

ORIGINAL

STATE OF SOUTH CAROLINA
In the Court of Appeals

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

Appellate Case No. 2016-001142

Erick Hernandez,

Petitioner,

v.

State of South Carolina,

Respondent.

BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General

JOHNNY ELLIS JAMES JR.
S.C. Bar No. 101260
Assistant Attorney General

Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737

ATTORNEYS FOR RESPONDENT

RECEIVED
MAY 13 2019
SC Court of Appeals

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

PETITIONER’S ISSUE PRESENTED iii

RESPONDENT’S ISSUE PRESENTED iii

STATEMENT OF THE CASE..... 1

STATEMENT OF THE FACTS 3

STANDARD OF REVIEW 8

ARGUMENT 9

THE PCR COURT PROPERLY DENIED RELIEF BECAUSE HERNANDEZ INTRODUCED NO PROBATIVE EVIDENCE TO SHOW EITHER AN ACTUAL CONFLICT OF INTEREST OR ANY ADVERSE EFFECT THEREFROM, BECAUSE HERNANDEZ KNOWINGLY, INTELLIGENTLY, AND VOLUNTARILY WAIVED THE ALLEGED CONFLICT BECAUSE THE IMPENDING EXPIRATION OF THE STATE’S PLEA OFFER COULD NOT AMOUNT TO COERCION AS TO EITHER THE PLEA OR THE WAIVER..... 9

 a. Hernandez introduced no probative evidence to show any actual conflict at any point in time, nor how any alleged conflict adversely affected Counsel’s representation, but relies entirely on speculation which runs contrary to the record. 10

 b. Hernandez waived the conflict on the record, and his efforts after his plea and in post-conviction relief do not show that he was coerced, but rather show reflect his continued efforts to play games with the court. 13

 c. Hernandez had no constitutional right to the plea offer set to expire on October 8, 2012, and that it was set to expire at the end of the day did not and could not amount to coercion sufficient to invalidate the guilty plea or his waiver of the alleged conflict. 14

CONCLUSION..... 17

TABLE OF AUTHORITIES

Cases

<u>Ard v. Catoe</u> , 372 S.C. 318, 642 S.E.2d 590 (2007).....	8
<u>Bannister v. State</u> , 333 S.C. 298, 509 S.E.2d 807 (1998).....	10
<u>Butler v. State</u> , 286 S.C. 441, 334 S.E.2d 813 (1985).....	8
<u>Cherry v. State</u> , 300 S.C. 115, 386 S.E.2d 624 (1989).....	8, 9
<u>Davie v. State</u> , 381 S.C. 601, 675 S.E.2d 416 (2009).....	14
<u>Fuller v. State</u> , 347 S.C. 630, 557 S.E.2d 664 (2001).....	10, 12, 15
<u>Gonzales v. State</u> , 419 S.C. 2, 795 S.E.2d 835 (2017).....	10
<u>Gustine v. State</u> , 325 S.C. 123, 480 S.E.2d 444 (1997).....	14
<u>Hoffman v. Leeke</u> , 903 F.2d 280 (4th Cir. 1990).....	13
<u>Hyman v. State</u> , 397 S.C. 35, 723 S.E.2d 375 (2012).....	14
<u>Jackson v. State</u> , 329 S.C. 345, 495 S.E.2d 768 (1998).....	10
<u>Jordan v. State</u> , 406 S.C. 443, 752 S.E.2d 538 (2013).....	13, 15
<u>Sellner v. State</u> , 416 S.C. 606, 787 S.E.2d 525 (2016).....	7
<u>Simpson v. State</u> , 317 S.C. 506, 455 S.E.2d 175 (1995).....	14
<u>Smalls v. State</u> , 422 S.C. 174, 810 S.E.2d 836 (2018).....	7
<u>State v. Chisolm</u> , 312 S.C. 235, 439 S.E.2d 850 (1994).....	13, 14
<u>State v. Stanko</u> , 402 S.C. 252, 741 S.E.2d 708 (2013).....	15
<u>State v. Whipple</u> , 324 S.C. 43, 476 S.E.2d 683 (1996).....	14
<u>Strickland v. Washington</u> , 466 U.S. 668 (1984).....	8, 9, 10
<u>Thomas v. State</u> , 346 S.C. 140, 551 S.E.2d 254 (2001).....	10, 12, 15
<u>United States v. Swartz</u> , 975 F.2d 1042 (4th Cir. 1992).....	12, 13
<u>Weatherford v. Bursey</u> , 429 U.S. 545 (1977).....	13
<u>Whitehead v. State</u> , 308 S.C. 119, 417 S.E.2d 529 (1992).....	9

Rules

Rule 71.1(e), SCRCP.....	8
--------------------------	---

PETITIONER'S ISSUE PRESENTED

The PCR judge erred in denying petitioner's claim that he was coerced into waiving plea counsel's conflict of interest in the case when counsel admitted that a conflict existed based on his dual representation of petitioner and his co-defendant in a drug conspiracy ring, and the plea judge removed counsel from the case after finding on the record that a conflict of counsel in fact existed in the case, because this meant that his guilty plea was given involuntarily as a result.

