

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Horry County
Thomas A. Russo, Circuit Court Judge

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MAR -1 2017

S.C. SUPREME COURT

ERICK HERNANDEZ,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2016-001142

APPENDIX

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ORIGINAL¹

STATE OF SOUTH CAROLINA) IN THE COURT OF GENERAL SESSIONS

COUNTY OF HORRY)

2012-GS-26-03383

THE STATE OF SOUTH)
CAROLINA,)

Plaintiff,)

Transcript of Record

vs.)

October 8, 2012.

ERICK HERNANDEZ,)

Defendant.)

B E F O R E:

Honorable Edward B. Cottingham
Horry County Courthouse
Conway, South Carolina

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

Donna Elder, Esquire
Attorney for Plaintiff

Fran Humphries, Esquire
Attorney for Defendant

Miriam Verrouet
Interpreter

Kay H. Richardson
Official Court Reporter

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(There were no exhibits marked during the hearing.)

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1 (October 8, 2012)

2 ERICK HERNANDEZ, HAVING BEEN SWORN,

3 TESTIFIED AS FOLLOWS:

4 MR. HUMPHRIES: This is the State versus Erick Hernandez.

5 CLERK: Judge, do you want to hear the interpreter before
6 we get started.

7 THE COURT: Yes, I do.

8 MIRIAM VERROUET, HAVING BEEN DULY

9 SWORN AS INTERPRETER:

10 MR. HUMPHRIES: This is the State versus Erick V.
11 Hernandez also known as Pedro Mendoza. They are indictment
12 numbers 2012-GS-26-3381, 3382, 3383, 3384 and 3385, various
13 drug offenses a number of which are trafficking of a level
14 which exposes my client to a minimum of twenty-five years
15 based on the amount and his prior record.

16 THE COURT: Madame Interpreter, are you telling him what
17 he's saying?

18 INTERPRETER: Yes, sir.

19 THE COURT: Please do. Let him know that under -- he's
20 facing a minimum of twenty-five years if convicted.

21 Yes, sir?

22 MR. HUMPHRIES: You have to answer out loud if you
23 understand him, that is if you understand.

24 INTERPRETER: Yes.

25 THE COURT: I understand.

1 INTERPRETER: Yes.

2 MR. HUMPHRIES: I've had the opportunity to extend the
3 offer to plea conveyed by the Solicitor in this matter. As I
4 understand the terms of the plea, if he were to plea, he would
5 enter a plea to trafficking in cocaine with an exposure of
6 seven to twenty-five years which is a violent offense and
7 which is non-paroleable. That is that he would have to serve
8 eighty-five percent of that sentence before he's eligible for
9 release. In return for that plea, my understand that the
10 State would nolle pros the remaining counts against him. I
11 have advised him that it is within the Court's discretion to
12 sentence within the seven to twenty-five year range. I have
13 advised him that I would argue that the Court sentence at the
14 seven or something a little lower into the range. I have
15 further advised him that the State has communicated to me
16 would argue for twenty-five or the upper end of the range. I
17 have told him that the Court need not accept either of those
18 recommendations and can sentence in its discretion anywhere in
19 that range, seven to twenty-five years. He has communicated
20 to me and I believe he wishes to tell the Court that he would
21 consider a sentence of seven years but if it remained an open
22 sentence that he would decline the offer to plea.

23 THE COURT: I didn't understand what you said that he
24 would consider. What are you talking about what he's gonna
25 consider?

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1 MR. HUMPHRIES: He advised me that if the sentence were
2 to be seven years he would accept that today. But if it
3 remained an open sentence where he could get as much as
4 twenty-five years, he would decline that offer to plea.

5 THE COURT: I understand what he says but I decline under
6 any circumstance to permit this Defendant or any other
7 defendant to accept my terms of sentencing. If he pled guilty
8 and I use that advisedly, he would be looking at from seven
9 years to twenty-five or any in between.

10 MR. HUMPHRIES: I've explained that to him.

11 THE COURT: But under no set of circumstances would I
12 consider seven years. Particularly as I understand it, the
13 State under the -- under the plea negotiations are dropping,
14 two other counts, are they not?

15 MR. HUMPHRIES: They're actually dropping four other
16 indictments ---

17 THE COURT: No, sir.

18 MR. HUMPHRIES: --- in return for a plea to this ---

19 THE COURT: Let him know without question that I
20 respectfully understand his position but I also respectfully
21 decline it. If I accept the negotiation, I would understand
22 that his distinguished attorney would argue for a number on
23 the lower end of seven to twenty-five. Otherwise, I would
24 understand that the distinguished attorney for the State would
25 ask for the total of twenty-five or something on the top. If

1 I took the plea, I would listen to whatever is appropriate and
2 decide accordingly. Under no circumstances would I accept his
3 proposal. Okay?

4 Donna, would you care to be heard on that issue?

5 MS. ELDER: No, sir, with the exceptions of course that
6 we'll be more than happy to try Mr. Hernandez and we will be
7 trying him on a two to four hundred level where he will get if
8 convicted twenty-five at a mandatory minimum and we'll be
9 asking for thirty at trial.

10 THE COURT: Mr. ---

11 MR. HUMPHRIES: Your Honor, just so the record can be
12 clear, what I've advised him is this, we've dealt with two
13 separate issues when I spoke with him prior to coming into
14 court. One was the offer to plea. The Court's heard what he
15 has to say about the offer to plea. The second is, I perceive
16 based on the discovery in the case and the count to be tried,
17 that there is or least there is present a potential and
18 dangerous conflict of interest related to another client of
19 mine, Karen Villamizar. I have told him that I have brought
20 these issues with the Solicitor up to the Court and that if I
21 were to make the motion to be removed based on that conflict
22 of interest, my understanding is the Court would be inclined
23 to rule in my favor in regard to that motion.

24 What I have told him in regard to his declining the offer
25 today and my removal is that it would be the Court's intention

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1 to appoint him another attorney today.

2 THE COURT: Correct.

3 MR. HUMPHRIES: And that he would be tried more likely
4 than not December 2nd ---

5 THE COURT: Was it the 3rd or 2nd?

6 MR. HUMPHRIES: I believe -- I thought it was the 2nd, it
7 may've been the 3rd.

8 THE COURT: Go ahead.

9 MR. HUMPHRIES: That he would be tried before more likely
10 than not, this same judge and that it would be the same
11 prosecutor and the prosecutor has indicated to me that there
12 would be no offer to plea after today's date and I'd ask her
13 to verify that for the record.

14 MS. ELDER: Yes, sir. Can I get -- can we approach Your
15 Honor and get one thing clarified.

16 THE COURT: Sure. Come forward. Surely.

17 (REPORTER'S NOTE: A bench conference was held off the
18 record.)

19 MR. HUMPHRIES: What I've explained to Mr. Hernandez is
20 that this prosecutor has advised me that after today's date,
21 there will be no further offers in the case and that he will
22 go to trial on at least one count which would expose him to a
23 mandatory minimum of twenty-five years.

24 THE COURT: Are you conveying that to him?

25 INTERPRETOR: Yes, sir.

1 THE COURT: Does he understand it?

2 (REPORTER'S NOTE: Defendant confers with Interpreter.)

3 INTERPRETOR: I understand what's being said to me but
4 what I don't understand is how I can be offered these years
5 when I did not traffic, distribute or was caught with any
6 drugs in my possession.

7 THE COURT: That's a question for the jury to determine.
8 They will have a jury of twelve people. He knows the system
9 and they will determine upon proper instructions and they must
10 find him guilty if at all beyond a reasonable doubt. That's
11 why we're gonna have a trial. They'll hear the evidence.
12 It's not for me to make that determination, we're gonna have
13 twelve people listen to it and let them decide and he knows
14 that anyway.

15 All right.

16 MS. ELDER: And, Your Honor, for the record, and I've
17 explained this before, the theory in this case is a conspiracy
18 to traffic. So, I don't know if that is a problem that he is
19 having understanding it. It is a conspiracy to traffic. We
20 don't have to show that he had dope in his hand.

21 THE COURT: Mr. ---

22 MR. HUMPHRIES: I, and in fairness to the prosecutor, I
23 have had numerous conversations with Mr. Hernandez about the
24 state law regarding trafficking and that it includes as one of
25 its elements conspiracy.

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1 THE COURT: He understands it, he just doesn't want to
2 understand it. Let me ask you this. This concerns me a
3 little bit. Why was your motion made today on the date of the
4 trial as to a conflict when this conflict has been known for a
5 year and a half. Why are we -- everybody is subpoenaed and
6 everything else.

7 MR. HUMPHRIES: Yes, sir.

8 THE COURT: Address that issue for me.

9 MR. HUMPHRIES: I'll be glad to, Your Honor.

10 THE COURT: I've determined and I will determine that
11 there is a conflict but I have some concern with him coming in
12 -- is it his motion or yours here on the day of trial?

13 MR. HUMPHRIES: It is -- Your Honor, it is a motion that
14 he has filed previous to today.

15 THE COURT: When did he file it?

16 MR. HUMPHRIES: I was notified -- actually, I was
17 notified by the State that ---

18 MS. ELDER: He filed it Thursday after the arraignment.

19 MR. HUMPHRIES: Of last week. Last week.

20 THE COURT: So, he decided to file a motion here four
21 days before the case is set for trial. She's subpoenaed
22 witnesses from out of state?

23 MR. HUMPHRIES: Yes, sir. And ---

24 THE COURT: Well, he's playing games with the Court. He
25 had a year and a half as I understand it from pre-trial to

1 know if there was a potential conflict.

2 MR. HUMPHRIES: Just so the record is complete as it
3 relates to the timeframe. I was retained to represent him
4 back in July of 2010.

5 THE COURT: Well, let me cut this short. I'm going --
6 based on what I've heard at pre-trial unless you want to get
7 on the record, I conclude that there may be possibly a
8 conflict. I'm not sure that there is but there's a vague
9 possibility that one exists and based on that, I'm going to
10 excuse you. Now, I want this clear and Madame Interpreter, I
11 want you to explain it to him real careful. This case was
12 scheduled for trial several weeks ago and he knew it and yet
13 he filed this motion at the last minute such that he won't be
14 tried. Now, I want you to tell him in no uncertain terms that
15 I'm appointing a public defender for him today.

16 INTERPRETER: I'm sorry, Judge, could you repeat that?

17 THE COURT: I am appointing a public defender for him
18 today. That lawyer will contact him. In addition to that,
19 I'm setting this trial for -- is it December the 2nd or the
20 3rd.

21 MS. ELDER: December the 3rd, I think,

22 THE COURT: Okay. Now, I assume that you were retained,
23 were you not?

24 MR. HUMPHRIES: Your Honor, I was retained and just for
25 the record, I was retained and was paid a portion of my fee

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1 but not nearly half of the fee.

2 THE COURT: Is he indigent now is my question.

3 MR. HUMPHRIES: I believe that he is. He's been in
4 detention since the date of his arrest.

5 THE COURT: Okay. Now, Madame Interpreter, I want him to
6 understand this. He has a right to represent himself. Does
7 he understand that?

8 INTERPRETER: Yes.

9 THE COURT: He has a right if he can afford it
10 financially to hire an attorney of his own choice. Does he
11 understand that?

12 INTERPRETER: Yes.

13 THE COURT: Absent him doing that, I'm going to appoint a
14 public defender today.

15 INTERPRETER: Okay.

16 THE COURT: Now, if he desires to pay his own lawyer,
17 that lawyer must be known to the Solicitor within thirty days
18 from today. Not going to extend it any further, it'll give
19 him thirty days if he can afford it. Otherwise, the court
20 appointed lawyer will represent him.

21 INTERPRETER: Okay.

22 THE COURT: Now, I want him to understand this: The
23 Court will not listen to his further -- I can promise you he's
24 gonna come into court on the day that case is set for trial on
25 December the 2nd and allege some controversy with the court

1 appointed attorney trying to get another continuance. Tell
2 him that that's not going to happen. He is obviously playing
3 with the Court by filing this motion four days before the case
4 was set for trial. But I propose to try him with the public
5 defender on December the 2nd. He's got thirty days to hire
6 his own attorney if he chooses to. If he has any questions,
7 I'll be -- he would not offend me if he has any questions.
8 This is serious matter. What's he saying?

9 INTERPRETER: He says that he's not playing with the
10 Court.

11 THE COURT: Well, he waited until Thursday, he had a year
12 and a half to file this motion and waited till four days
13 before the case was called for trial.

14 INTERPRETER: I just got my motion a month ago.

15 THE COURT: Got what? He knew of a potential conflict a
16 year ago.

17 INTERPRETER: A copy of his ---

18 THE COURT: Well; that's neither here nor there, I'm
19 gonna grant his motion. There may be -- may or may not be
20 some merit to it but there's enough I conclude that there is a
21 possible conflict and I'm gonna honor his motion. But, I'm
22 gonna -- I want him to know that I'm gonna try him on December
23 the 2nd with a public defender or the attorney of his own
24 choice. Tell him that. And that all plea negotiations will
25 end as of five o'clock this afternoon. They will not

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1 thereafter be available to him.

2 INTERPRETER: Okay.

3 THE COURT: Now, as I understand it, pretrial, he had
4 filed some other motion and asked that you be discharged
5 because he couldn't work with you or something like that.
6 Isn't that true?

7 MR. HUMPHRIES: He felt as though I had not done a good
8 enough job obtaining ---

9 THE COURT: Well, I don't need to address that issue
10 because I'm recusing you anyway.

11 MR. HUMPHRIES: Yes, sir.

12 THE COURT: But knowing him -- knowing that, he's gonna
13 file an identical motion on December the 2nd, or whoever his
14 lawyer is, and I'm not gonna listen to it. Now, Madame Court
15 Reporter -- I mean Interpreter, I want you to advise him very
16 carefully that the plea negotiations as set forth by his
17 attorney are not available to him pursuant to statement of the
18 State after five P.M. this afternoon. You want to verify that
19 again, Donna?

20 MS. ELDER: That's most definitely correct, Your Honor.

21 THE COURT: All right.

22 MR. HUMPHRIES: Can I ask in that light ---

23 THE COURT: Yes, sir.

24 MR. HUMPHRIES: What I've advised Mr. Hernandez is this,
25 that based on his motion to relieve me, I would ask the Court

1 for leave to remain in the case until five o'clock in that ---

2 THE COURT: Granted.

3 MR. HUMPHRIES: --- he changes his mind regarding his
4 plea. But I've explained to my client that he does avail
5 himself of the plea offer, it would be at his discretion
6 incumbent upon him to waive any potential conflict in order
7 for me to act as his attorney.

8 THE COURT: If I should take such a plea, the record will
9 fully reflect that or I would not accept a plea.

10 MR. HUMPHRIES: Very good.

11 THE COURT: But I will in fairness to him, since if
12 convicted, he's facing a minimum of twenty-five years, I'm
13 going to leave it open till five o'clock this afternoon.

