The Respondent made its Return on or about November 29, 2012. An evidentiary hearing into the matter was convened on January 11, 2013, at the Spartanburg County Courthouse. The Applicant was present at the hearing and was represented by J. Kevin Owens, Esquire. Suzanne H. White, Esquire, of the South Carolina Attorney General's Office represented the Respondent.

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At the hearing, the Applicant testified on his own behalf using the assistance of a certified interpreter. Robert L. Newton, Esquire, also testified. This Court also had before it a copy of the records of the Spartanburg County Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, the Return, and the plea transcript.

PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Spartanburg County Clerk of Court. The Applicant was indicted at the February 2011 term of the Spartanburg County Grand Jury for trafficking in cocaine more than 400 grams (11-GS-42-0420). He was represented by Robert L. Newton, Esquire. On November 7, 2011, the Applicant pled guilty to the lesser included offense of

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trafficking in cocaine 28-100 grams, 1st offense. He was sentenced by the Honorable Roger L. Couch, pursuant to a negotiated sentence, to confinement for a period of twelve (12) years. The Applicant did not appeal his guilty plea or sentence.

ALLEGATIONS

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

1. Ineffective assistance of counsel
2. Involuntary guilty plea, in that;
 - a. Applicant was told he was pleading guilty to conspiracy
3. Violation of due process

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony and arguments presented at the PCR hearing. This Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon the credibility. This Court has weighed the testimony accordingly. Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80 (2003).

Ineffective Assistance of Counsel

The Applicant alleges he received ineffective assistance of counsel. In a PCR action, "[t]he burden of proof is on the applicant to prove his allegations by a preponderance of the evidence." Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (citing Rule 71.1(e), SCRPC). Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler v. State,

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286 S.C. 441, 334 S.E.2d 813 (1985).

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

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. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Johnson v. State, 325 S.C. 812, 386 S.E.2d 733, 735 (1997) (*citing* Strickland).

Applicant testified that he paid Counsel a total of \$3,000 to represent him on this charge.
Applicant testified that Counsel never informed Applicant of the charge he was facing.
Applicant also testified that Counsel did not tell him that he was going to court to be sentenced on the day that the plea was held. Applicant acknowledged that he did sign the paperwork, which included the sentencing sheet dated for that date. Applicant testified that Counsel came to meet with him on the Friday before the plea for a short time and indicated at that time that Counsel would try to get a lesser sentence. However, Applicant ultimately testified that he pled guilty freely and voluntarily on that day, but just wanted to get a lesser sentence.

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This Court finds that the Applicant failed to meet his burden of proof as to the allegation that Counsel was ineffective. Although the Applicant indicated in his testimony that he only met with Counsel briefly, the "brevity of time spent in consultation, without more, does not establish that counsel was ineffective." Easter v. Estelle, 609 F.2d 756, 759 (5th Cir. 1980). The Applicant failed to point to any specific matters Counsel failed to discover or any defenses that could have been pursued had Counsel spent more time with the Applicant. Furthermore, the Applicant failed to show any prejudice that may have resulted from Counsel's alleged inadequacy.

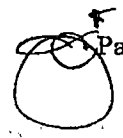
This Court also finds that the Applicant's allegation of ineffective assistance of counsel lacks merit. This Court finds that the Applicant has failed to meet his burden of proof as to this claim. It is clear from the record and testimony that the Applicant was fully aware of the charge and of the negotiated sentence to a reduced charge. Therefore, this claim is denied and dismissed.

Involuntary Guilty Plea

To be knowing and voluntary, a plea must be entered with a full understanding of the charges and the consequences of the plea. Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 17 L.Ed.2d 274 (1969); Dover v. State, 304 S.C. 433, 405 S.E.2d 391 (1991). In determining guilty plea issues, it is proper to consider the guilty plea transcript as well as evidence at the PCR hearing. Harris v. Leeke, 282 S.C. 131, 318 S.E.2d 360 (1984).

Because a guilty plea is a solemn, judicial admission of the truth of the charges against an individual, a criminal inmate's right to contest the validity of such a plea is usually, but not invariably, foreclosed. Blackledge v. Allison, 431 U.S. 63, 97 S.Ct. 1621, 52 L.Ed.2d 136 (1977). Therefore, statements made during a guilty plea should be considered conclusive unless a criminal inmate presents valid reasons why he should be allowed to depart from the truth of his

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statements. Crawford v. U.S., 519 F.2d 317 (4th Cir. 1975); Edmonds v. Lewis, 546 F.2d 566 (4th Cir. 1976).

A defendant who enters a plea on the advice of counsel may only attack the voluntary and intelligent character of the plea by showing that counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's errors, the defendant would not have pled guilty, but would have insisted on going to trial. Roscoe v. State, 345 S.C.16, 546 S.E.2d 417 (2001); Richardson v. State, 310 S.C. 360, 426 S.E.2d 795 (1993).

This Court finds that this allegation conclusively refuted by the record and the Applicant's own testimony at the PCR hearing. Applicant stated that he was pleading guilty freely and voluntarily at the plea hearing and then confirmed that fact at the PCR hearing. There was no testimony presented to support the claim that the Applicant believed he was pleading guilty to a conspiracy charge.