RESPONDENT'S ISSUE PRESENTED

Did the PCR properly find that Petitioner failed to establish trial counsel was ineffective due to a conflict of interest where the alleged subject of the conflict had no substantive part in the charges to which Petitioner pled, and where Petitioner's motion to relief counsel was granted by the Court and thereafter waived by him on the record in order to avoid trial and the possibility of a more severe sentence upon conviction?

STATEMENT OF THE CASE

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

On October 8, 2012, Hernandez pled guilty to trafficking in cocaine, between 28 and 100 grams, as indicted; all other indictments were dismissed *nolle prosequi*. Consistent with terms negotiated between Hernandez and the State, the Honorable Edward B. Cottingham sentenced Hernandez to imprisonment for a term of 15 years. Hernandez did not appeal his plea or sentence.

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

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

Respondent made its return on October 24, 2013, and an evidentiary hearing into the matter was convened on November 13, 2015, before the Honorable Thomas A. Russo. Hernandez was

present at the hearing and represented by Tristan M. Shaffer, Esq. J. Croom Hunter, Esq., of the South Carolina Attorney General's Office, represented Respondent. Hernandez testified on his own behalf, and Frances A. Humphries, Esq., also testified. By written order dated April 13, 2016, and filed April 21, 2016, Judge Russo denied and dismissed the application.

Hernandez thereafter filed a notice of appeal and a petition for writ of certiorari was filed by Wanda H. Carter, Esq., on March 1, 2017. Johnny Ellis James Jr., Esq., of the South Carolina Attorney General's Office, filed the State's Return on July 12, 2017. By Order filed October 30, 2017, the Supreme Court of South Carolina transferred the appeal to the South Carolina Court of Appeals. This Court granted certiorari and directed further briefing. This brief follows.

STATEMENT OF THE FACTS

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

In July 2012, law enforcement executed a search warrant on the Clay Pond Road location and served one of the search warrants on one Karen Villamizar.¹ (Appx. 30, ll.6-13; Appx. 64, ll.18-22). Hernandez was arrested at the scene and law enforcement secured utility bills indicating Hernandez's residence at the location. Id. Law enforcement also seized a cell phone in Hernandez's possession that was later confirmed as his, based on the use of its number for Hernandez's utility account, and confirmed as the phone used to call the confidential informant to demand money for the drugs. (Appx. 30, ll. 6-16). In the course of developing the case, the State confirmed the cooperation of "Vargas," as well as co-conspirator Herman Diaz, who provided the drugs to Hernandez. (Appx: 30-31).

Hernandez retained attorney Frances A. Humphries ("Counsel"). Counsel promptly secured a cooperation agreement for Hernandez, and Hernandez provided substantial intelligence

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

to facilitate the DEA's investigation. (Appx. 57-58). In exchange, Hernandez was to receive "four to five years on one third parole eligible time and essentially be a turnaround sentence[.]" (Appx. 60, ll. 3-5). However, against Counsel's advice, Hernandez instead posted bond and was taken into custody by U.S. Immigration and Customs Enforcement; the assistant solicitor assigned to the case thereafter informed Counsel that the action violated the cooperation agreement, as Hernandez was no longer available to cooperate. (Appx. 60-61).

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

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

Hernandez appeared before Judge Cottingham on October 8, 2012, four days before trial. Counsel first communicated Hernandez's willingness to plead in exchange for a sentence of seven years, the minimum of the seven to twenty-five year range in the State's plea offer, but

Judge Cottingham rejected Hernandez's effort to negotiate with the court and explained "under no set of circumstances would I consider seven years." (Appx. 4-5). Assistant Solicitor Donna Elder confirmed that the plea offer was scheduled to expire at the end of that day and that no further offers would be made in the case. (Appx. 7, ll. 11-23).

Judge Cottingham then took up the matter of the alleged conflict of interest. Counsel explained to the court "that there is or at least there is present a potential and dangerous conflict of interest related to another client of mine, Karen Villamizar." (Appx. 6, ll. 15-19). Counsel did not detail the conflict further. Counsel further explained his understanding that if he were relieved, a new attorney would be immediately appointed and the case would be tried the following December, just under two months later. (Tr. 6-7). Judge Cottingham expressed his frustration that the motion was made four days prior to trial, and noted "he's playing games with the Court." (Appx. 9, ll. 1-24). The court alternately determined there was a conflict and that "there's a vague possibility that [a conflict] exists[.]" (Appx. 9, ll. 10-11; Appx. 10, ll. 7-10). Accordingly, Judge Cottingham granted the motion to relieve counsel and indicated that it would appoint a public defender that same day. (Appx. 10, ll. 5-18). Judge Cottingham also excoriated Hernandez for "obviously playing with the Court by filing this motion four days before the case was set for trial." (Appx. 12, ll. 2-4).