14 Now let him know this, he is presumed innocent. The
15 State of South Carolina will have to prove him guilty beyond a
16 reasonable doubt. He is entitled to that process with no
17 prejudice to him. He doesn't have to plead guilty. There's
18 no adverse inference to be derived from the fact that he asked
19 for a jury trial. He's entitled to it. Now, let him know
20 this.

21 INTERPRETER: I understand.

22 THE COURT: All right. Does he fully understand this,
23 that that plea negotiation will end today?

24 INTERPRETER: I understand.

25 THE COURT: And does he understand he will be tried on

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1 December the 2nd or 3rd, whatever day it is.

2 INTERPRETER: Yes, sir.

3 THE COURT: Now in fairness to him, he would not offend
4 me if he has any questions about these procedures today?

5 INTERPRETER: I don't really understand about how the law
6 is because I really didn't understand the law that was read to
7 me by my lawyer.

8 THE COURT: Why can't -- his lawyer is under -- has
9 explained it to him several times. What -- ask him what part
10 of the law he doesn't understand and that's a fair question.

11 INTERPRETER: What happens is that I don't know how to
12 read well in English and I don't understand that much English.

13 THE COURT: That's got nothing to do with him
14 understanding what his lawyer tells him.

15 INTERPRETER: I understand now at the last minute.

16 THE COURT: Mr. Humphries.

17 MR. HUMPHRIES: Yes, sir, Your Honor.

18 THE COURT: Tell me, for the record, so that she can
19 explain to him again what you have explained to him under this
20 theory that the Court is proceeding under.

21 MR. HUMPHRIES: He and I spoke upon being retained back
22 in July of 2010, regarding the charges against him and that I
23 understood that the State's position was he was involved in a
24 conspiracy to traffic drugs. Not that he was ever caught with
25 trafficking weight drugs but that he was facilitating the

1 movement of drugs from the source to the CI. And that if he
2 were found guilty of that, he would be as guilty as the person
3 who had actual possession of the drugs. He has -- I
4 understand that he believes that that is not fair and that he
5 was never caught with drugs and he believes based on that the
6 State should extend a more favorable offer to him. I have
7 explained to him that he is under the law, if proven guilty,
8 just as guilty as the person who actually possessed the drugs.

9 THE COURT: Under the conspiracy.

10 MR. HUMPHRIES: Under the conspiracy portion of the
11 trafficking statute.

12 THE COURT: Madame, you tell him that that's the law of
13 this state and this country. He may not like it but it's the
14 law. And that law will be charged to the jury for their
15 consideration.

16 INTERPRETER: I just was now understanding that it's for
17 a conspiracy of trafficking where before I was told that it
18 was trafficking.

19 THE COURT: It's conspiracy of trafficking, is it not?

20 MR. HUMPHRIES: It's trafficking in the statute but
21 trafficking contains the element of conspiracy.

22 THE COURT: Of conspiracy.

23 MR. HUMPHRIES: Which I explained to him at the beginning
24 of my representation and consistently throughout my
25 representation.

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1 THE COURT: The law with regards to one who is charged
2 trafficking also contains the element of conspiracy but he is
3 charged under the trafficking statute based on the alleged
4 conspiracy. And that's the law of this state. It'll be to a
5 jury to determine whether or not he conspired with somebody
6 else. Does he have any -- he's entitled to these questions
7 and -- because it's a serious matter and -- does he have any
8 other questions. But in fairness to him, you tell him that he
9 ought to -- he's got one the best lawyers in the State of
10 South Carolina -- he ought to listen to his lawyer as to what
11 the law is and not what it ought to be. Tell him I said that.

12 INTERPRETER: I know everybody keeps telling me he's a
13 good lawyer but there are a lot of things that I see that is
14 lacking like he didn't follow through which my discovery.

15 THE COURT: Well, he hired him and he's a good lawyer but
16 he ought to take his lawyer's advice. I'm not sure that he's
17 -- he has the legal expertise to determine what discovery is
18 or is not appropriate. That's what you hire a lawyer for.
19 But I'm not gonna -- you want to respond to what he says about
20 discovery?

21 MR. HUMPHRIES: Your Honor, the discovery, I upon
22 receiving discovery, I discussed it thoroughly with him. He
23 had actually requested a copy of it. In fairness, in these
24 kinds of cases, I typically do not deliver a copy, a physical
25 copy of discovery to the jail to maintain at the jail just

1 because it can be quite frankly dangerous for the client to
2 maintain his discovery there.

3 THE COURT: I understand.

4 MR. HUMPHRIES: But -- so he requested that his family be
5 allowed to come pick it up. It was available for a
6 significant period of time and his family never came and got
7 it. So, ultimately, I did deliver it to the jail, which is
8 against my better judgment but at his request.

9 THE COURT: Ask him was it not delivered to the jail?

10 INTERPRETER: I received it a month ago.

11 THE COURT: Pardon me?

12 INTERPRETER: A month ago he received it.

13 THE COURT: So, what's his complaint?

14 INTERPRETER: I see a lot of things that don't seem to be
15 in accordance with what my lawyer is telling me.

16 THE COURT: All right. Well, I suggest he quit trying to
17 practice law and follow his lawyer's advice but he can do what
18 he wishes to.

19 All right.

20 MR. HUMPHRIES: Thank you, Your Honor.

21 THE COURT: Is there anything else he cares to say?

22 INTERPRETER: That's all. Thank you.

23 THE COURT: I can promise you he's gonna raise these same
24 issues against any lawyer who's got -- who we appoint.

25 All right. Take him away.

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1 MR. HUMPHRIES: Thank you, Your Honor.

2 MS. ELDER: Thank you, Your Honor.

3 *****OFF THE RECORD*****

4 (On the Record.)

5 ERICK HERNDANDEZ, HAVING BEEN SWORN,

6 TESTIFIED AS FOLLOWS:

7 THE COURT: What's before me, please?

8 MS. ELDER: Your Honor, this is the State versus Erick
9 Hernandez, a/k/a Pedro Mendoza. We have an interpreter, Your
10 Honor. She has previously been sworn before the Court this
11 morning. It's my understanding this matter was scheduled for
12 trial. We've performed some substantial issues this morning
13 on the record regarding conflict and attorney representation.
14 It's my understanding that Mr. Hernandez or Mendoza has
15 decided to waive any conflict of interest with his attorney at
16 this time, plead guilty to trafficking twenty-eight to a
17 hundred grams which is a lesser included offense of what he's
18 indicted for. The State had negotiated a fifteen-year
19 sentence. It is violent, it is serious. It's my
20 understanding he has been made aware of the parameters of that
21 sentence.

22 THE COURT: So, you are reducing the original charge to a
23 lesser included; is that correct?

24 MS. ELDER: That is correct. And we are dismissing his
25 remaining indictments which are for the record, 2012-3381,

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1 2012-3382, 2012-3384 and 2012-3385.

2 MR. HUMPHRIES: If I may add, I believe that in reducing
3 this charge, it reduces my client's exposure by at least 120
4 years.

5 THE COURT: Okay. Mr. Humphries -- did you swear the
6 interpreter again for me.

7 MIRIAM VERROUET, HAVING BEEN DULY SWORN AS
8 INTERPRETER:

9 THE COURT: Mr. Humphries, you heard the State give to me
10 the parameters of the plea negotiation which contemplates the
11 dismissal of numerous indictments and contemplates a sentence
12 of fifteen years. Is that your understanding?

13 MR. HUMPHRIES: It is, Your Honor.

14 THE COURT: Have you conveyed it to this Defendant?

15 MR. HUMPHRIES: I have, Your Honor.

16 THE COURT: And does he, in your opinion fully understand
17 it?

18 MR. HUMPHRIES: I believe he does.

19 THE COURT: Now, let me first address this issue. And
20 Madame Interpreter, I want to make sure that we go slow enough
21 for him to hear me. We had a hearing this morning on his
22 request to dismiss Mr. Humphries because of an alleged
23 conflict in his representation of another individual. The
24 record will reflect that I granted that motion and dismissed
25 Mr. Humphries. In those proceedings, we did leave open the

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1 possibility of a plea by five o'clock today. My question,
2 though, is this, Does he now waive his conflict of interest
3 assertion and ask that Mr. Humphries now proceed to represent
4 him.

5 INTERPRETER: Yes.

6 THE COURT: Does he clearly understand that I dismissed
7 Mr. Humphries at his request this morning and I'm glad to have
8 Mr. Humphries again representing him if he tells me that that
9 is his desire.

10 INTERPRETER: Yes.

11 THE COURT: If he told me this moment, I do not want Mr.
12 Humphries to be my lawyer, I'd dismiss this proceedings this
13 minute; does he understand that?

14 INTERPRETER: Yes, I want him as an attorney.

15 THE COURT: Ma'am?

16 INTERPRETER: I want him as an attorney.

17 THE COURT: Okay. Mr. Humphries, before we proceed ---

18 INTERPRETER: He took his time to explain to me
19 everything.

20 THE COURT: Pardon me?

21 INTERPRETER: He took his time to me everything.

22 THE COURT: That's fine. And tell him I thank him for
23 that.

24 Mr. Humphries, as to that issue only at this moment, is
25 there anything else you want to put on the record?

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1 MR. HUMPHRIES: I do, in this regard.

2 THE COURT: All right, sir.

3 MR. HUMPHRIES: Rule 1.7 deals with attorney/client
4 conflicts. Pursuant to that rule, I became aware that
5 information provided by another client of mine, Karen
6 Villamizar had been communicated to law enforcement prior to
7 my being retained by either Ms. Villamizar or Mr. Hernandez.
8 After receiving the discovery in the case and after being
9 noticed on what particular charge was to be called, and after
10 an expression of concern from my client regarding a potential
11 conflict of interest, I advised the Court this morning
12 regarding that matter. Suffice it to say, I believe that
13 there was a potential conflict of interest based on
14 information provided by my client Villamizar prior to my being
15 retained. After having heard ---

16 THE COURT: Does that alleged conflict in any way affect
17 your ability as his lawyer today under these proceedings.

18 MR. HUMPHRIES: I do not believe so.

19 THE COURT: I don't either based on the record.

20 MR. HUMPHRIES: No, sir. But I do -- but I appreciate the
21 Court's inquiry with Mr. Hernandez as the rule requires that
22 any waiver of conflict has to be done in writing and of
23 course, when it's done on the record, that is at least in my
24 understanding, the Court can correct me, is the equivalent of
25 waiver in writing.

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23

1 THE COURT: In this case, though, I want a waiver in
2 writing too.

3 MR. HUMPHRIES: And if it please the Court, what I will
4 do -- do you prefer that prior to the entry of the plea or do
5 you want to do that to supplement the record after the plea.

6 THE COURT: I have no problem in supplementing the
7 record. I think that the fact that he's upon the record and
8 under oath, has agreed to the removal of the conflict, that's
9 okay. But in an abundance of precaution, let's put it in
10 writing too.

11 MR. HUMPHRIES: That'd be my preference and I'll
12 supplement the record after I speak with Mr. Hernandez.

13 THE COURT: Now, you have represented him in this event
14 for a number of months.

15 MR. HUMPHRIES: Since July of 2009.

16 THE COURT: And are fully aware of all the facts in the
17 case.

18 MR. HUMPHRIES: I am.

19 THE COURT: And do you understand, and have you explained
20 to him his constitutional rights?

21 MR. HUMPHRIES: I have, Your Honor.

22 THE COURT: Recite to me for the record, the
23 constitutional rights that you have explained to him and tell
24 me, were they given in the presence of the interpreter who in
25 turn gave them to him.

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1 MR. HUMPHRIES: I will, Your Honor.

2 THE COURT: Please.

3 MR. HUMPHRIES: I've explained to him ---

4 THE COURT: Madame Interpreter, if he goes too fast, I
5 want him to hear this. My interest here is making sure that
6 he was advised of his constitutional rights through you and
7 that he knowingly understands them and waives them and desires
8 to plead guilty. Go ahead.

9 MR. HUMPHRIES: I've advised him that in entering a plea
10 of guilty he waives his right to trial.

11 THE COURT: Proceed.

12 MR. HUMPHRIES: I have advised him in waiving his right
13 to trial he waives certain other very important constitutional
14 rights. I have advised him that he has the right to confront
15 the witnesses against him. I have advised him that he has the
16 right to contest any evidence against him. I have advised him
17 that he has the right to call witnesses on his behalf. I have
18 previously advised him that he has the right to testify in his
19 own behalf. I have discussed with him the pitfalls of
20 testifying in his behalf based on his prior criminal history
21 but then he has a right to do so. I had previously advised
22 him that if he should not testify that the Court would advise
23 the jury that they could not hold that against him. And I've
24 asked him if he's understood all those rights. He's indicated
25 that he does and that he wishes to waive those rights and to

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25

1 plead guilty.

2 THE COURT: All right. Counsel -- I mean, Madame
3 Interpreter, I want to know does he understand these various
4 constitutional rights as given by Mr. Humphries?

5 INTERPRETER: Yes.

6 THE COURT: Does he understand, now, clearly that if he
7 pleads guilty and that's his decision, he waives all of these
8 rights.

9 INTERPRETER: Yes.

10 THE COURT: Is his plea today of guilty freely and
11 voluntarily made?

12 INTERPRETER: Yes.

13 THE COURT: Nobody is pressuring him to plead guilty?

14 INTERPRETER: No.

15 THE COURT: Nobody has threatened him in any way?

16 INTERPRETER: No.

17 THE COURT: He understands that they are dismissing
18 several charges, reducing the charge that he was to go to
19 trial upon and have agreed that the sentence will be fifteen
20 years.

21 INTERPRETER: Yes.

22 THE COURT: Other than that, are there any promises of
23 any kind made to him by anybody in this wide world?

24 INTERPRETER: I don't understand what you mean.

25 THE COURT: Anybody promise him anything other than the

State v. Hernandez - 2012-GS-26-3383
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1 fifteen years? He understands that.

2 INTERPRETER: No.

3 THE COURT: All right. Now, I want it abundantly clear
4 one more time, that he is entitled to a trial by jury with all
5 of its rights, that I have set that trial for December the
6 3rd.

7 INTERPRETER: I don't want to go to trial.

8 THE COURT: Ma'am?

9 INTERPRTER: I don't want to go to trial.

10 THE COURT: Okay. But I want him to know at that trial,
11 if we had one, I would charge the jury that he's presumed
12 innocent and doesn't have to prove a thing, the State must
13 prove him guilty beyond a reasonable doubt. I understand
14 that he does not want a trial and wishes to plead guilty. Is
15 that correct?

16 INTERPRETER: Correct.

17 THE COURT: Correct. As to that issue, counsel for the
18 State or Mr. Humphries, any other inquiry you think we need to
19 make in this case?