This Court finds that Applicant has failed to carry his burden of proving that his guilty plea was not freely and voluntarily entered. The overwhelming evidence in the record and presented through the testimony of the witnesses at the hearing reflects that the plea was knowingly and voluntarily entered. Boykin v. Alabama, 395 U.S. 238 (1969); Vickey v. State, 258 S.C. 33, 186 S.E.2d 827 (1972). Therefore, this Court finds that Applicant's guilty plea was freely and voluntarily entered.

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Due Process Violations

This Court finds that the Applicant has failed to meet his burden of proof as to this claim. The Applicant failed to present any testimony or evidence in support of this claim. Therefore, this claim is denied and dismissed.

Summary

This Court finds in regards to the allegations of ineffective assistance of counsel, involuntary guilty plea and due process violations, the Applicant failed to meet his burden of proof. Accordingly, this Court finds the Applicant has failed to prove the first prong of the Strickland test – that Counsel failed to render reasonably effective assistance under prevailing professional norms. The Applicant failed to present specific and compelling evidence that Counsel committed either errors or omissions in his representation of the Applicant.

This Court also finds the Applicant has failed to prove the second prong of Strickland – that he was prejudiced by Counsel’s performance. This Court concludes the Applicant has not met his burden of proving Counsel failed to render reasonably effective assistance. See Frasier supra. Therefore, this allegation is denied.

CONCLUSION

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

This Court cautions Applicant that he must file and serve a notice of appeal within the (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an Applicant has a right to an appellate counsel’s assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCP, provides that if the applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant’s behalf. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for

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appeal.

IT IS THEREFORE ORDERED:

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

AND IT IS SO ORDERED this 10 day of July, 2013.



J. Derham Cole
Presiding Judge

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SPARTANBURG COUNTY
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M. HOPE BLACKLEY

Spartanburg County

Spartanburg County Court House
180 Magnolia Street
P. O. Box 3483
Spartanburg, SC 29304-3483

Phone (864) 596-2591
Fax (864) 596-2239



M. Hope Blackley

Clerk of Court

July 16, 2013

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF SPARTANBURG

7TH JUDICIAL CIRCUIT

Ricardo Gomez Hernandez
384548

CASE # *2012 CP 42-56*

Applicant

CERTIFICATE OF SERVICE

[Signature]

Respondent

I certify that, on this date, I served a copy of the

Order of Dismissal

in this action dated

7-10

2013 on

7-10-13

By mailing to him/her, at his/her last known address, by depositing it in the U.S. Mail, in an envelope with sufficient postage affixed, addressed as follows:

- [Signature]*
- [Signature]*
- [Signature]*
- [Signature]*

7-10-13

(Date)

[Signature]

(Signature)

STATE OF SOUTH CAROLINA)

CIVIL ACTION COVERSHEET

Plaintiff(s))

-CP - -

vs.)

2017-CP-42-2786

RICHARDO HERNANDEZ)

Defendant(s))

Submitted By: Tommy A. Thomas
Address: P.O. Box 88, Irmo, SC 29063

SC Bar #: 5536
Telephone #: 803-732-5507
Fax #: 803-781-4226
Other:
E-mail: jackie@paroleme.com

NOTE: The coversheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this coversheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION (Check all that apply)

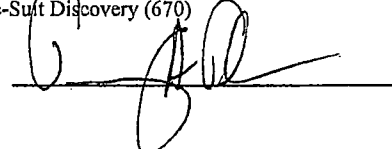
*If Action is Judgment/Settlement do not complete

- JURY TRIAL demanded in complaint. NON-JURY TRIAL demanded in complaint.
- This case is subject to ARBITRATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
- This case is subject to MEDIATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
- This case is exempt from ADR. (Proof of ADR/Exemption Attached)

NATURE OF ACTION (Check One Box Below)

- | | | | |
|--|--|---|--|
| <p>Contracts</p> <ul style="list-style-type: none"> <input type="checkbox"/> Constructions (100) <input type="checkbox"/> Debt Collection (110) <input type="checkbox"/> General (130) <input type="checkbox"/> Breach of Contract (140) <input type="checkbox"/> Fraud/Bad Faith (150) <input type="checkbox"/> Failure to Deliver/Warranty (160) <input type="checkbox"/> Employment Discrim (170) <input type="checkbox"/> Employment (180) <input type="checkbox"/> Other (199) <p>Inmate Petitions</p> <ul style="list-style-type: none"> <input checked="" type="checkbox"/> PCR (500) <input type="checkbox"/> Mandamus (520) <input type="checkbox"/> Habeas Corpus (530) <input type="checkbox"/> Other (599) <p>Special/Complex /Other</p> <ul style="list-style-type: none"> <input type="checkbox"/> Environmental (600) <input type="checkbox"/> Automobile Arb. (610) <input type="checkbox"/> Medical (620) <input type="checkbox"/> Other (699) <input checked="" type="checkbox"/> Sexual Predator (510) <input type="checkbox"/> Permanent Restraining Order (680) | <p>Torts - Professional Malpractice</p> <ul style="list-style-type: none"> <input type="checkbox"/> Dental Malpractice (200) <input type="checkbox"/> Legal Malpractice (210) <input type="checkbox"/> Medical Malpractice (220) Previous Notice of Intent Case #
20 -NI- - <input type="checkbox"/> Notice/ File Med Mal (230) <input type="checkbox"/> Other (299) <p>Administrative Law/Relief</p> <ul style="list-style-type: none"> <input type="checkbox"/> Reinstate Drv. License (800) <input type="checkbox"/> Judicial Review (810) <input type="checkbox"/> Relief (820) <input type="checkbox"/> Permanent Injunction (830) <input type="checkbox"/> Forfeiture-Petition (840) <input type="checkbox"/> Forfeiture-Consent Order (850) <input type="checkbox"/> Other (899) <p>Pharmaceuticals (630)</p> <ul style="list-style-type: none"> <input type="checkbox"/> Pharmaceuticals (630) <input type="checkbox"/> Unfair Trade Practices (640) <input type="checkbox"/> Out-of State Depositions (650) <input type="checkbox"/> Motion to Quash Subpoena in an Out-of-County Action (660) <input type="checkbox"/> Pre-Suit Discovery (670) | <p>Torts - Personal Injury</p> <ul style="list-style-type: none"> <input type="checkbox"/> Conversion (310) <input type="checkbox"/> Motor Vehicle Accident (320) <input type="checkbox"/> Premises Liability (330) <input type="checkbox"/> Products Liability (340) <input type="checkbox"/> Personal Injury (350) <input type="checkbox"/> Wrongful Death (360) <input type="checkbox"/> Assault/Battery (370) <input type="checkbox"/> Slander/Libel (380) <input type="checkbox"/> Other (399) <p>Judgments/Settlements</p> <ul style="list-style-type: none"> <input type="checkbox"/> Death Settlement (700) <input type="checkbox"/> Foreign Judgment (710) <input type="checkbox"/> Magistrate's Judgment (720) <input type="checkbox"/> Minor Settlement (730) <input type="checkbox"/> Transcript Judgment (740) <input type="checkbox"/> Lis Pendens (750) <input type="checkbox"/> Transfer of Structured Settlement Payment Rights Application (760) <input type="checkbox"/> Confession of Judgment (770) <input type="checkbox"/> Petition for Workers Compensation Settlement Approval (780) <input type="checkbox"/> Other (799) | <p>Real Property</p> <ul style="list-style-type: none"> <input type="checkbox"/> Claim & Delivery (400) <input type="checkbox"/> Condemnation (410) <input type="checkbox"/> Foreclosure (420) <input type="checkbox"/> Mechanic's Lien (430) <input type="checkbox"/> Partition (440) <input type="checkbox"/> Possession (450) <input type="checkbox"/> Building Code Violation (460) <input type="checkbox"/> Other (499) <p>Appeals</p> <ul style="list-style-type: none"> <input type="checkbox"/> Arbitration (900) <input type="checkbox"/> Magistrate-Civil (910) <input type="checkbox"/> Magistrate-Criminal (920) <input type="checkbox"/> Municipal (930) <input type="checkbox"/> Probate Court (940) <input type="checkbox"/> SCDOT (950) <input type="checkbox"/> Worker's Comp (960) <input type="checkbox"/> Zoning Board (970) <input type="checkbox"/> Public Service Comm. (990) <input type="checkbox"/> Employment Security Comm (991) <input type="checkbox"/> Other (999) |
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MICHELE BLACKLEY



Date: 8/8/17

Submitting Party Signature:

00071

FORM 5

STATE OF SOUTH CAROLINA)

COUNTY OF SPARTANBURG)

RICARDO GOMEZ-HERNANDEZ #348548)

Full name and prison number (if any) of Applicant.)

v.)

State of South Carolina)

IN THE COURT OF COMMON PLEAS

2017-CP-42- 2780

APPLICATION FOR

POST-CONVICTION RELIEF

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 MacDougall Correctional Institution, 1516 Old Gilliard Road, Ridgeville, SC 29472
2. Name and location of Court which imposed sentence Spartanburg County Court of General Sessions, 180 Magnolia Street, Spartanburg, SC 29306
3. Name(s) of co-defendant(s) (if any) Horacio Rodriquez, Bonifacia Aguilar-Cabera
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) 11-GS-42-0420 - Trafficking in Cocaine 28-100 grms, 1st Offense
 - (b)
 - (c)