20 MS. ELDER: Your Honor, I don't know if you want to at
21 this time make sure he is aware that this is a strike and a
22 violent offense.

23 THE COURT: A strike and a what?

24 MS. ELDER: A violent offense.

25 THE COURT: Yeah, I'm sure Mr. Humphries has advised him

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1 of that, have you Mr. Humphries. And he is in fact, he is
2 well aware of potential consequences as a result of violent
3 offense. Further he understands and I've explained to him
4 that if he receives the fifteen years as is negotiated, that
5 under the law he will have to serve at least eighty-five
6 percent of that sentence before he is eligible for supervised
7 release.

8 THE COURT: And Interpreter, does he understand that?

9 INTERPRETER: Yes.

10 THE COURT: All right. I'll hear the facts in just a
11 moment. I conclude that I ---

12 MR. HUMPHRIES: Your Honor, can I ask this one last
13 question.

14 THE COURT: Yes, sir, please.

15 MR. HUMPHRIES: Because I know we have dealt with the
16 issue regarding the potential conflict and his waiver on the
17 record of that conflict, can you inquire of the Defendant as
18 to his satisfaction through his attorney at this point?

19 THE COURT: I can do that and will and I thank you for
20 calling that to my attention.

21 Madame Interpreter, inasmuch as he has filed a motion to
22 discharge Mr. Humphries and today on the record, has said to
23 me I want Mr. Humphries' services, I wish to make the
24 following inquiry. Is he totally and completely now satisfied
25 in every respect with the services of Mr. Fran Humphries as

1 his attorney?

2 INTERPRETER: Yes.

3 THE COURT: Does he have any questions on this issue?

4 INTERPRETER: None.

5 THE COURT: All right. Let the record now reflect that I
6 have exhaustively inquired of this Defendant of his
7 constitutional rights including the right to trial by jury,
8 the right to confront the witness against him, the right to
9 testify in his own behalf as explained to him by his attorney.
10 He tells me that he is understanding his constitutional rights
11 and desires to plead guilty. I conclude from his testimony to
12 me that the plea is freely, intelligently, voluntarily made.
13 He upon the record waives any alleged or potential conflict
14 with Mr. Humphries. The record will reflect that it is his
15 desire that Mr. Humphries continue on this plea.

16 I conclude then -- let me hear the facts in the case, but
17 I conclude that his plea is freely and voluntarily given but
18 let me hear the facts.

19 MS. ELDER: Your Honor, this was a ongoing investigation
20 with the DEA and Horry County Police Department. I want to
21 apologize, I didn't introduce -- Agent Elliott is here. He's
22 a federal agent with the DEA and has worked extensively on
23 this case, Your Honor.

24 THE COURT: Thank you, Mr. Elliott, for your presence.

25 MS. ELDER: And on June 2nd, DEA and officers from Horry

State v. Hernandez - 2012-GS-26-3383
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1 County wired a confidential informant. They then exchanged --
2 had a delivery made by a Codefendant Vargas in this case to
3 the CI. It was wired. We have audio of that transaction.
4 Vargas, Codefendant Vargas delivered a quarter kilo of cocaine
5 to the CI. It was fronted, there was no money exchanged at
6 that time. Subsequent to that, approximately within the next
7 two weeks ---

8 THE COURT: Slow down just a minute. Are you able to
9 communicate with him (To Interpreter).

10 INTERPRETER: Yes.

11 THE COURT: Fine. Thank you.

12 MS. ELDER: Approximately two weeks after this
13 transaction into evidence, the drugs were taken into evidence
14 on the date of the transaction. Approximately two weeks
15 later, within that two weeks, there was a phone call made
16 between this Defendant and the CI. This Defendant
17 acknowledges -- we've got that telephone conversation recorded
18 whereas he acknowledges that he supplied Vargas the drugs that
19 were fronted to our CI on June 2nd and that he needed the
20 money for that drug.

21 THE COURT: Has this -- have these things been turned
22 over to Defense counsel?

23 MS. ELDER: Yes, sir.

24 THE COURT: All right.

25 MS. ELDER: Subsequent to that, Officers were able to

1 obtain a search warrant for the location. On June 2nd, there
2 had been some surveillance where officers followed Vargas,
3 Codefendant Vargas to a location on Clay Pond Road where they
4 met with a Hispanic male. A package was handed off. That
5 package was followed back to our CI. It has been tested for
6 288 grams of cocaine. The search warrant that was obtained in
7 July was for that Clay Pond address. At that time, officers
8 secured paperwork inside that residence, for example, the Time
9 Warner Cable bill, utility bill, was in this Defendant's name.
10 Upon further discovery and subpoena, the utility company
11 provided the same cell number that we had documented for this
12 Defendant as being on that account and in this Defendant's
13 name. He was arrested at the scene of the search warrant at
14 which time he provided the cell phone to agents with DEA.
15 They were able to once again verify that that was in fact his
16 phone number that made that call. In preparation for this
17 trial, Herman Diaz, who we believe is at the tier, top tier of
18 this drug conspiracy is in federal custody, has been indicted,
19 has been sentenced. He was willing to cooperate with the
20 State and testify at this trial against this Codefendant that
21 he did in fact provide a quarter kilo of cocaine ---

22 THE COURT: Was that information provided to the Defense
23 counsel?

24 MS. ELDER: Yes, sir.

25 THE COURT: All right. Thank you. Go ahead. I

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1 apologize.

2 MS. ELDER: He was then -- he provided a quarter kilo to
3 this Codefendant who in then turn would give it to Vargas to
4 deliver. Also, Codefendant Vargas having been tried and
5 sentenced in February of this year to sixteen years, had
6 agreed to also testify against this Codefendant at his trial
7 and he would indicate that on that day he received the drugs
8 from Erick Hernandez.

9 THE COURT: This was -- information was provided to
10 Defense too?

11 MS. ELDER: Yes, sir, Your Honor.

12 THE COURT: All right.

13 MS. ELDER: And, Your Honor, that would basically be the
14 facts that would have been presented for the conspiracy on
15 this Defendant.

16 THE COURT: Thank you. Mr. Humphries, be glad to hear
17 from you, sir.

18 MR. HUMPHRIES: Please the Court, Your Honor. I can say
19 that initially, Erick had some difficulty with understanding
20 the concept of trafficking as it exists in the laws of South
21 Carolina. Erick is from Mexico. He had a very troubled youth
22 which involved serious physical and sexual abuse which
23 ultimately led him to the abuse of drugs in a way to cope with
24 his situation. That involvement with the personal use of
25 drugs ultimately placed him in the position that he finds

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1 himself today. Erick had a great deal of difficulty in
2 understanding the relative fairness of charging him with
3 trafficking when he simply conspired but benefited very little
4 if at all in the process. He had difficulty in understanding
5 the comparative sentences of his Codefendants. That is Diaz,
6 who I believe was convicted federally and Vargas who was
7 convicted in State court. I have explained to them that they
8 are -- that every case rises and falls on its own facts.
9 Because of his prior record, and because of the way the State
10 viewed him in terms of his level of culpability, he was
11 extended an offer of thirteen years initially. He believed
12 that to be unfair. Now, on Mr. Hernandez' behalf, he has
13 never indicated to the Court that he was not guilty but that
14 ~~he didn't believe that the offer extended by the State~~
15 correctly reflected his involvement.

16 In preparation for trial, I filed motions which if they'd
17 been successful would've suppressed the voice identification
18 on the telephone call that the Solicitor has referred to and
19 would've suppressed the seizure of the telephone which
20 ultimately led to the telephone call. Even if I had been
21 successful in those two motions and that certainly is an
22 unanswered question, I explained to Mr. Hernandez that that
23 would not prevent Diaz, the confidential source or Vargas from
24 testifying as fact witnesses regarding his involvement. In
25 explaining all those things and the law as it relates to

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PLEA

1 trafficking in South Carolina, I believe that Mr. Hernandez
2 understands and freely and voluntarily enters his plea of
3 guilty today and ask the Court to accept the negotiated
4 sentence of fifteen years.

5 THE COURT: Do we need the proceedings this morning made
6 a part of this record?

7 MR. HUMPHRIES: We do, Your Honor, and I would ask that
8 also incorporated by reference is the arraignment and I can
9 get the date for the Court Reporter but these issues were
10 addressed in part at that time as well.

11 THE COURT: Get that and I will make the arraignment a
12 part of this record and I specifically order that the
13 proceedings this morning be a part of the record. I want the
14 record to reflect that I acquiesced in his request to remove
15 you but particularly in view of the fact that today he has
16 decided to keep you.

17 MR. HUMPHRIES: Yes, sir, Your Honor.

18 THE COURT: Okay. Is there anything else prior to
19 imposition of sentence? What says the State?

20 MS. ELDER: No, sir, Your Honor.

21 MR. HUMPHRIES: If you will -- if you will inquire of the
22 Defendant if he is pleading guilty because he is guilty, I
23 believe that's the one remaining question we've not asked.

24 THE COURT: What question is that?

25 MR. HUMPHRIES: If he's pleading guilty because he is

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1 guilty.

2 THE COURT: Well, he says he's guilty.

3 MR. HUMPHRIES: Yes, sir, he has.

4 THE COURT: And the facts as related by the Solicitor if
5 found by the jury would clearly represent the guilty plea if
6 it would be jury's decision.

7 MR. HUMPHRIES: Yes, Your Honor.

8 THE COURT: You are pleading guilty. Are you guilty?

9 INTERPRETER: Yes.

10 MR. HUMPHRIES: Very good. Thank you, Your Honor.

11 THE COURT: All right. That -- anything further now?

12 MR. HUMPHRIES: Begging the Court's indulgence just one
13 moment.

14 ~~THE COURT: Does DEA need to be heard in any way?~~

15 MS. ELDER: No, sir, Your Honor, they're just here to
16 support the prosecution's case.

17 THE COURT: Tell them the Court appreciates their
18 presence.

19 AGENT ELLIOTT: Thank you, Your Honor.

20 MS. ELDER: Yes, sir. Thank you.

21 THE COURT: How long has he been in jail?

22 MS. ELDER: Your Honor, that's another matter. We just
23 need to, I think, probably just give him credit for time
24 served, let them figure it out. He did post bond and then
25 serve about a fifteen-month sentence on an immigration

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SENTENCE OF THE COURT

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1 violation with the Feds. I don't think he's entitled to the
2 credit for that since he did post bond. So, I think the
3 Department of Corrections can figure -- calculate that out,
4 Your Honor.

5 MR. HUMPHRIES: And just so I can -- because that's the
6 question that my client just asked me. As I -- the State's
7 position is that you will get credit from the time you were
8 committed or arrested to the point which you posted bond. And
9 I assume that you do not object to the time that -- from the
10 time he was returned to this jurisdiction until today's date?

11 MS. ELDER: That's correct.

12 THE COURT: He's entitled to both of those.

13 MS. ELDER: Yes, sir.

14 MR. HUMPHRIES: Yes, sir.

15 THE COURT: He's not entitled to that other issue with
16 the government though.

17 MR. HUMPHRIES: I understand. (To Mr. Hernandez) Do you
18 understand that?

19 MR. HERNADEZ: (Indicates affirmatively.)

20 MR. HUMPHRIES: He says yes.

21 THE COURT: All right. In accordance with this
22 negotiated sentence, having concluded that the plea is freely,
23 voluntarily, intelligently made and concluding under the facts
24 presented before me that it is appropriate, it is the judgment
25 of this Court that this Defendant be confined in the State

State v. Hernandez - 2012-GS-26-3383
SENTENCE OF THE COURT

1 Penitentiary for a period of fifteen years, giving him credit
2 for time served.

3 Does that comport now with all the negotiations in this
4 case?

5 MS. ELDER: Yes, sir, Your Honor.

6 MR. HUMPHRIES: It does, Your Honor.

7 THE COURT: The record will reflect now that you have
8 dismissed numerous other actions.

9 All right. Thank you so much.

10 MS. ELDER: Yes, sir.

11 MR. HUMPHRIES: Thank you, Your Honor.

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(Adjourned.)

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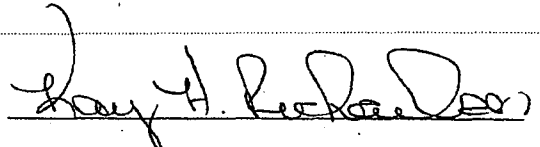
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C E R T I F I C A T E

I, the undersigned, Kay H. Richardson, Official Court Reporter for the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the plea held in the case of The State versus Erick Hernandez, held in the Court of General Sessions for Horry County, Horry County Courthouse, Conway, South Carolina, on October 8, 2013.

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



Kay H. Richardson, CVR
Official Reporter

August 20, 2013.

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FORM 5

STATE OF SOUTH CAROLINA)
)
COUNTY OF Horry.)
)
Erick V. HERNANDEZ, # 352808)
Full name and prison number (if any) of Applicant.)
)
v.)
)
State of South Carolina)
)

IN THE COURT OF COMMON PLEAS

13 4030

APPLICATION FOR
POST-CONVICTION RELIEF

Horry County
JUN 11 AM 9:43
CLERK OF COURT
ANIE HUGENSBACH

INSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legible 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 S.C. Dept. of CORR. [Perry Correctional Institution, 430 Oaklawn Rd., Peter, S.C. 29669].
2. Name and location of Court which imposed sentence Horry General Sessions Court of Horry County, 1301 2nd Avenue, Conway, S.C. 29526.
3. Name(s) of co-defendant(s) (if any) Karen Villamizar and Gener Vargas.
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) 2012-65-26-03983 and Trafficking in Cocaine, 28-100grams, 1st offense.
 - (b) _____
 - (c) _____
5. The date upon which sentence was imposed and the terms of the sentence:
 - (a) October 8, 2012 and 15 years.
 - (b) _____

- (c) _____
- 6. Check whether a finding of guilty was made:
 - (a) after a plea of guilty ✓ _____
 - (b) after a plea of not guilty _____
 - (c) after a plea of nolo contendere _____

7. Did you appeal from the judgment of conviction or the imposition of sentence?
NO.

8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
 - i. _____
 - ii. _____
 - 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) Defense counsel failed to file for direct appeal as requested.
 - (b) _____
 - (c) _____

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

- (a) Ineffective Assistance of Counsel.
- (b) Ineffective Assistance of Counsel.
- (c) Ineffective Assistance of Counsel.

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

- Did counsel failure to quash indictment because offense of trafficking in cocaine, 28g-100g, was not lesser included offense of trafficking in cocaine, 200g-400g, constituted ineffective assistance?*
- (a) Did counsel failure to quash indictment because offense of trafficking in cocaine, 28g-100g, was not lesser included offense of trafficking in cocaine, 200g-400g, constituted ineffective assistance?
 - (b) Did counsel conflict of interest in representation of defendant and co-defendant who had opposing interests constituted ineffective assistance?
 - (c) Did counsel failure to file notice of appeal after being instructed to do so because defendant had right to appeal constituted ineffective assistance?