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

(a) November 7, 2011 - 12 years

(b) _____

(c) _____

6. Check whether a finding of guilty was made:

(a) after a plea of guilty x

(b) after a plea of not guilty _____

(c) after a plea of nolo contendere _____

7. Did you appeal from the judgment of conviction or the imposition of sentence?

no

8. If you answered "yes" to (7), list:

(a) the name of each Court to which you appealed:

i. _____

ii. _____

iii. _____

(b) the result in each such Court to which you appealed:

i. _____

ii. _____

iii. _____

(c) the date of each such result:

i. _____

ii. _____

iii. _____

(d) if known, citations of any written opinion or orders entered pursuant to such results:

i. _____

ii. _____

iii. _____

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

(a) _____

(b) _____

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- (c) _____
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:
- (a) Belated Appeal
- (b) New PCR hearing
- (c) _____
-
11. State concisely and in the same order the facts which support each of the grounds set out in (10):
- (a) See Attached
- (b) See Attached
- (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? _____
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief?
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? _____
- (d) any other petitions, motions or applications in this or any other Court? _____
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. _____
- ii. _____
- iii. _____
- iv. _____
- (b) the name and location of the Court in which each was filed:
- i. _____
- ii. _____
- iii. _____
- iv. _____
- (c) the disposition thereof:

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(b) _____

(c) _____

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

(a) your arraignment and plea? x

(b) your trial, if any?

(c) your sentencing? X

(d) your appeal, if any, from the judgment of conviction or the imposition of sentence?

(e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? x

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. Robert L. Newton, Esq., 611 North Main St., Greenville, SC 29601

ii. J. Kevin Owens, Esq., P.O. Box 170128, Spartanburg, SC 29301

iii. _____

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

i. Trial, Sentencing

ii. PCR

iii. _____

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

PCR Appeal

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

No

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SPARTANBURG COUNTY
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STATE OF SOUTH CAROLINA)
)
County of)

VERIFICATION

I, Ricardo G. Gernandez, 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.

Ricardo Hernandez

SWORN to and subscribed before me this 8th
day of August, 2017

[Signature] (L.S.)
Notary Public

My Commission Expires: 3/17/24

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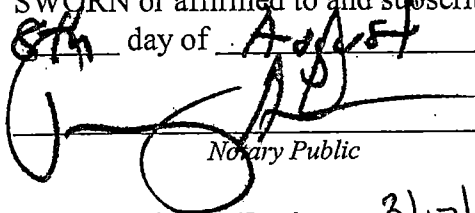
APPLICATION TO PROCEED WITHOUT PAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF

I, Ricardo G. Hernandez, 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.

Ricardo Hernandez
Applicant

SWORN or affirmed to and subscribed before me this
8th day of August, 2017.


Notary Public

My Commission Expires: 3/17/24

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SPARTANBURG COUNTY
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M. HOPE BLACKLEY

STATE OF SOUTH CAROLINA)
)
COUNTY OF SPARTANBURG)

IN THE COURT OF COMMON PLEAS

DOCKET NO.: 2012-CP-42-0056

RICARDO GOMEZ HERNANDEZ)

Plaintiff,

vs.

STATE,

Defendant.

AFFIDAVIT

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SPARTANBURG COUNTY
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That the Affiant, being duly sworn, would state as follows:

1. That the Affiant is currently incarcerated at the South Carolina Department of Corrections. Having plead guilty to Trafficking Cocaine 28 - 100 grams, first offense on November 7, 2011. The Affiant was sentenced by the Honorable L. Couch to a negotiated sentence of twelve (12) years.
2. The Affiant did not Appeal his guilty plea or sentence.
3. That Affiant filed an Application for Post-Conviction Relief on January 6, 2012 and an evidentiary hearing was convened on January 11, 2013. The Affiant was represented by J. Kevin Owens. The Honorable J. Derham Cole denied the Affiant relief and an Order of Dismissal was signed on July 10, 2014.
4. The Affiant was born in the Country of Mexico and his native language is Spanish. The Affiant speaks and understands very little English and the assistance of a translator was necessary at the PCR hearing.

0 100 03079

5. The Affiant spoke with his Attorney J. Kevin Owens immediately after the PCR hearing and also when he was notified that his Post Conviction Relief Application had been denied. The Affiant was informed by Mr. Owens that an Appeal of the Court's decision would be filed. The Affiant did not receive any further communication from Mr. Owens, but was under the impression that his Appeal had been filed and was proceeding.
6. Approximately one year later, July 25, 2014, the Affiant was notified by the Supreme Court of South Carolina that J. Kevin Owens had been suspended from the practice of law.
7. On July 28, 2014, the Affiant sent a letter to Peyre Lumpkin, the Trustee of Mr. Owens' files, asking that a substitute counsel be appointed to protect his interest. That the Affiant, never received an appointment of counsel nor a response from Mr. Lumpkin. In addition, a Petition for Substitution of Counsel was also sent to Suzanne White, Assistant Attorney General on August 3, 2014.
8. The Affiant is informed and believes that he is entitled to a belated Appeal of the Court's denial of his Post Conviction Relief Action.
9. The Affiant would request that he be granted a Belated Appeal.

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FURTHER AFFIANT SAYETH NOT.

Richardo Gomez Hernandez
Richardo Gomez Hernandez #348548

SWORN to before me this 5th
day of April, 2017.

Nicole R. Chapman
Notary Public for South Carolina
My Commission Expires: 12-22-2026

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00081

STATE OF SOUTH CAROLINA)
)
COUNTY OF SPARTANBURG)

IN THE COURT OF COMMON PLEAS

DOCKET NO.: 2012-CP-42-0056

RICARDO GOMEZ HERNANDEZ)

Applicant,)

vs.)