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

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

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

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

iv. _____

(d) the date of each such disposition:

i. _____

ii. _____

iii. _____

iv. _____

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

i. _____

ii. _____

iii. _____

iv. _____

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

no.

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

(a) which grounds have been presented:

i. _____

ii. _____

iii. _____

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

i. _____

ii. _____

iii. _____

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

(a) Ineffective Assistance of Counsel/cannot present this ground on direct appeal.

(b) Ineffective Assistance of Counsel cannot present this ground on direct appeal.

(c) Ineffective Assistance of Counsel cannot present this ground on direct appeal.

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

- (a) your arraignment and plea? yes.
- (b) your trial, if any? no.
- (c) your sentencing? yes.
- (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? no.
- (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? no.

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. Francis A. Humphries, Jr. / 1300 Professional Drive, Suite 102 / Myrtle Beach, S.C. 29577.
 - ii. _____
 - iii. _____
- (b) the proceedings at which each such attorney represented you:
 - i. arraignment / guilty plea / sentencing.
 - ii. _____
 - iii. _____

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

Vacate conviction and sentence and/or fine(s) / Reverse conviction and sentence.

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

No.

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

13

4030

I, ~~Erick V. Hernandez~~ Erick V. Hernandez, 357808, 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.

Hernandez de Ruck
Applicant

SWORN or affirmed to and subscribed before me this
7th day of June, 2013.

Gary C. Minkot
Notary Public

My Commission Expires: 1-23-2023

HARRIS COUNTY
13 JUN 11 AM 9:13
MELANIE HUGGINS-WARD
CLERK OF COURT

STATE OF SOUTH CAROLINA)

County of HORRY)

VERIFICATION

13

4030

I, Erick V. Hernandez, 352808 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.

Hernandez ERICK

SWORN to and subscribed before me this 7th day of June, 2013.

Nancy S. Mendenhall (L.S.)
Notary Public

My Commission Expires: 1-23-2023

HORRY COUNTY
13 JUN 11 AM 9:42
MELANIE HUGGINS - WARD
CLERK OF COURT

STATE OF SOUTH CAROLINA)
)
 COUNTY OF HORRY)
)
 Erick V. Hernandez,)
 S.C.D.C. No. 352808,)
)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
)
 Respondent.)
 _____)

IN THE COURT OF COMMON PLEAS
 C.A. No. 2013-CP-26-4030

RETURN

In response to the post-conviction relief application filed June 11, 2013, the Respondent would show this Court:

I.

The Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the Horry County Clerk of Court's orders of commitment. The Applicant was indicted at the August 2012 term of the Horry County Grand Jury for trafficking cocaine (2012-GS-26-3383). Fran Humphries, Esquire represented the Applicant.

On October 8, 2012, the Applicant pled guilty. The Honorable Edward B. Cottingham sentenced the Applicant to fifteen (15) years imprisonment. The Applicant did not appeal.

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

II.

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

1. Ineffective assistance of counsel.
 - a. Failure to quash indictment.
 - b. Conflict of interest.
 - c. Failure to file Notice of Appeal.

Any claims not specifically enumerated in the Application or amendments thereto will be opposed by the State at the evidentiary hearing. All amendments should be made well in advance of hearing and should be filed in compliance with Rule 11, SCRCP.

III.

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

Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 2064 (1984); Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985).

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

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel.

First, the applicant must prove counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under prevailing professional norms." Cherry v. State, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688, 104 S. Ct. at 2065). Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984)).

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

IV.

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

V.

WHEREFORE, having made its Return, the Respondent requests that a hearing be held and counsel appointed to represent the Applicant.

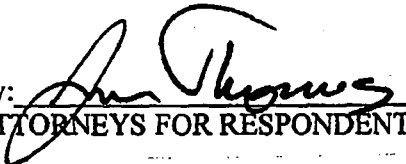
Respectfully submitted,

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By: 
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10/24, 2013

STATE OF SOUTH CAROLINA)
)
 COUNTY OF Horry)
)
)
)
 Erick V. Hernandez, #352808)
)
 Applicant,)
)
 vs)
)
 STATE OF SOUTH CAROLINA,)
)
 Respondent.)

IN THE COURT OF COMMON PLEAS


2013-CP-26-4030

AFFIDAVIT OF SERVICE BY MAIL

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

Tristan M. Shaffer, Esquire
1928 Barnwell St.
Columbia, SC 29201

DATED this 24TH day of October, 2013.


 Norma Bigbee, Legal Assistant
 For Respondent

1 State of South Carolina) Court of Common Pleas
 2 County of Horry) 2013-CP-26-04030
 3
 4
 5 Erick Hernandez)
 6 vs.) Transcript of Record
 7 State of South Carolina)

ORIGINAL

November 13th, 2015
Conway, South Carolina

11 BEFORE:

12 Honorable Thomas A. Russo, Judge.

13 APPEARANCES:

14 J. Croom Hunter, Esq.
15 Assistant Attorney General
16 Attorney for the State

17 Tristan M. Schaffer, Esq.
18 Attorney for the Defendant

19 ALSO PRESENT:

20 Miriam Verrouet, Interpreter

22 Teresa J. F. Bautz, RPR
23 Official Court Reporter
24
25

I N D E X

1	2	3	4	5	6	7	8	9
	WITNESS			DIRECT	CROSS	REDIRECT	RECROSS	
	Francis A. Humphries, Jr.							
	Mr. Shaffer	7	--	31	--			
	Mr. Hunter	--	23	--	--			
	Erick Hernandez							
	Mr. Shaffer	33	--	39	--			
	Mr. Hunter	--	36	--	--			

E X H I B I T S

11	12	13	14	15	16	17	18	19	20	21	22	23	24	25
	NO.		DESCRIPTION			ID		EV						
	P-1		Letter from Applicant			34		34						

Exhibit retained by Clerk of Court.

1 (The hearing commenced at approximately 10:15
2 a.m.)

3 THE COURT: All right. Well, what are we starting
4 with this morning?

5 MR. HUNTER: Mr. Hernandez, Your Honor.

6 THE COURT: All right.

7 MR. HUNTER: If it please the Court, this is Erick
8 Hernandez versus the State of South Carolina, Case No.
9 2013-CP-26-4030. Mr. Hernandez is presently
10 incarcerated with SCDC pursuant to the Horry County
11 Clerk of Court's orders. He was indicted at the
12 August 2012 term of the Horry County Grand Jury for
13 trafficking cocaine. That Indictment No. was
14 2012-GS-26-3383. He was represented by Fran Humphries.

15 On October 8th, 2012, Mr. Hernandez pled guilty.
16 Judge Cottingham sentenced him to 15 years
17 imprisonment. He did not appeal. He filed this
18 application for post-conviction relief on June 11th,
19 2013, in which he alleged ineffective assistance of
20 counsel for failure to quash the indictment, conflict
21 of interest and failure to file notice of appeal. He's
22 represented here today by Mr. Shaffer. The State is
23 ready to proceed.

24 THE CLERK: Judge, I want to swear in the
25 interpreter, please.

1 THE COURT: Yes.

2 MIRIAM VERROUET, after being duly sworn,

3 interpreted testimony as follows:

4 THE CLERK: Thank you.

5 THE COURT: All right. Mr. Shaffer. Thank you.

6 MR. SHAFFER: Thank you, Your Honor. Given the
7 fact that he is facing substantially more time if he is
8 able to get this overturned, I would like to just put
9 on the record the fact that I have informed him that
10 going forward and being successful in his PCR means his
11 original charges are restated including the 25-year
12 minimum that he was facing before.

13 THE COURT: Okay. And you had that conversation
14 with him?

15 MR. SHAFFER: Yes, Your Honor, I have.

16 THE COURT: Did he seem to understand?

17 MR. SHAFFER: Yes, Your Honor. We've had it --
18 we've had it through the interpreter. And I've also
19 written him letters.

20 THE COURT: All right. And in light of those
21 conversations, though, he still wishes to proceed with
22 this application?

23 MR. SHAFFER: Yes, he does.

24 THE COURT: All right. Let me address
25 Mr. Hernandez briefly. Mr. Hernandez, sir, you

1 understand that if -- well, hold on for a minute. Let
2 me first go back and ask, what were the original
3 charges?

4 MR. SHAFFER: Your Honor, they were all related to
5 trafficking. I think they were all --

6 THE COURT: But it was a greater weight, because I
7 think there was a reduction; is that correct?

8 MR. SHAFFER: That's correct. It's all 25 to --
9 all 25 to 30.

10 THE COURT: Okay.

11 MR. HUNTER: Your Honor, it was, let's see, there
12 were six charges for trafficking in drugs, marijuana,
13 one to 100 pounds, cocaine, 200 to 400 grams, cocaine
14 10 to 28 grams, another cocaine, well, 28 to 100 grams,
15 another cocaine 28 to 100 grams, and a cocaine 200 to
16 400 grams, all which were third offenses.

17 THE COURT: And the plea was to?

18 MR. HUNTER: 15 years.

19 THE COURT: Did he plead to all of -- reduce them
20 all down, or wait a minute, how --

21 MR. HUNTER: I think they were --

22 THE COURT: Some were dismissed?

23 MR. SHAFFER: Some were dismissed, I think that --

24 MR. HUNTER: Mr. Humphries can probably.

25 MR. HUMPHRIES: He pled to one count.

1 THE COURT: Okay.

2 MR. HUMPHRIES: It was -- and it was still
3 85 percent, but --

4 THE COURT: But --

5 MR. HUMPHRIES: But it was only 15 years.

6 THE COURT: One count for a 15-year sentence, the
7 other charges were dismissed pursuant to the plea.

8 MR. HUMPHRIES: That's correct.

9 THE COURT: Okay. Thank you, folks. I just
10 wanted to have that so that, Mr. Hernandez, if we go
11 forward with your PCR, you understand that the only
12 thing I can do is to put you back in the place you were
13 before you entered your plea?

14 THE APPLICANT: Yes, I understand.

15 THE COURT: And that means that all of the charges
16 that were dismissed come back, and any charge that was
17 reduced goes back to its original charge.

18 THE APPLICANT: Yes, I understand.

19 THE COURT: All right. Understanding that, do you
20 still wish to go forward with your PCR application?

21 THE APPLICANT: Yes, sir.

22 THE COURT: All right. Mr. Shaffer.

23 MR. SHAFFER: Thank you, Your Honor. The
24 applicant calls Fran Humphries.

25 THE COURT: All right. Mr. Humphries, if you

1 would please come around and be sworn, sir.

2 MR. HUMPHRIES: Yes, sir.

3 FRANCIS A. HUMPHRIES, JR., after being duly sworn,
4 testified as follows:

5 THE CLERK: Please have a seat, state your name.

6 THE WITNESS: Francis Allen Humphries, Jr.

7 DIRECT EXAMINATION

8 BY MR. SHAFFER:

9 Q Good morning, Mr. Humphries.

10 A Good morning.

11 Q You represented Erick Hernández; correct?

12 A I did.

13 Q How did you come to represent him?

14 A He was referred to me by another person in the
15 Hispanic community.

16 Q Okay. And who was the person who referred him to
17 you?

18 A Karen Viamazar.

19 Q Okay. And he retained you; correct?

20 A He did. He and his family.

21 Q Okay.

22 A He was incarcerated at the time.

23 Q Can you tell us what you initially did to prepare
24 this case?

25 A Sure, be glad to. I was aware at the time that I

1 was retained that he was charged with six very serious
2 trafficking offenses which exposed him to the mandatory
3 minimum of 25 years on each. I was generally familiar
4 with the evidence, having spoken with the prosecutor
5 and the local agent, which is my typical practice prior
6 to becoming engaged in a criminal case. If I have the
7 ability to reach out to an assigned prosecutor or an
8 officer to see what their vantage point is on a case, I
9 do that, quite frankly, just to figure out what I'm
10 getting into.

11 So I had a general sense of what Mr. Hernandez's
12 role was in the alleged scheme. So understanding that,
13 I went and spoke with Erick, who also goes by Pedro
14 Mendosa, and discussed with him very briefly what I saw
15 as his role based on law enforcement's vantage point.

16 He told me what his position was. And based on
17 sort of the combination of that information, I
18 discussed with him what I believed was his best
19 opportunity to limited exposure which is to cooperate
20 with Horry County drug task force and the DEA. We
21 discussed that at some length. I answered all the
22 questions he had. He would like -- he wanted to get
23 out.

24 I talked with the DEA about that prior to the
25 debriefings. They said they would contact immigration,

1 but that immigration was very resistant to allowing
2 people to get out on their detainer when they were
3 illegal and a substantial flight risk. So I explained
4 that to Mr. Hernandez. He elected to go forward with
5 the debriefing. He was signed as a cooperating
6 individual with the DEA. And he was debriefed at least
7 twice, I believe once at the Horry County Police
8 Department and again at the solicitor's office.

9 As a result of his intelligence which was
10 substantial, he sort of fleshed out the investigation
11 for the DEA, identified other members of the
12 trafficking scheme that were not well known to law
13 enforcement and more -- and clarified more clearly the
14 roles of other people that they had identified. So his
15 information was valuable.

16 There was only one other component, because ICE
17 was not going to let him out, they made that clear.
18 And that disappointed Mr. Hernandez which I understand,
19 but I also understand ICE's reasoning under the
20 circumstances. So the only other component of
21 Mr. Hernandez's cooperation was that he had to be
22 available to the State in the trial of the codefendant
23 should it be necessary.

24 I met with Mr. Hernandez at least from my practice
25 relatively frequently. He was very concerned about his

1 parents who were ill, I understand, back home, and he
2 just needed -- he just needed more attention than
3 others. Doesn't make him a bad person or good person,
4 just makes him that kind of guy.

5 He became very frustrated with his pre-detention
6 status, I think is fair to say. The federal
7 investigation was proceeding like federal
8 investigations proceed, you know, at their own pace.
9 And they got the 800-pound gorilla and nobody tells
10 them to move, so that's the way that works. And so he
11 was getting frustrated, you know, he wanted to get it
12 all done, he wanted to be able to get back home.

13 He -- at one particular meeting, he told me that
14 he had a plan for going back home. That plan was, he
15 said he'd spoken to another Hispanic inmate there at
16 the detention center, and that inmate had told him that
17 if he posts his bond, which was 125,000, if his family
18 comes up with the money to post the bond, ICE will pick
19 him up, they will prosecute him federally, he'll plead
20 guilty, he'll do a year, and then they'll send him back
21 home.

22 And I made it really clear, that ain't what's
23 going to happen. You've got 125 plus on the State
24 side, they are not going to let you go back, they are
25 going to bring you back. And if you do that, then the

1 solicitor has told me and I'm telling you she will
2 consider that a violation of our cooperating agreement.
3 And so this deal where you want to do four to five
4 years on one third parole eligible time and essentially
5 be a turnaround sentence is gone if you do that.

6 I made that very clear to him. And let me say
7 this. I had -- I had no difficulty in communicating
8 with Mr. Hernandez.

9 THE INTERPRETER: The interpreter would like the
10 Court's permission to have just a minute.

11 THE COURT: Sure. Yes, ma'am, absolutely.

12 (Discussion off the record.)

13 THE INTERPRETER: I would like to ask if Mr. Fran
14 Humphries would repeat his statement beginning from
15 when he told the client not to pay the bond.

16 THE COURT: All right.

17 THE WITNESS: In discussing the matter with
18 Mr. Hernandez, I explained to him that the information
19 he'd received from the fellow Hispanic inmate was
20 inaccurate, that instead of going home after the
21 service of the federal time for the immigration
22 violation, he would be returned to the State, where he
23 faced in excess of 125 years, and that his deal to
24 cooperate would be violated. And there would be no
25 agreement of four to five years for parole eligible

1 time which is a turnaround sentence.

2 I made that very clear to him. And I think I need
3 to say at this point, I had no difficulty whatsoever in
4 communicating with Mr. Hernandez one on one. And he
5 debriefed with the DEA twice without an interpreter,
6 and they had no difficulty. The difficulties in
7 communication came after he became dissatisfied with my
8 services, just put it that way.

9 In any event, I could tell that he didn't trust my
10 advice. He didn't tell me specifically what he was
11 going to do, but I got the sense that he wasn't buying
12 into what I was selling. So I happened to be at the
13 detention center on another case the day that ICE came
14 to pick up. I learned, I was told, that his family had
15 paid the 12,500, or whatever it was, to get him out of
16 jail. And I was at the jail on another case, and he
17 was being escorted out of the detention center by the
18 immigration folks. And he was smiling and waving at me
19 like, see you later, and he did.

20 And I can't remember exactly how long it was. I
21 know that the prosecutor called me and said, did you
22 know that Hernandez bonded out, and I said, yeah, I
23 heard he did. Said, well, that violates our agreement.
24 He's not available to me, I'm going to proceed without
25 him, he's got no deals. Okay. I said, well, I

1 explained that to him. He knew that when he said --
2 when he posted the bond.

3 He was returned to State custody after the service
4 of his federal time for the immigration violation.
5 Once I learned he was back at the detention center, I
6 contacted the prosecutor, I said, he's back, what's the
7 best we can do. And she offered him 13 years,
8 85 percent, and that was based primarily from her
9 standpoint as sort of an equitable comparison between
10 other codefendants and what they received. And she
11 believed that one other codefendant that she felt like
12 was equally as culpable as Mr. Hernandez got 13, so he
13 should get 13.

14 So I went out to the jail. Said, hello, explained
15 to him his situation and told him that the prosecutor
16 had offered him 13, 85 percent. He's going to have to
17 do, you know, the better part of 11 before he's
18 eligible for release. And at that point Mr. Hernandez
19 became very resistant to anything I told him.
20 Essentially he told me that I was not a very good
21 lawyer, that I could do better than that, that he had
22 paid me so I should do better than that. I told him.--
23 he said I wasn't a very good lawyer, I said he wasn't a
24 very good client, he didn't do -- I gave him good
25 advice, he declined it.

1 Our relationship after that point was severely
2 strained. I explained to him that he has to make a
3 decision on the 13 years. That was an offer. He said,
4 well, I don't want to plead guilty, but I don't want to
5 go to trial, I want a better deal. I communicated that
6 to the solicitor, she scheduled an arraignment. We
7 appeared in front of Judge Culbertson, I believe. He
8 went through the whole process with him, the 13 years
9 do you accept it or not, no, I don't want that. Well,
10 you're going to trial, I don't want to go to trial,
11 well, you got to do one. And ultimately Judge
12 Culbertson signed an order essentially indicating that
13 his failure to accept the plea was a request for trial.

14 Again, it began -- it deteriorated further from
15 that. Now, do you want me to talk a bit about the
16 conflict?

17 Q Well, I guess keep going, and we'll go back.

18 A Okay, all right. So the matter was scheduled for
19 trial, the other codefendants had been resolved. He
20 did not accept the 13, that was withdrawn pursuant to
21 the arraignment order. And we were given a court date,
22 the date of which escapes me right now. But in any
23 event, I began to meet or attempt to meet with
24 Mr. Hernandez about the factual matters of the case in
25 preparation for trial. And at this point he was almost

1 noncommunicative with me, not as a result of any
2 linguistic or language barrier, he just didn't like me
3 at that point.

4 And so, you know, I tried to talk to him about it.
5 And finally I was left to prepare the case essentially
6 without any input from Mr. Hernandez, he sort of shut
7 down on me. After review of the evidence I filed a
8 couple of motions, one related to identity and one
9 relating to search and seizure. And I thought those
10 were the only two meritorious issues in this case. And
11 they were not. They were not compelling, but they were
12 issues. And we prepared for trial.

13 I received, and I can't tell you exactly, I guess
14 maybe a month more or less before the trial date, I
15 received another batch of discovery from the State.
16 And when I reviewed it I noted that in the discovery --
17 and it was all six cases, okay, so it was voluminous --
18 but I noted that on one of the search warrants on the
19 return, the return was made to Karen Viamazar, who was
20 the woman who referred me, whom the State, who the
21 prosecutor and the DEA had indicated has no connection
22 with Mr. Hernandez.

23 And so I called the prosecutor and I'm like,
24 Donna, the Karen Viamazar name popped up on the search
25 warrant. Well, she just happened to be at the house,

1 we left it with her. We're not even prosecuting him on
2 that case. All right.

3 And I talked to Mr. Hernandez about that. But
4 again, he's not very -- he wasn't talking to me then,
5 he was like, I don't want to talk to you. Okay. I
6 later saw, and in fairness I don't know if I just
7 missed it or it was something that was provided to me
8 later, but there was a reference in one investigative
9 report that said that either Karen Viamazar called
10 Erick or Erick called Karen to ask why the police were
11 at the house. That was the only reference, but why the
12 police were at the house.

13 So I called Donna again, Donna Elder, who was the
14 assigned prosecutor, and I said, Donna, there's a
15 reference in the investigative report to Karen Viamazar
16 about calling -- about why the police are there. We're
17 not trying him on that case. You know, she will not be
18 a witness, we're not trying him on that case.

19 Well, at that point, and I don't know exactly the
20 timing of it, but I know that Mr. Hernandez filed a pro
21 se motion to have me relieved. I joined in that
22 motion. I filed a motion to be relieved based on
23 potential conflict. That -- neither of those matters
24 were heard until we came before Judge Cottingham
25 essentially on the eve of trial.

1 And so we had Mr. Hernandez, I believe, got to say
2 what he wanted to say about me being his lawyer. I
3 explained to the Court why I believed there was a
4 potential for conflict, and based on the poor
5 relationship between Mr. Hernandez and I, I thought
6 that it was in Mr. Hernandez's best interest and, quite
7 frankly, mine to be relieved.

8 Judge Cottingham reviewed the matter. He said he
9 specifically found that he did not see a conflict of
10 interest. There was some -- there were some
11 discussions in chambers relative to my being relieved.
12 Ultimately the judge decided to relieve me in an
13 abundance of caution but specifically finding there was
14 no conflict and got -- you know, it was Judge
15 Cottingham, and if anybody has practiced in front of
16 Judge Cottingham, you understand that he can get upset
17 with defendants he believes are abusing the system by
18 extending their case out with frivolous motions and
19 that kind of thing. So that's sort of the context of
20 what was going on, and he was not -- he was none too
21 pleased with Mr. Hernandez.

22 So, and I don't recall if he said we're going to
23 go forward with your case, we're going to relieve
24 Mr. Humphries, we're going forward this week or we're
25 going to do it next term, I don't recall. In any

1 event, Ms. Elder, I believe, left the 15 years, had
2 gone from 13 to 15 on the eve of trial, on the table
3 for the day. But he relieved me, Judge Cottingham
4 relieved me. I'm heading out the courtroom, I just
5 didn't make the door quick enough, and I got word from
6 the holding cell that Mr. Hernandez wanted to speak to
7 me.

8 So I went back, I talked with him. And now he's
9 talking to me and he said, I want you to stay on my
10 case, I want you to get me the 15. And I said, well,
11 I'm not your lawyer. Well, I want you to be my lawyer.
12 I go back out, I talk with Ms. Elder, I talk with
13 Judge Cottingham. Here's the deal. Now, I believe
14 it's in his best interest, but I've been relieved. So
15 Judge Cottingham brings him back out, is my
16 recollection, and he goes through this extensive
17 qualification of waiving the potential conflict of
18 interest with me to allow me to stay on the case for
19 the remainder of the day in order to attempt to work
20 out the plea.

21 I don't have a transcript of that, I assume you
22 do. But in any event, all of it was on the record, and
23 Mr. Hernandez clearly indicated on the record that he
24 wished to waive any potential conflict of interest,
25 keep me on the case in order to discuss this plea offer

1 of 15 years which was only available that day.

2 He agreed, he said he waived any potential
3 conflict of interest, he wanted me as his lawyer. We
4 go back. I can't remember if it was over lunch, it
5 might have been over lunch, in any event, I talked with
6 him, we went through all of the ramifications of the
7 plea, what it would mean, the kind of service time he
8 would have to do. He told me that he wanted to do it.

9 Came back in like, again, I don't know if it was
10 before or after lunch, I don't recall. He entered the
11 plea, that plea was on the record obviously, he was
12 sentenced to 15 years. One of the last things that
13 Judge Cottingham did, and honestly, I don't recall
14 whether Ms. Elder encouraged him to do this or not, but
15 he required Mr. Hernandez to sign a written waiver of
16 the potential conflict of interest consistent with his
17 oral waiver on the record and asked me to prepare that.
18 So I did.

19) My recollection is that instead of going to the
20 office, I went to my house, typed it on my home
21 computer, showed it to the State and the Court, they
22 said, yep, that's what we said. I took it out to the
23 detention center, and Hernandez said no. And I said,
24 well, I can't make you sign it. I can tell you knowing
25 Judge Cottingham as I do for at that point 25 years or

1 so, he's not going to be happy. And he said, I don't
2 care, I'm not signing it.

3 Okay. So as an officer of the court, I had to
4 report to Judge Cottingham that he failed to sign the
5 order that he required him to do. Well, if you know
6 Judge Cottingham, that didn't make him happy. So he
7 called him back up the next day. And it was a very
8 uncomfortable situation, I'll say that. But at the end
9 of the day he found him in contempt of court for
10 failing to obey the instructions order of the Court and
11 sentenced him to six months in addition to the 15
12 years.

13 There was a point at which, and I can't -- and
14 honestly I do not recall -- when I got word somehow
15 that he wished to appeal his sentence. Now, my
16 recollection is I filed that notice of intent to appeal
17 upon his communicating that to me, and I can't tell you
18 how he communicated it. My recollection also is that
19 it was outside the ten days but that my request was
20 relatively contemporaneous with his request to me.

21 And so knowing that it was outside, I still filed
22 it. But that's -- and that would have been the last I
23 had heard from him until he grieved me.

24 Q Okay. And you had represented Karen Viamazar?

25 A Yes.

1 Q Okay. What did you represent her on?

2 A Drug charges.

3 Q Okay. Was she prosecuted around the time that he
4 was arrested?

5 A I don't believe -- no. Well, were her charges
6 pending around the time?

7 Q Yeah.

8 A Yes, the charges were pending around the time --
9 she -- and honestly, I'm not really sure that this is
10 the right forum to discuss how her case was resolved or
11 why.

12 Q Okay.

13 A But fair to say that, yes, her charges were
14 pending.

15 Q Okay. And you filed a motion to be relieved
16 because you thought it might be a conflict with your
17 previous client; correct?

18 A I thought that there was a potential for conflict
19 and that our relationship, that is my and
20 Mr. Hernandez's relationship, had so degraded that I
21 thought it was in his best interest and mine as well.

22 Q And he had complained about a potential conflict
23 in a pro se motion; correct?

24 A He did.

25 Q Okay.

1 A He did. And that was after I told him that I had
2 discovered that reference in the discovery.

3 Q You had said something about them not trying him
4 on any of the cases that Karen Viamazar is related to?

5 A No. What I said was -- what it was related to me
6 was, that they will not try him -- well, it's probably
7 saying it the same way, that Karen Viamazar would not
8 be involved in or would not be a witness in any case
9 that they tried him. In fact, I think Ms. Elder
10 selected a case which didn't have any reference to
11 Karen Viamazar or any connection to. At least that was
12 her -- that was her strategy.

13 Because I had brought this issue up with Donna
14 prior to filing the motion. I'm like, Donna, this, you
15 know, based on this discovery puts me in a bad place
16 with my client. And that's when she said, well, you
17 don't have to worry about that, because, you know, they
18 had the election of six charges they could have
19 brought. They selected this one instance, one charge,
20 she said or she said at that time that has no
21 reference, no involvement with Ms. Viamazar. But it's
22 a trafficking scheme.

23 Q Okay.

24 A That was the issue for me.

25 Q Okay. And without -- was there some allegation at

1 some point from some law enforcement agency that Karen
2 Viamazar was involved in the same trafficking scheme as
3 Erick Hernandez?

4 A No. The only two -- again, the only two
5 references I had regarding Karen Viamazar was, one, she
6 was left a copy of a search warrant, a return of a
7 search warrant, which meant that she had to be at the
8 house where the search warrant was executed. So if
9 there's a contact -- there's a connection there, there
10 is.

11 And then the second and only other reference I was
12 aware of was that, and honestly, I can't tell you today
13 what it was, but either Erick called Karen or Karen
14 called Erick and asked why are the police at the house.
15 So that's really the only involvement that I knew of.

16 Q But her potential ties were enough for you to ask
17 to be relieved?

18 A That in combination again with the relationship
19 that I then enjoyed with Mr. Hernandez, yeah.

20 Q Okay.

21 MR. SHAFFER: I think no further questions.

22 CROSS-EXAMINATION

23 BY MR. HUNTER:

24 Q Good morning, Mr. Humphries.

25 A Good morning.

1 Q I'll try and make it brief. I think you've
2 already covered most of what I was planning to ask you.
3 How long have you been practicing law?

4 A Since 1989, it's a long time.

5 Q And --

6 A Not as long as Judge Russo, but maybe it is, isn't
7 it.

8 THE COURT: Not quite.

9 Q Has a substantial portion of your practice been
10 devoted to criminal defense?

11 A Well, I was a criminal prosecutor for 24 years.
12 And then I've been in -- I have a mixed practice of
13 criminal defense and personal injury, but that's been
14 since December of 2010, so five years. But certainly
15 I've been involved in criminal law for a long time.