STATE,)

Respondent.)

ATTACHMENT TO PCR APPLICATION

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SPARTANBURG COUNTY
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M. HOPE BLACKLEY

11 a. That the Applicant would respectfully request a belated Appeal from his Post-Conviction Relief Action that was heard on January 11, 2013. The Applicant was represented by John Kevin Owens. The Applicant believed that counsel filed an Appeal of his Post Conviction Relief Action on his behalf.

On July 25, 2014, the Applicant received notification from the South Carolina Supreme Court that his PCR counsel, John Kevin Owens had been suspended from the practice of law. During this period the Applicant believed that an Appeal had been filed and that his rights were being protected by a trustee appointed by the South Carolina Bar.

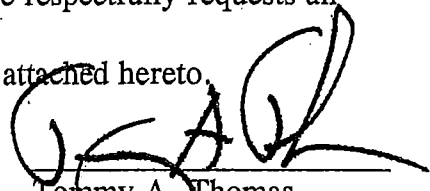
In this case, the Applicant did not knowingly and voluntarily waive his right to Appeal. The right to seek Appellate review of denial of Post-Conviction Relief is expressly authorized by State Law, South Carolina Law Annotated Section 15-27-100, Austin v. State 305 S.C. 453.

An Affidavit is attached hereto regarding the Applicant's request for a belated Appeal of his Post Conviction Relief Decision.

11 b. In addition, the Applicant is informed and believes that he is entitled to Post-Conviction Relief evidentiary hearing.

That a previous hearing was held on January 11, 2015. That at this hearing he was represented by John Kevin Owens. The Applicant is informed and believes that he did not receive any type of effective representation from counsel. None of his issues were properly presented before the Court.

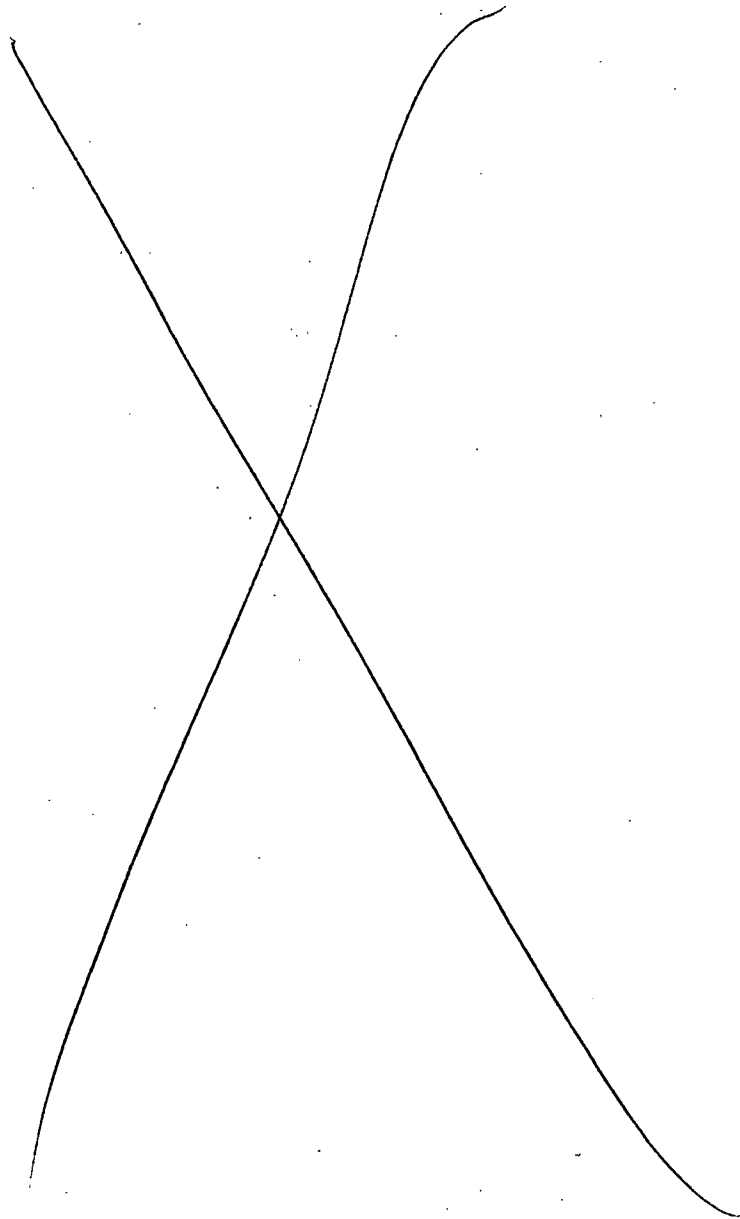
The transcript of the Post-Conviction Relief hearing consists of only 5 pages, which includes testimony and argument. The Applicant is informed and believes that he is equitably entitled to a review of his issues regarding his plea and therefore respectfully requests an evidentiary hearing on these issues. A copy of the transcript is attached hereto.