16 Q Okay. I assume you filed Rule 5 Brady motions in
17 this case?

18 A Yes, sir, all that was done.

19 Q Okay. And did you have any trouble getting
20 discovery?

21 A I don't know that I'd term it difficulty. It came
22 when it came. It was a mixture of fed, federal and
23 state. The State information was available more
24 readily than the federal information was, and that's
25 just the way that works.

1 Q So was Mr. Hernandez also facing federal charges,
2 that was --

3 A He could have been.

4 Q Okay.

5 A The feds worked the case. I think at the end of
6 the day, there may have been a mixture of prosecutions.
7 The feds may have picked up some of the things because
8 there were multiple defendants which, you know, they
9 range from geographical areas like, you know, Florida,
10 you know, so, you know, there may have been a mix. But
11 there were some state prosecutions, and there may have
12 been some federal prosecutions related to it.

13 Q Okay. And you went over all of the discovery with
14 Mr. Hernandez?

15 A I did.

16 Q Without an interpreter?

17 A Yes, sir, without an interpreter.

18 Q And he had no trouble?

19 A No difficulty whatsoever.

20 Q Okay. I know you said you met with him fairly
21 frequently. Do you have a ballpark estimate of how
22 many times you met, or...

23 A I took calls from him a good bit, as I recall.
24 And -- but basically the calls were, I need you to come
25 see me, I need you to see me. And my practice was

1 anytime I went out there to see anybody, I stopped in
2 and saw him.

3 Q Okay.

4 A So --

5 Q So you saw him often?

6 A Compared to what I see other criminal clients,
7 yeah.

8 Q Okay.

9 A Yeah. He was one of the ones I saw more
10 frequently than others.

11 Q Okay. And, again, it wasn't until he became
12 unhappy with you that your communications became
13 difficult as far as the language barrier?

14 A The language, honestly, even then, he could -- he
15 didn't indicate that he couldn't understand me, he just
16 indicated he wasn't talking to me. He indicated to
17 other people that he couldn't understand. But that was
18 never -- it was never, I don't know what you mean, I
19 don't know what you mean, that was not it. It was, I
20 don't want to hear what you got to say.

21 Q And did you discuss with Mr. Hernandez the
22 potential conflict of interest?

23 A Yes, sir.

24 Q What was his position with that?

25 A Well, I told him at that point, once I had finally

1 fleshed it out, I told him that I was going to join
2 essentially in his motion to have me relieved without
3 conceding a potential conflict, I mean, a conflict, an
4 actual conflict of interest, that there was enough of a
5 potential there that I was no longer comfortable
6 without at least bringing it to the Court's attention
7 and having the Courts pass on it.

8 Q And then the Court obviously did decide there was
9 no conflict?

10 A Judge Cottingham, as I recall, specifically found
11 that there was no conflict of interest, but in an
12 abundance of caution and, quite frankly, in deference
13 to me.

14 Q Okay. And then the reason you ended up being --
15 representing Mr. Hernandez at his plea is that he
16 actually came back and said, wait, Mr. Humphries, I do
17 want you to represent me?

18 A Yeah. He asked me to represent him after I had
19 been relieved, so we had to go back on the record and
20 he had to waive any potential conflict of interest.

21 MR. HUNTER: Beg the Court's indulgence.

22 Q Prior to Mr. Hernandez pleading, did you explain
23 the elements of the offense as in the nature of the
24 charges?

25 A Exhaustively.

1 Q And he understood that?

2 A He did.

3 Q Okay. You conveyed all the plea offers to him and
4 discussed those with him?

5 A Yes.

6 Q Okay. I believe you already testified to this,
7 but you explained his constitutional rights that he was
8 waiving by pleading guilty?

9 A Yes.

10 Q Okay. Who ultimately made the decision to plead
11 guilty?

12 A The Defendant, Mr. Hernandez.

13 Q And did you agree with that decision?

14 A I did. I did, given where we were in time, yes.

15 Q Okay.

16 A That was in his best interest, in my opinion.

17 Q So I believe you testified earlier that he
18 essentially, you know, kind of felt like he was caught
19 between a rock and a hard place, he didn't really want
20 to go to trial, but he didn't really want to plead
21 either?

22 A He wanted a better deal.

23 Q Okay.

24 A And I had to explain to him that he had had a
25 better deal, but he failed to follow my advice, didn't

1 trust me, which, again, I think is a cultural thing as
2 much as anything else. And I regret it. He's -- he's
3 not a bad guy. He's had a horrific childhood. We
4 discussed and we talked not just about this case but
5 about his childhood, about how he had been abused in
6 the past, by who had abused him. You know, we spent a
7 lot of time together, and I really felt for him in
8 terms of the situation.

9 This is not a -- he isn't the kingpin, he's not
10 making a ton of money. What money he did make I'm
11 certain he sent back to his family who was -- his
12 parents who were ill. He's not a bad guy. But he just
13 didn't -- at the end of the day he chose to believe a
14 Hispanic inmate who was similarly situated to him over
15 me. And I -- I just found that, you know, is
16 disheartening, disheartening to the point, and I've
17 said it to a number of people, I don't represent
18 Hispanics anymore on serious offenses because of the
19 potential danger with the cultural differences.
20 Because I don't feel like I can do an effective job
21 when they don't trust me.

22 Q But you felt you did an effective job with Mr.
23 Hernandez?

24 A Oh, I don't think -- there's no question. I had
25 him in a situation, quite frankly, if he had stayed,

1 followed my advice, stayed there, cooperated in the
2 trial of his codefendants, he would have been going to
3 the detention -- he would have been going to the
4 Department of Corrections and getting out. It would
5 have been a turnaround sentence.

6 Q Okay. And actually at his mitigation you
7 discussed many of the factors that you just went over
8 now; did you not?

9 A I did.

10 Q Okay. So I'm almost finished.

11 A Okay.

12 Q So you were essentially forced to prepare for
13 trial without any substantive input from Mr. Hernandez?

14 A He just -- when it got to the point where he
15 didn't think I was getting a good enough deal for him,
16 he just shut down.

17 Q And at that trial do you recall how many of the
18 charges the State was going to go forward on; was it --

19 A My recollection is just one at the time of the
20 trial.

21 Q Just one, okay.

22 A There may have been a companion case. There was
23 one instance, I'll put it that way.

24 Q Okay.

25 MR. HUNTER: That is all the questions I have.

1 Thank you, Mr. Humphries.

2 THE WITNESS: You're welcome.

3 THE COURT: Anything further on redirect?

4 MR. SHAFFER: One or two.

5 REDIRECT EXAMINATION

6 BY MR. SHAFFER:

7 Q Did you ever advise him after Judge Cottingham
8 ruled that he could not -- well, that after Judge
9 Cottingham relieved you?

10 A Yes.

11 Q Okay. And he said that there was -- did you give
12 him any advice after that point?

13 A Nu-uh.

14 Q Okay.

15 A No, honestly, once I was relieved, he went back to
16 the holding cell, and I was working my way to the back
17 door, which any good lawyer that's been relieved should
18 do. But I got caught talking to people before I got
19 out the door and was summoned back.

20 Q Okay. And at that point did you have a long
21 discussion with him about whether or not he wanted --

22 A I didn't have a long discussion at that point.

23 Essentially what he said was, can you get me that 15.

24 And I said, I'm not your lawyer anymore. Can you be my
25 lawyer and get me that 15. I'll go ask the judge.

1 So I talked to the prosecutor and talked to the
2 judge and came out of holding, asked to approach, asked
3 Ms. Elder to come up. Told Judge Cottingham what he'd
4 said, and he said, bring him back out, I don't know if
5 it was immediately or after lunch but he subsequently
6 brought him back out. And we went through that whole
7 waiver of potential conflict of interest before I had
8 any other material discussions about his case.

9 Q Okay. And did the solicitor make it clear to him
10 that the 15 expired that day?

11 A I don't think -- yeah, that is my recollection, it
12 was just that day.

13 MR. SHAFFER: Okay. No further questions.

14 THE COURT: Anything further? Thank you,
15 Mr. Humphries.

16 THE WITNESS: Thank you judge. Good to see you.

17 THE COURT: You too, sir.

18 MR. HUNTER: And may Mr. Humphries be excused?

19 THE WITNESS: May I be excused?

20 MR. SHAFFER: No objection, Your Honor.

21 (Witness excused.)

22 THE COURT: Mr. Shaffer?

23 MR. SHAFFER: We'll call Erick Hernandez.

24 THE COURT: Mr. Hernandez, if you would please
25 come around to be sworn, sir.

1 ERICK HERNANDEZ, after being duly sworn,
2 testified, via interpreter, as follows:

3 THE CLERK: Please have a seat, state your name
4 for the Court.

5 THE COURT: Erick Hernandez.

6 DIRECT EXAMINATION

7 BY MR. SHAFFER:

8 Q Mr. Hernandez, you retained or paid Fran Humphries
9 to represent you; correct?

10 A Yes.

11 Q At some point you decided you didn't want him
12 representing you; is that correct?

13 A Yes.

14 Q Why was that?

15 A When I discovered that he represented my
16 codefendant, I told him. And he said to me, she's not
17 my codefendant. I hadn't received my discovery. I had
18 to send him a letter asking him for my discovery.

19 Q And why do you think that she was your
20 codefendant?

21 A I didn't know the laws here, I didn't know about
22 business here, until I commented to someone. And I was
23 told that I needed to review my motions to see if she
24 was my codefendant.

25 Q Who are we talking about, what's her name?

1 A We're talking about another prisoner.

2 Q What is the name of the codefendant; is it Karen
3 Viamazar?

4 A Karen Viamazar.

5 Q Okay. And why do you think that Karen Viamazar
6 was a codefendant of yours?

7 A When I received my motion, because when I got my
8 discovery I looked and I saw Karen Viamazar and Erick
9 Hernandez, codefendants. And I showed it to the
10 lawyer, and I said, why did he lie to me.

11 Q What was his response?

12 A Well, basically she's not your codefendant, but on
13 the paper it does say she's your codefendant. So
14 that's why I wanted to fire him. I sent this letter to
15 the Court explaining to them what happened.

16 (WHEREUPON, Plaintiff's Exhibit No. 1 was marked
17 for identification only.)

18 MR. SHAFFER: Your Honor, we're going to move one
19 in by stipulation, Applicant's-1.

20 THE COURT: All right. Without objection.

21 (WHEREUPON, Plaintiff's Exhibit No. 1 was admitted
22 in evidence.)

23 MR. SHAFFER: Applicant's-1, by the way, Your
24 Honor is a motion that he filed to the Court to relieve
25 his trial counsel.

1 THE COURT: Okay.

2 Q Mr. Hernandez, was Karen Viamazar arrested when
3 they executed the search warrant on one of the
4 locations?

5 A She was the one that lived there.

6 Q Okay.

7 A And I was -- I hadn't lived there for a month.

8 Q She lived -- did she live there when you lived
9 there?

10 A I only lived there 20 days, and then I moved.

11 Q Did the State believe that that location was used
12 for drug trafficking?

13 MR. HUNTER: Objection, Your Honor. That's
14 speculation. How could he know what the State
15 believed?

16 THE COURT: Sustained.

17 Q Were they looking for drugs when they executed the
18 search warrant?

19 A That's what the paper says, that they were looking
20 for drugs.

21 Q Did they find any drugs?

22 A No.

23 MR. SHAFFER: No further questions.

24 THE COURT: Cross?

25 MR. HUNTER: Yes, Your Honor.

CROSS-EXAMINATION

1
2 BY MR. HUNTER:

3 Q Good morning, Mr. Hernandez.

4 A Good morning.

5 Q Mr. Hernandez, you do speak a little bit of
6 English; correct?

7 A Yes.

8 Q Okay. And when you pled guilty, you had a number
9 of other charges dropped as part of your plea; correct?

10 A Yes.

11 Q And you say you were concerned about a conflict
12 that Mr. Humphries might have had representing you and
13 Karen Viamazar?

14 A Yes, sir.

15 Q Okay. And Mr. Humphries was actually relieved as
16 your lawyer by Judge Cottingham; correct?

17 A He decided to relieve himself after I was
18 sentenced.

19 Q After you were sentenced?

20 A Yes. When I was sentenced, he decided to relieve
21 himself from my case.

22 Q So you didn't go -- you didn't ask to have
23 Mr. Humphries represent you for your plea after Judge
24 Cottingham had already relieved him?

25 A No.

1 Q Okay. Do you recall your plea?

2 A The offer was for 13 years, but the lawyer said it
3 was going to be between seven and 25.

4 Q Okay. You told the plea judge -- let me rephrase
5 that. When you went to plead guilty, the judge
6 explained to you that you were going to waive your
7 conflict of -- your concern that there was a conflict
8 of interest?

9 A Yes. Because my lawyer came and spoke with me and
10 told me I could get 45 years.

11 Q You didn't ask him to come speak with you?

12 A No. He followed me.

13 Q Okay. So you don't remember telling the plea
14 judge that you wanted to keep Mr. Humphries as your
15 attorney?

16 MR. HUNTER: Judge, that's on page 21.

17 THE APPLICANT: I told the lawyer to get me less
18 than 15 years.

19 Q Okay. That wasn't my question.

20 A Okay. What was the question?

21 Q At your plea you told the judge that you wanted
22 Mr. Humphries to represent you; correct?

23 A Yes.

24 Q And you told the judge that you were pleading
25 guilty freely and voluntarily; correct?

1 MR. HUNTER: It's page 25, judge.

2 A I didn't want to, but I kind of felt forced to
3 because who wants to get a sentence of 45 years.

4 Q Well, you told the judge that no one had pressured
5 you to plead guilty; correct?

6 A And the judge told me that he would get me another
7 lawyer, but before 5 p.m. I couldn't negotiate anymore
8 my case, and I would have to go to trial.

9 Q Right. So you pled guilty because you didn't want
10 to go to trial; correct?

11 A Yes.

12 Q Because you knew that if you went to trial and
13 lost, you could face much more time?

14 A Because my lawyer himself told me we could lose
15 the case, and I said you could get a good base to
16 defend me, and he said, I will try.

17 Q Okay. But you told the judge you did not want to
18 go to trial; correct?

19 A Yes.

20 Q Okay. And do you recall -- well, let me rephrase
21 that. You told the judge that you were completely
22 satisfied with Mr. Humphries at your plea?

23 MR. HUNTER: And that's on page 28, Your Honor.

24 A Yes, yes, I told him that.

25 Q Okay. So was that the truth?

1 A No. Because inside of myself I knew that that
2 wasn't true because I was fighting for him to leave my
3 case. And I told him three or four times before my
4 case that he renounce my case.

5 Q Okay.

6 MR. HUNTER: No further questions.

7 REDIRECT EXAMINATION

8 BY MR. SHAFFER:

9 Q If you had gotten another lawyer, do you think
10 that you would have been able to negotiate at all, or
11 would you have had to go to trial?

12 A I believe that he would have negotiated my case
13 better.

14 Q Okay.

15 A My lawyer lost interest in me after I paid my
16 bond. And when I tried to communicate with him, it
17 took him a while to get back to me.

18 Q After he was taken off your case, why did you ask
19 him to come back on the case?

20 THE INTERPRETER: Would the attorney repeat the
21 question, please.

22 Q After Fran Humphries was relieved, why did you ask
23 him to come back and represent you for the plea?

24 A When he came back for me to sign the papers, I
25 told him that I wanted him to do my appeal. And he

1 said, I'm no longer your attorney. (And I noticed in
2 the court that he wasn't really so concerned with my
3 case, but he was more concerned with his record as an
4 attorney. And it's in the transcripts that he worried
5 more.

6 Q The question I'm asking is Judge Cottingham told
7 him he could go and not represent you. But then he
8 ended up representing you after that for the plea?

9 A Yes.

10 Q Why did you allow him to represent you for the
11 plea?

12 A Because the judge told me I could get up to 45
13 years, and I became afraid.

14 Q Okay. Did you know that the 15 years was not an
15 option after that day? Is he --

16 THE INTERPRETER: Restate the --

17 Q All right.

18 MR. HUNTER: Judge, I'll just object. He's
19 already testified that he knew the offer was expired at
20 the end of the day.

21 THE COURT: All right. I'll let him ask it, go
22 ahead. Overruled.

23 Q Did you let Mr. Humphries represent you for the
24 plea because you were scared that the 15 years would go
25 away?

1 A Yes.

2 MR. SHAFFER: No further questions.

3 THE COURT: Anything further of this witness?

4 MR. HUNTER: No, Your Honor.

5 THE COURT: All right. Thank you very much, sir.

6 You may step down.

7 (Witness excused.)

8 THE COURT: Anything further, Mr. Shaffer?

9 MR. SHAFFER: Well, we rest. The Applicant would
10 rest.

11 THE COURT: All right. Does the State have any?

12 MR. HUNTER: The State has no witnesses, Your
13 Honor.

14 THE COURT: All right. I'll hear from -- first
15 from Mr. Shaffer and then from the State with regards
16 to any closing remarks you would like to make.

17 MR. SHAFFER: Your Honor, related to the conflict
18 of interest issue, I don't believe that this was a
19 waivable conflict of interest. If you have two people
20 who are involved in -- both of them are involved in
21 drug trafficking, the nature of drug trafficking is
22 that you -- it's a large conspiracy. If you have two
23 people who are involved in it, she's there whenever
24 they executed a search warrant for his case, I don't
25 believe that that's a waivable conflict of interest,

1 Your Honor. I think that the -- that she would be
2 considered a codefendant.

3 Now, whether or not she got prosecuted for it,
4 because there is -- I didn't go into it with him and I
5 don't believe that he probably could have gone into
6 everything that was involved in why or how her case got
7 resolved. But just because -- or at least not in open
8 court, he probably wouldn't want to talk about
9 everything about how her case got resolved.

10 But the issue is that you have two people who are
11 involved in a drug trafficking ring. Anytime that you
12 have a conflict of interest, an actual conflict of
13 interest, it's not unwaivable, Your Honor.

14 THE COURT: How is it a conflict of interest
15 simply because they were codefendants? Does there not
16 have to be more, does there not have to be that they
17 took contrary positions to each other?

18 MR. SHAFFER: Your Honor, I think that in this
19 particular situation whenever you had two people who
20 had both -- and perhaps I'm reading between the lines
21 on Ms. Viamazar, but whenever you have a client who has
22 a made a statement about a ring and an instrumental
23 statement about a drug trafficking ring that possibly
24 implicated the other one, Ms. Viamazar had her case
25 resolved through some means. Anytime you have that,

1 they are taking contrary positions to each other, Your
2 Honor, they are.

3 THE COURT: I thought she was not a codefendant in
4 the case that he pled to?

5 MR. SHAFFER: And, Your Honor, that might be the
6 case, or depending on your definition of codefendant,
7 Your Honor. I mean, was she charged with that specific
8 amount or that specific drug? Probably not based off
9 the testimony from Mr. Humphries. However,
10 Mr. Humphries did say that this is a trafficking ring.
11 This isn't a single, you know, possession charge, this
12 is a ring of people who are trafficking narcotics.
13 That is a little bit different, because just because
14 she's not charged for the exact same narcotics, she
15 might be part of the same ring.

16 He thought enough about it to raise it in front of
17 the Court, Your Honor. If a Court -- if the attorney
18 has reservations about whether or not there's potential
19 conflict, if he had gone to trial with him after, say
20 Judge Cottingham denied it and he went to trial,
21 there's no prejudice, reversible error right there, US
22 Supreme Court precedent saying that it's reversible
23 error without prejudice, it's a structural error in the
24 trial. He raised it, it's the same issue here, and
25 then he got relieved.

1 But he decided to plea. And the waiver is not
2 effective because what you're talking about is a waiver
3 of ineffective assistance of counsel, which
4 preemptively you can't really do, Your Honor, you can't
5 waive an ineffective assistance of counsel claim
6 beforehand related to that. He doesn't know what would
7 happen or how Mr. Humphries would have gone about the
8 case differently had Karen Viamazar not been involved
9 at all.

10 Your Honor, I don't think the Court knows, I don't
11 think that anyone would be able to know, and that's the
12 exact reasoning that they find when people go to trial
13 for that, that it's reversible error, that there's no
14 prejudice because of the fact that you really don't
15 know what they would have done differently, Your Honor.

16 In this situation, he was clearly dissatisfied
17 with his attorney. He's put in a position saying, you
18 have a deal on the table right now, you can either take
19 it with the attorney you're dissatisfied with that you
20 think has a conflict of interest, or you can walk out
21 the door and then the deal's off the table and we get
22 another attorney. That is coercive, Your Honor,
23 there's no way around that, that's naturally coercive
24 to somebody. Did he consider that in making a decision
25 in whether or not he had an attorney, or whether or not

1 to choose to go with a new attorney, certainly. I
2 mean, if they had given him time to speak to another
3 attorney, it probably wouldn't have been coercive, and
4 I would imagine given the fact that he had made that
5 motion in front of the Court, that he would have spoken
6 to the other attorney beforehand. But he never got the
7 chance because the deal expired that day.

8 That is coercive and it denied him the ability to
9 actually seek independent, un-conflicted counsel, which
10 is denying him his right to counsel, Your Honor. Thank
11 you.

12 THE COURT: All right. Thank you.

13 MR. HUNTER: Just very briefly, Your Honor, I
14 believe the record before the Court clearly indicates
15 that Mr. Hernandez's plea was entered knowingly,
16 voluntarily and intelligently. He testified that he
17 pled to the 15-year deal because he was scared of
18 getting 45 years at trial.

19 As far as the conflict of interest goes,
20 Mr. Humphries testified that the State or the solicitor
21 told him that they were going to go forward on the
22 charge that didn't involve Karen Viamazar. So, A,
23 there's no conflict there anyway. Plus, on the record
24 in the plea transcript, Mr. Hernandez clearly waived
25 any conflict. The plea judge went over it exhaustively

1 with him.

2 Finally, Mr. Hernandez actually, according to
3 Mr. Humphries' testimony, went -- after Judge
4 Cottingham had determined there was no conflict but
5 relieved Mr. Humphries anyway, Mr. Hernandez asked
6 Mr. Humphries to represent him. So he clearly had
7 already been relieved, and then Mr. Hernandez went back
8 and said, well, no, I actually do want Mr. Humphries to
9 represent me because I want to take this plea deal.

10 And finally, I would just point the Court to
11 Jackson v. State, and the State -- the cite for that is
12 329 SC 345. It's a 1998 case. And it says that an
13 applicant alleging his conviction was unlawful due to a
14 conflict of interest from counsel's representation
15 bears the burden of showing that a potential conflict
16 actually materialized into a realized conflict,
17 adversely affecting counsel's performance.

18 The State would submit there's been no evidence
19 shown today that counsel's performance was affected by
20 any potential conflict, even though it's the State's
21 position none existed anyway. And so for those reasons
22 the State would ask that this Court deny and dismiss
23 Mr. Hernandez's PCR.

24 MR. SHAFFER: Your Honor, I did have two or three
25 cases I actually wanted to cite too versus just saying

1 there's US Supreme Court precedent on point. I'm
2 having connectivity problems to get to my research.

3 THE COURT: I absolutely understand that because I
4 can't half the time get on this internet.

5 MR. SHAFFER: Okay. Would you mind if I actually
6 submitted those to you?

7 THE COURT: I'm going to take it under advisement
8 and allow you to do that.

9 MR. SHAFFER: Thank you.

10 THE COURT: Make sure you copy Mr. Hunter.

11 MR. SHAFFER: Yes, sir.

12 THE COURT: And Mr. Hunter, if you want, you're
13 certainly welcome to respond to anything he may submit.

14 MR. HUNTER: Okay.

15 THE COURT: But I want to, while I've got you both
16 here and I've got the transcript which I have perused
17 but haven't gone into great detail, but the concern, if
18 any concern that I have, is with regards to this
19 possible conflict. But it was my understanding through
20 the testimony -- now, you keep raising the issue of
21 this drug ring and all this.

22 But my understanding from the testimony was the
23 case that the State was proceeding on with regards --
24 there were six cases, but the case they were proceeding
25 on involving Mr. Hernandez didn't involve the young

1 lady you're speaking of, not as a conspirator, not as a
2 principal. My understanding it didn't involve her. It
3 was a drug case that was separate and apart from
4 anything that she was involved in.

5 So that -- I do have the question in regards to
6 whether or not there is any evidence of a conflict, or
7 was there any evidence presented. So I say these
8 concerns that the Court has so whatever it is you
9 submit keeping that in mind, that it is my
10 understanding that there were six charges that some of
11 them, I think, probably did involve Ms. -- what's her
12 name?

13 MR. HUNTER: Viamazar.

14 THE COURT: Viamazar. But that this one did not,
15 so -- and he wasn't charged with conspiracy. So again,
16 it goes back to the conflict is the question that the
17 Court's wrestling with at this point. The record is
18 abundantly clear, this is about as detailed a plea
19 transcript as I've ever seen, and which doesn't
20 surprise me because Judge Cottingham, Judge Cottingham
21 is a wonderful man, wonderful judge.

22 And a lot of people mistake him being brief and
23 being quick with not being thorough. But if you give
24 him a hesitation, he becomes so thorough that he's
25 turning over every stone. So I have no concerns as I

1 go through there and look at this transcript that he
2 covered every issue that could be covered with regards
3 to whether or not this plea was voluntarily, knowingly
4 and intelligently entered into.

5 Now, I have the age old issue that Mr. Hernandez
6 raises, and that is that even though he was under oath,
7 he didn't respond honestly or in truth to the Court's
8 questions. Well, that's certainly not the first time
9 I've heard that. But I do have the concerns and the
10 issues regarding the potential conflict, and I'm going
11 to give you whatever time, well, I'm going to give you
12 ten days to submit it to the Court, anything you want
13 to support that issue. All right.

14 MR. SHAFFER: Thank you, Your Honor.

15 MR. HUNTER: Thank you, Your Honor.

16 (The hearing concluded at approximately
17 11:26 a.m.)

18 (End of Transcript of Record.)

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100

FILED
HURRY COUNTY

MOTION TO DISMISS COUNSEL

ERICK HERNANDEZ

2012 OCT -3 PM 3:12

TRANSFERRED
TO

PETITIONER

MELANIE HUGGINS-WARD
CLERK OF COURT

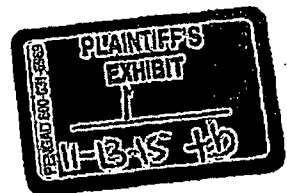
OCT 04 2012

SOLICITOR'S OFFICE

COMES NOW, ERICK HERNANDEZ, (HEREINAFTER PETITIONER)

RESPECTFULLY MOVES THIS HONORABLE COURT TO GRANT PETITIONERS MOTION TO DISMISS COUNSEL FOR INEFFECTIVE ASSISTANCE OF COUNSEL, A CONFLICT OF INTEREST AND BREACH OF TRUST. FOR THE FOLLOWING REASONS:

1. UPON OBTAINING FRANCIS A. HUMPHRIES AS MY ATTORNEY HE INSURED ME THAT HE WOULD MAKE SURE THAT THE PROCEEDINGS WOULD BE FAIR, AND THAT HE WOULD AFTER RECEIVING THE DISCOVERY FILE ALL PRE-TRIAL MOTIONS. HOWEVER, MY ATTORNEY HAS NOT FILED ANY MOTIONS OTHER THAN THE DISCOVERY MOTION. I'VE REPEATEDLY REQUESTED A COPY OF MY DISCOVERY WHICH WAS JUST FORWARDED TO ME AUG. 27, 2012. MY ATTORNEY HAS BEEN IN POSSESSION OF MY DISCOVERY SINCE JAN. 25, 2011, AND RECEIVING ADDITIONAL DISCOVERY ON FEB. 28, 2011. AFTER RECEIVING MY DISCOVERY I TOOK NOTICE OF SEVERAL VIOLATIONS COMMITTED BY OFFICERS WITH THE GATHERING OF THE EVIDENCE, AS WELL AS WITH THE RETURN OF THE SEARCH WARRANT WHICH WAS NOT RETURNED TO A JUDGE. I UNDERSTAND THAT PRE-TRIAL IS THE MOST IMPORTANT STAGE FOR A DEFENDANT AND THAT MOST CASES ARE WON OR LOST IN THE PRE-TRIAL STAGE. HERE MY ATTORNEY HAS NOT FILED ANY PRE-TRIAL MOTIONS.



2. I've also took notice of a Rule 3 violation committed by the Solicitors. And to this day I have not received an indictment, My Attorney ensured me that due process would be afforded to me, but his actions show otherwise.

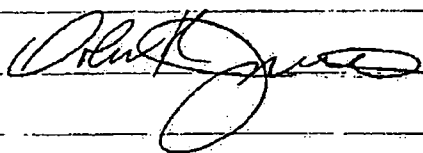
PCR#2 3] The conflict of interest arises from my attorney representing me and my co-defendant Karen Villamizar who is cooperating with the agents in my case. I have not been arrested with any drugs, yet I am being charged with trafficking cocaine, drugs that were sold by another individual. A search warrant was executed and left with my co-defendant, and she gave a statement to agents, stating that I lived there. Also giving the agents another location where she alleged that I lived. This information is within my discovery, and when I presented this to my attorney, he stated that she was not my co-defendant. If the state takes this case to trial, my co-defendant must take the stand to establish that the search warrant was lawfully served upon her, as well as testify to giving the other agents another location where I am alleged to live. Without her testimony the state cannot present anything that derived from the search. My attorney has obtained funds from me and my co-defendant, knowingly that a conflict exist.