Tommy A. Thomas,
Attorney for Applicant
P.O. Box 88
Irmo, SC 29063
(803) 732-5507

August 8, 2017

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M. HOPE-BLACKLEY



file



RECEIVED
1-29-18

ALAN WILSON
ATTORNEY GENERAL

January 26, 2018

Tommy Arthur Thomas, Esquire
Post Office Box 88
Irmo, South Carolina 29063

Re: Ricardo Hernandez, #348548 v. State of South Carolina
2017-CP-42-2786

Dear Mr. Thomas:

Enclosed please find a copy of the signed and filed **Consent Order Granting Belated Review Pursuant to Austin v. State** in the above mentioned Post Conviction Relief case.

Sincerely,

Valerie Garcia Giovanoli
Assistant Attorney General

VGG/lm
Enclosure(s)

00085



ALAN WILSON
ATTORNEY GENERAL

March 21, 2018

FILE

The Honorable Barry J. Barnette
Solicitor, Seventh Judicial Circuit
180 Magnolia Street
Spartanburg, South Carolina 29306

Re: Ricardo Gomez Hernandez, #348548 v. State of South Carolina
Case No.: 2017-CP-42-2786
Indictment No.: 2011-GS-42-0420

Dear Solicitor Barnette:

On November 7, 2011, Ricardo Gomez Hernandez pled guilty for trafficking in cocaine in Spartanburg County before the Honorable Roger L. Couch, who sentenced Mr. Hernandez to incarceration for twelve years pursuant to negotiations. Thereafter, Mr. Hernandez filed his first application for post-conviction relief, which was later denied by the circuit court and was not appealed. Thereafter, Mr. Hernandez filed his second application for post-conviction relief, arguing he was entitled to a belated appellate review of his first post-conviction relief action pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991).. By order dated January 12, 2018, the circuit court granted Mr. Hernandez's Austin claim for belated appellate review of his initial post-conviction relief action and denied all other allegations.

Accordingly, Mr. Hernandez has been granted his right to a belated review of his initial post-conviction relief action. Your office will be informed as soon as Mr. Hernandez's appellate review of his first post-conviction relief action is resolved. Thank you, and if you have any questions or need any additional information, please contact me at (803) 734-3737 or by email at seventhcircuitpcr@scag.gov.

Sincerely,

Megan Harrigan Jameson
Senior Assistant Deputy Attorney General

MHJ/lm
Enclosures

cc: Barton J. Vincent, Esquire (SCDC)
Tommy A. Thomas, Esquire
Victim Services

00080

STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG

Ricardo Hernandez, #348548,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
SEVENTH JUDICIAL CIRCUIT

2017-CP-42-2786

**CONSENT ORDER
GRANTING BELATED REVIEW
PURSUANT TO AUSTIN V. STATE¹**

This matter comes before the Court pursuant to an application for post-conviction relief (PCR) filed August 11, 2017.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Spartanburg County Clerk of Court. In February 2011, the Spartanburg County Grand Jury indicted Applicant for trafficking cocaine – over 400 grams (2011-GS-42-0420). The charge resulted from Applicant's participation in a cocaine deal that was set up by a confidential police informant where a package of 1,001.80 grams of powder cocaine was recovered. (Tr. p. 20). Robert Newton, Esquire, represented Applicant. Assistant Solicitor Ryan McCarty represented the State.

On November 7, 2011, Applicant pleaded guilty to the lesser included offense of trafficking cocaine – 28 to 100 grams before the Honorable Roger L. Couch. Janet Chavez served as Applicant's interpreter at the guilty plea hearing. (Tr. p. 3). Pursuant to a negotiated sentence, Judge Couch sentenced Applicant to imprisonment for twelve years for trafficking cocaine – 28 to 100 grams. Applicant did not appeal his conviction or sentence.

¹ Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991).

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Page 1 of 4
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2018 JAN 26 AM 11:59
M. HOPE BLACKLEY

First PCR application - 2012-CP-42-0056

In his first application for post-conviction relief, filed on January 6, 2012, Applicant alleged that he was being held unlawfully for the following reasons:

1. Ineffective Assistance of Counsel
 - a. "My attorney failed to investigate my case and had lied [that] I would be sentenced under ten years."
 - b. "He took my hard earned money, \$3,000, as down payment and did not perform in my defense at getting the best possible results in violation of my Sixth Amendment right to effective assistance of counsel and my Fourteenth Amendment right to due process."
2. "Plea not knowingly and voluntarily entered."
 - a. "I believed I was pleading [guilty] to conspiracy."
 - b. "[Plea Counsel] informed [Applicant] that he would get very little time if convicted, since counsel acknowledged or knew [Applicant]."
 - c. "This is [Applicant's] very first drug offense, not his second, third, etc."
3. "Due Process violations"

Respondent filed its Return on November 29, 2012. An evidentiary hearing into the matter was convened on January 11, 2013, at the Spartanburg County Courthouse before the Honorable J. Derham Cole. Applicant was present at the hearing and represented by John Kevin Owens, Esquire. Suzanne H. White, Esquire, of the South Carolina Attorney General's Office, represented Respondent. Marie Bustamante served as interpreter for Applicant. On July 10, 2013, Judge Cole issued the order of dismissal denying Applicant's application for post-conviction relief.