4. When the federal prosecutor decided to dismiss my federal case, the money taken from me was returned. However, my attorney only gave me a portion of the money

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stating that money was owed to the Sheriff's office and to the courts. I've requested proof of such action, but my attorney refuses to provide me with any documents to establish that the money was owed to these departments by me. This was my legal money, I've never been to court, so how is it that I owed the court or Sheriff's office? My attorney has breached the trust, I don't believe anything my lawyer tells me. He has visited me on three occasions, not once discussing pre-trial motions, or trial strategy. I now place this court on notice that I no longer desire for this attorney to represent me, and move this honorable court to issue an order for reimbursement of funds, and that was from the time that this attorney took notice that he represented my co-defendant and I.

Respectfully Submitted

Pedro Mendoza



10-1-12

My Commission Expires August 5, 2018

CERTIFICATE OF SERVICE

BY MAIL

FILED
Horry County

2012 OCT -3 PM 3:12

MELANIE HUGGINS-WARD
CLERK OF COURT

I certify that on:

This 1 day of October, 2012

I served a copy of the attached motion in this criminal matter on:

MELANIE Huggins Ward
Clerk of Court

P.O. Box 1677

CONWAY, S.C. 29528-0677

And respectfully request that a copy be served upon

MARTIN D. SPRATLEN

Assistant Solicitor

Horry County Solicitor Office

P.O. Box 12716

CONWAY, S.C. 29528

FRANCIS A. HUMPHRIES

ATTORNEY AT LAW

1300 PROFESSIONAL DR. SUITE 102

MYRTLE BEACH, S.C. 29577

MR Francis A Humphree

I am writing you in regard of the information concerning my motion of discovery. I have yet to date receive a receipt or documents on this matter.

I have constantly sought out and discussed with you, obtaining any knowledge of any information recorded or documented concerning my previous case, with the attorney fees that has been compensated to your firm, it seems possible this should have been sought out immediate. the response that's been demonstrated has been unsatisfactory to say the least. would you please take this opportunity of completing the matter. thank you.

FILED
Horry County
2012 OCT -3 PM 2:42
MEDANIE HUGGINS WARD
CLERK OF COURT

Sworn to and Subscribed Before Me
This 15 Day of August, 2012

[Signature]

Notary Public for South Carolina
My Commission Expires May 5, 2021

Pedro Mendosa - Erik Mendosa

STATE OF SOUTH CAROLINA)
 COUNTY OF HORRY)
 Erick Hernandez, SCDC No. 352808,)
 Applicant,)
 v.)
 State of South Carolina,)
 Respondent.)

IN THE COURT OF COMMON PLEAS
 FOR THE FIFTEENTH JUDICIAL CIRCUIT
 Case No. 2013-CP-26-4030

ORDER OF DISMISSAL

2013 APR 21 PM 1:13
 Horry County
 Clerk of Court

This matter comes before the Court by way of an Application for Post-Conviction Relief filed June 11, 2013. Respondent made a Return on or about October 24, 2013. The Court convened an evidentiary hearing into the matter on November 13, 2015, at the Horry County Courthouse. Applicant was present at the hearing and represented by Tristan M. Shaffer, Esquire. J. Croom Hunter, Esquire, of the South Carolina Attorney General's Office, represented Respondent.

Applicant testified on his own behalf at the evidentiary hearing. Applicant's plea counsel, Fran Humphries, Esquire, also testified. The Court had before it a copy of the transcript, the records of the Horry County Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, and the pleadings in this matter. The Court finds as follows:

I. PROCEDURAL HISTORY

The Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the Horry County Clerk of Court's orders of commitment. The Applicant was indicted at the August 2012 term of the Horry County Grand Jury for trafficking cocaine (2012-GS-26-3383). Fran Humphries, Esquire represented the Applicant.

On October 8, 2012, the Applicant pled guilty. The Honorable Edward B. Cottingham sentenced the Applicant to fifteen (15) years imprisonment. The Applicant did not appeal.

copy

II. ALLEGATIONS

At the PCR hearing, Applicant proceeded with the following allegations:

1. Involuntary guilty plea.
2. Ineffective Assistance of Counsel.
 - a. Failure to provide adequate representation.
 - b. Conflict of interest.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court has reviewed the record in its entirety and has heard the testimony and arguments presented at the evidentiary hearing. The Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their credibility. This Court finds Counsel's testimony credible and Applicant's testimony not credible. The 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). Furthermore, this Court finds that Applicant abandoned all allegations except for those specifically addressed below.

A. Involuntary Guilty Plea

In post-conviction relief cases, an applicant asserting a constitutional violation must frame the issue as one of ineffective assistance of counsel. Al-Shabazz v. State, 338 S.C. 354, 363-64, 527 S.E.2d 742, 747 (2000) (citing Drayton v. Evatt, 312 S.C. 4, 430 S.E.2d 517 (1993); Hyman v. State, 278 S.C. 501, 299 S.E.2d 330 (1983); Richardson v. State, 310 S.C. 360, 426 S.E.2d 795 (1993)). An applicant who pleads guilty on the advice of counsel may collaterally attack the plea only by showing (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, 20, 546 S.E.2d 417, 419 (2001) (citing Hill v. Lockhart, 474 U.S. 52; Jackson v. State, 342 S.C. 95, 535 S.E.2d 926 (2000); Thompson v. State, 340 S.C. 112, 531 S.E.2d 294 (2000); Rayford v.

State, 314 S.C. 46, 443 S.E.2d 805 (1994)). An applicant alleging his guilty plea was induced by ineffective assistance of counsel must prove counsel's advice was not "within the competence demanded of attorneys in criminal cases." Hill v. Lockhart, 474 U.S. at 56. Furthermore, "[a] guilty plea is a solemn, judicial admission of the truth of the charges" against the applicant. Dalton v. State, 376 S.C. 130, 137, 654 S.E.2d 870, 874 (Ct. App. 2007) (citing Blackledge v. Allison, 431 U.S. 63 (1977)). Admissions "made during a guilty plea should be considered conclusive unless [an applicant] presents valid reasons why he should be allowed to depart from the truth of his statements." Id. at 137-38, 654 S.E.2d at 874 (citing Crawford v. United States, 519 F.2d 347 (4th Cir. 1975); Edmonds v. Lewis, 546 F.2d 566 (4th Cir. 1976)).

Applicant testified at the PCR hearing that he felt his plea was entered involuntarily because the plea judge told him the State's plea offer would be revoked if the plea did not go forward that day. The allegation is without merit. The record shows the solicitor indicated to the plea judge that Applicant's plea offer was only good for the remainder of the day. As such, the State, not the judge, placed that condition on Applicant's plea. "The State may withdraw from a plea bargain arrangement at any time prior to, but not after, the actual entry of the guilty plea by defendant or any other change of position by him constituting detrimental reliance upon the arrangement. Detrimental reliance may be demonstrated where the defendant performed some part of the bargain; for example, where the defendant provides beneficial information to law enforcement." Custodio v. State, 373 S.C. 4, 11, 644 S.E.2d 36, 39 (2007). Furthermore, Applicant did not have a constitutional right to a plea bargain. See Reed v. Becka, 333 S.C. 676, 511 S.E.2d 396 (Ct.App.1999). As Applicant was not entitled to any sort of plea bargain in the first place, and he has shown no detrimental reliance, his allegation that the threat of the offer's revocation unlawfully induced him to plead guilty is without merit.

Furthermore, this Court has reviewed the record, and, in particular, the plea colloquy in its entirety and can find no evidence Applicant's plea was not entered freely, knowingly, and voluntarily. Applicant's allegations are just one more example of a defendant swearing to tell the truth and pleading guilty, only to come back years later, unsatisfied with his sentence, and telling the Court that even though he swore to tell the truth, everything he said at the guilty plea was a lie. Accordingly, this Court finds Applicant's testimony to be not credible and his allegations to be without merit.

B. Ineffective Assistance of Counsel

In this post-conviction relief action, Applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (citing Griffin v. Martin, 278 S.C. 620, 300 S.E.2d 482 (1983)). Where the application alleges ineffective assistance of trial counsel as a ground for relief, Applicant must prove trial 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." Id. (citing Strickland v. Washington, 466 U.S. 668, 686 (1984)).

The proper measure of performance is whether trial counsel provided representation within the range of competence required in criminal cases. Id. (citing Strickland, 466 U.S. at 687; Turner v. Bass, 753 F.2d 342 (4th Cir. 1985); Marzullo v. Maryland, 561 F.2d 540 (4th Cir. 1977)). The Court strongly presumes trial counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Id. (citing Strickland, 466 U.S. at 690). Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

The Court applies a two-pronged test in evaluating allegations of ineffective assistance of trial counsel. Id. at 117, 386 S.E.2d at 625. First, Applicant must prove trial counsel's performance was deficient. Id. Under this prong, the Court measures trial counsel's performance by its "reasonableness

under prevailing professional norms.” Id. (citing Strickland, 466 U.S. at 688). Second, trial counsel’s deficient performance must have prejudiced Applicant such that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Id. at 117-18, 386 S.E.2d at 625.

1. Failure to Provide Adequate Representation

This Court finds Applicant has failed to show Counsel’s performance fell below an objective standard of reasonableness. Counsel’s testimony indicated he was extremely familiar with the facts of Applicant’s case. This Court finds Counsel met with Applicant an adequate number of times and was familiar with the discovery materials. Counsel indicated he explained Applicant’s constitutional rights, and he explained the differences between going to trial and entering a guilty plea. Counsel indicated he never had trouble communicating with Applicant, and he never had any concern that Applicant did not fully understand their conversations. Counsel testified Applicant made a fully informed decision to plead guilty, and Counsel agreed with the decision. As such, Counsel’s testimony indicated his performance was well within the range required under the law. This Court finds no reason to believe Counsel’s testimony was not credible. Accordingly, this Court finds Applicant’s allegations are without merit.

2. Conflict of Interest

At the PCR hearing, Applicant alleged he was prejudiced at his guilty plea by a conflict of interest existing because his attorney also represented his codefendant. This allegation is without merit. Testimony elicited at the PCR hearing from both Applicant and plea counsel indicated that counsel did not, in fact, represent Applicant’s codefendant because the charge at issue, to which Applicant pled guilty, did not involve the person in question. Additionally, Applicant was not charged with any type of conspiracy. In fact, the alleged codefendant had nothing to do with the charge to which Applicant

pled guilty. Plea counsel testified that prior to Applicant's plea, the solicitor made sure that none of Applicant's charges involved the alleged codefendant. "An applicant alleging his conviction was due to a conflict of interest from counsel's representation bears the burden of showing that a potential conflict actually materialized into a realized conflict adversely affecting counsel's performance." Jackson v. State, 329 S.C. 345, 495 S.E.2d 768, 773 (1998). Here, Applicant has not shown the existence of any conflict, nor has Applicant shown how said conflict might have affected counsel's performance. As such, this allegation is without merit. As Applicant has shown no ineffectiveness, he can show no prejudice.

C. All Other Allegations

As to any and all allegations that were raised in the application or at the hearing in this matter and not specifically addressed in this order, the Court finds Applicant failed to present any evidence regarding such allegations. Accordingly, the Court finds Applicant has abandoned any such allegations.

IV. CONCLUSION

Based on the foregoing, the Court finds and concludes 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.

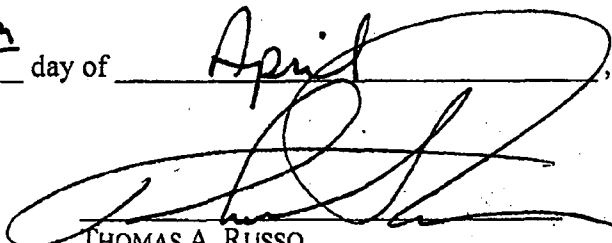
The Court notes Applicant must file and serve a notice of appeal within thirty (30) days from receipt of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), Applicant has a right to appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRPC, provides that if Applicant wishes to seek appellate review, his post-conviction relief attorney

must serve and file a notice of appeal on Applicant's behalf. Applicant and his attorney are directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED THAT:

1. The Application for Post-Conviction Relief is denied and dismissed with prejudice; and
2. Applicant must be remanded to the custody of the Department of Corrections to complete service of his sentence.

AND IT IS SO ORDERED this 13th day of April, 2016.



THOMAS A. RUSSO
Presiding Judge
Fifteenth Judicial Circuit

Florence, South Carolina

DOCKET NO. 2012-GS-26-03383

WITNESSES

Kyle Jolliff Horry County Police Department

The State of South Carolina
County of Horry

Donna E. Elder

10H02904

COURT OF GENERAL SESSIONS

August, 2012 TERM

ARREST WARRANT NUMBER

M506477

CDR: 0288 44-53-0370(e)(2)(d)

DOA: 7/15/2010

THE STATE

vs.

ACTION OF GRAND JURY

TRUE BILL

Erick V Hernandez

H/M

Conway, SC 29526

DOB:

SSN:

Foreperson of Grand Jury
Date: AUG 23 2012

ATTORNEY: Humphries Jr., Francis A.

VERDICT

Indictment for

Trafficking Cocaine

J. Gregory Hembree, Solicitor

ORIGINAL

Foreperson of Petit Jury
Date:

STATE OF SOUTH CAROLINA)
)
COUNTY OF Horry)

INDICTMENT

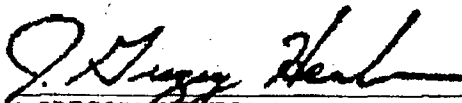
At a Court of General Sessions, convened on August 23, 2012, the Grand Jurors of Horry County present upon their oath:

TRAFFICKING COCAINE
(200 GRAMS OR MORE, BUT LESS THAN 400 GRAMS)

CDR: 0288 44-53-370(e)(2)(d)

That Erick V Hernandez did in Horry County on or about June 2, 2010, knowingly, sell, deliver, purchase or bring in to this State, or aid, abet, attempt or conspire to sell, deliver, purchase or bring into this State, or was in actual or constructive possession, or attempted to become in actual or constructive possession of a quantity of Cocaine in an amount of 200 grams or more, but less than 400 grams, the same being a controlled substance, a within the meaning of Section 44-53-370, et. seq., S. C. Code of Laws, 1976, as amended, such possession not having been authorized by law, and being in violation of Section 44-53-370(e)(2)(d), S. C. Code of Laws, 1976, as amended, for the crime of trafficking.

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


J. GREGORY HEMBREE
FIFTEENTH CIRCUIT SOLICITOR