Applicant did not appeal the denial of post-conviction relief. On July 25, 2014, Applicant was notified that John Kevin Owens, Esquire, had been suspended from the practice of law and that Applicant should seek other counsel. On August 3, 2014, Applicant petitioned for appointment of substitute counsel.

Current Application

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

1. "Applicant would respectfully request a belated appeal from his post-conviction relief action heard on January 11, 2013."

- a. "Applicant was represented by John Kevin Owens (PCR Counsel). The Applicant believed that counsel filed an appeal of his post-conviction relief action on his behalf."
- b. "On July 25, 2014, Applicant received notification from the S.C. Supreme Court that his PCR Counsel had been suspended from the practice of law. During this period, Applicant believed that an appeal had been filed and that his rights were being protected by a trustee appointed by the South Carolina Bar."
- c. "Applicant did not knowingly and voluntarily waive his right to appeal."²

2. Ineffective Assistance of PCR Counsel

- a. "Applicant is informed and believes that he did not receive any type of effective representation from [PCR] counsel."

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Applicant alleges that he was denied the right to appeal the dismissal of his previous post-conviction relief application because his prior PCR counsel, John Kevin Owens, Esquire, was suspended from the practice of law shortly after his PCR hearing and never filed his notice of appeal. Pursuant to Austin v. State, a post-conviction relief applicant may petition the South Carolina Supreme Court for discretionary review of the dismissal of his prior application.

Respondent consents to allow Applicant a belated review of the denial of his PCR application (2012-CP-42-0056). After review of the facts and circumstances surrounding the waiver of Applicant's right to appeal the denial of his post-conviction relief application, this Court finds that Applicant did not knowingly and voluntarily waive his right to appeal his first

² Applicant attached an affidavit to his application in which he also alleges he spoke to PCR Counsel immediately after both his hearing and the issuance of the order of dismissal and was informed that an appeal would be filed. Applicant alleges he received no further communications, but thought an appeal was proceeding. Applicant also alleges he asked for substitute counsel in July 2014, but was never appointed counsel.

PCR application. Accordingly, this Court grants Applicant a belated review of the denial of post-conviction relief pursuant to Austin v. State, in which he may raise on appeal any issues that were raised and ruled upon in his prior application. In order to secure this review, however, Applicant must appeal from this Order.

2018 JAN 26 AM 11:59
M. HOPE BRADLEY

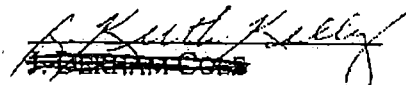
CONCLUSION

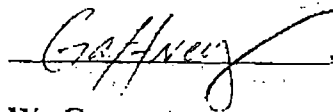
This Court advises Applicant that he must file a notice of intent to appeal within thirty (30) days from the receipt of written notice of entry of this Order to secure appropriate appellate review. His attention is also directed to King v. State, 308 S.C. 348, 417 S.E.2d 868 (1992) and Rule 243 of the South Carolina Appellate Court Rules for the appropriate procedures for filing a belated appeal.

IT IS THEREFORE ORDERED:

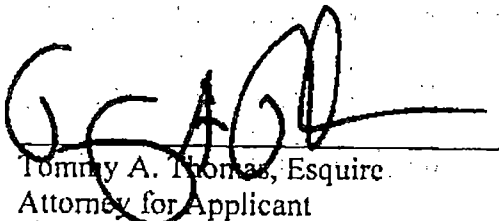
1. That Applicant be granted an appeal of case 2012-CP-42-0056 pursuant to Austin v. State;
2. That all other PCR allegations are waived and dismissed with prejudice;
3. That Applicant remain in the custody of the South Carolina Department of Corrections.

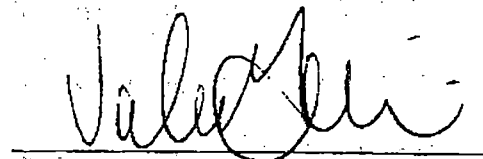
AND IT IS SO ORDERED this 12 day of January, 2018.


~~Chief Administrative Judge~~
Chief Administrative Judge
Seventh Judicial Circuit


_____, South Carolina.

We Consent:


Tommy A. Thomas, Esquire
Attorney for Applicant



Valerie Garcia Giovanoli, Esquire
Assistant Attorney General
Attorney for Respondent

02900

00090

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

RICARDO HERNANDEZ, #348548

Applicant,

v.

STATE OF SOUTH CAROLINA,

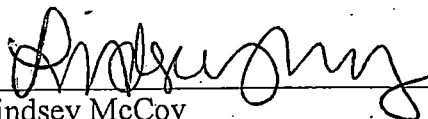
Respondent.

CERTIFICATE OF SERVICE

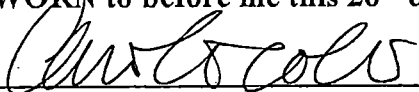
The undersigned hereby certifies that a true copy of the **Consent Order Granting Belated Review Pursuant to Austin v. State** has been served upon the applicant by mailing one (1) copy in the United States mail, postage prepaid, addressed to:

Tommy Arthur Thomas, Esquire
Post Office Box 88
Irmo, South Carolina 29063

This 26th day of January, 2018.


Lindsey McCoy
Legal Assistant

SWORN to before me this 26th day of January, 2018.


Notary Public for South Carolina.
My Commission Expires: 5/20/2025

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas
Post Conviction Relief

RECEIVED
FEB 26 2018
S.C. SUPREME COURT

J. Derham Cole, Circuit Court Judge

Docket No.: 2012-CP-42-0056

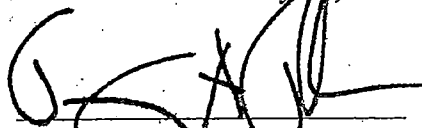
Ricardo Hernandez #348548,..... Appellant,

vs.

State of South Carolina,Respondent.

NOTICE OF APPEAL

Ricardo Hernandez #348548 appeals the Order of Dismissal from the Honorable J. Derham Cole dated July 10, 2013, pursuant to a Consent Order Granting Belated Review Pursuant to Austin v. State, signed by the Honorable R. Keith Kelly (2017-CP-42-2786) on January 12, 2018, filed on January 26, 2018 and received on January 26, 2018.



TOMMY A. THOMAS
Attorney for Appellant
P.O. Box 88
Irmo, SC 29063
(803) 732-5507

Other Counsel of Record:

Valerie Garcia Giovanoli., Esq.
Assistant Attorney General
P.O. Box 11549
Columbia, SC 29211
Attorney for Respondent

Irmo, South Carolina
February 23, 2018

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas
Post-Conviction Relief

RECEIVED

FEB 26 2018

S.C. SUPREME COURT

J. Derham Cole, Circuit Court Judge

Docket No.: 2012-CP-42-0056

Ricardo Hernandez #348548, Appellant,


vs.

State of South Carolina, Respondent.

CERTIFICATE OF SERVICE

I, Jacquelyn E. Miller, secretary to Tommy A. Thomas, Attorney for the Appellant hereby certify that I placed in the United States Mail, a copy of a Notice of Appeal with postage prepaid and the return address clearly shown on said envelope to Valerie Giovanoli, Esq. of the Attorney General's Office, at:

Valerie Giovanoli, Esq.
Attorney General's Office
P.O. Box 11549
Columbia, SC 29211-1549


Jacquelyn E. Miller
Secretary to Tommy A. Thomas
Attorney for Appellant
P.O. Box 88
Irmo, SC 29063
(803) 732-5507

Irmo, SC
February 23, 2018

00093

Tommy A. Thomas

ATTORNEY AND COUNSELOR AT LAW

TELEPHONE:
(803) 732-5507
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HARRINGTON BUILDING
7588 WOODROW STREET
IRMO, SOUTH CAROLINA 29063

PLEASE REPLY TO:
PO BOX 88
IRMO, SC 29063

FACSIMILE:
(803) 781-4226

INMATE LINE
(803) 732-6542

February 23, 2018

The South Carolina Supreme Court
Daniel E. Shearouse, Clerk of Court
P.O. Box 11330
Columbia, SC 29211

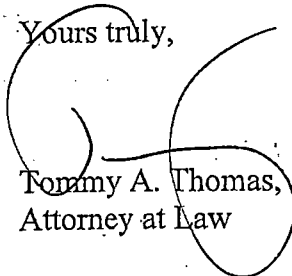
RE: Ricardo Hernandez #348548 v. State of South Carolina

Dear Mr. Shearouse:

Enclosed please find a Notice of Appeal, with attachments and a Certificate of Service by mail.

Kindly return a clocked copy to me in the enclosed envelope. Thank you.

Yours truly,


Tommy A. Thomas,
Attorney at Law

TAT/jem
cc: Valerie Giovanoli, Esq.
Ricardo Hernandez #348548

00094

Tommy A. Thomas

ATTORNEY AND COUNSELOR AT LAW

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February 23, 2018

The Honorable M. Hope Blackley
Spartanburg County Clerk of Court
P.O. Box 3483
Spartanburg, SC 29304

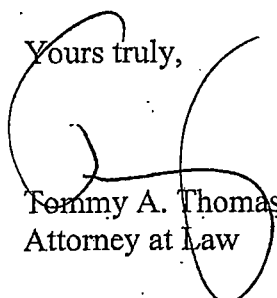
RE: Richardo Hernandez 348548 v. State

Dear Ms. Blackley:

Enclosed please find for filing an original and a copy of a Notice of Appeal with attachments as well as a Certificate of Service in the above referenced matter.

Kindly return the clocked copy to me in the enclosed envelope. Thank you for your assistance in this matter and please feel free to contact me should you have any questions.

Yours truly,


Tommy A. Thomas,
Attorney at Law

TAT/jem
cc: Valerie Giovanoli, Esq.
Richardo G. Hernandez #348548

00095