Despite the grant of the motion, Counsel requested Judge Cottingham permit him to remain on the case until the end of the day in case Hernandez changed his mind regarding the plea offer; the court granted that request. (Appx. 13-14). Hernandez returned to courthouse detention, where he requested Counsel speak with him; Hernandez there asked Counsel to secure a deal for fifteen years. (Appx. 18-19; Appx. 67, ll. 4-10). Counsel did so achieve a negotiated plea offer of fifteen years and Hernandez again appeared before Judge Cottingham. Id. In an

exceedingly thorough colloquy between Judge Cottingham and Hernandez, Hernandez indicated that he understood Counsel had been relieved, affirmed that he wanted Counsel restored as his attorney, that Counsel explained everything to him, that he was entering his plea freely and voluntarily, that he did not wish to go to trial, and that he was totally and completely satisfied with Counsel's services. (Appx. 20-28). Of particular note, Judge Cottingham affirmatively expressed his belief that the alleged conflict did not cause any deficiency on the part of Counsel:

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

MR. HUMPHRIES: I do not believe so.

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

(Appx. 22, ll. 16-19). Hernandez pled guilty and was sentenced to fifteen years. (Appx. 34, ll. 8-9; p. 36, line 1).

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

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

STANDARD OF REVIEW

The post-conviction relief court's findings of fact receive great deference during appellate review and will be upheld if "any evidence of probative value" exists in the record to support the lower court's findings. Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016). Questions of law are reviewed *de novo*, and appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. Id.; Smalls v. State, 422 S.C. 174, 180-81, 810 S.E.2d 836, 839 (2018).

ARGUMENT

THE PCR COURT PROPERLY DENIED RELIEF BECAUSE HERNANDEZ INTRODUCED NO PROBATIVE EVIDENCE TO SHOW EITHER AN ACTUAL CONFLICT OF INTEREST OR ANY ADVERSE EFFECT THEREFROM, BECAUSE HERNANDEZ KNOWINGLY, INTELLIGENTLY, AND VOLUNTARILY WAIVED THE ALLEGED CONFLICT BECAUSE THE IMPENDING EXPIRATION OF THE STATE'S PLEA OFFER COULD NOT AMOUNT TO COERCION AS TO EITHER THE PLEA OR THE WAIVER

The PCR Court's Order of Dismissal should be affirmed because Hernandez failed to establish either that he lacked a full understanding of the consequences of his plea or of the charges against him, or with any specificity establish the actual conflict of interest he alleged against Counsel, and in any event very clearly waived any potential conflicts on the record.

In a post-conviction relief action, an applicant has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant alleges ineffective assistance of counsel as a ground for relief, he or she must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686 (1984); Butler, 286 S.C. at 442, 334 S.E.2d at 814. The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Strickland, 466 U.S. at 687. "There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case." Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007). The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

Judicial scrutiny of counsel's performance must be highly deferential, as it is all too tempting for a defendant to second guess counsel's assistance after conviction or adverse

sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. Strickland, 466 U.S. at 689. "[E]very effort be made to eliminate the distorting effects of hindsight" and to evaluate counsel's decisions at the time they were made. Id. Accordingly, courts must be wary of second-guessing counsel's tactics. Whitehead v. State, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland, 466 U.S. at 688). Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. Strickland, 466 U.S. at 696. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. Id. at 697. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Id.

- a. **Hernandez introduced no probative evidence to show any actual conflict at any point in time, nor how any alleged conflict adversely affected Counsel's representation, but relies entirely on speculation which runs contrary to the record.**

"To establish a violation of the Sixth Amendment right to effective counsel due to a conflict of interest arising from multiple representation, a defendant who did not object at trial

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

In this matter, Fuller is dispositive. The entirety of Hernandez's allegation of a conflict of interest is that Counsel represented both Hernandez and Villamizar on separate drug charges, and that a search warrant on the Clay Pont Road location was served on Villamizar. No evidence was introduced to show that Villamizar's legal troubles intersected in any way beyond that incidental role. No evidence was introduced to show that Villamizar could have offered any testimony either favorable or detrimental to Hernandez.² To the contrary, the consistent evidence introduced at the evidentiary hearing *and* at the plea proceeding was that Villamizar was not a witness for Hernandez's impending trial, had no connection to the charges, and that the

² Villamizar did not testify at the evidentiary hearing; it is therefore hardly appropriate to estimate what her testimony may or may not have been. See Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998) ("This Court has repeatedly held a PCR applicant *must produce the testimony* of a favorable witness *or otherwise offer the testimony in accordance with the rules of evidence* at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial.") (emphasis original).

potential conflict did not affect Counsel's performance.

Hernandez seeks reversal on the basis of assertions of fact and inferences that run plainly contrary to the facts introduced at the evidentiary hearing. "In the case at bar, trial counsel represented petitioner and [Villamazar], both of whom were charged as participants in the same drug conspiracy ring." (Brief of Petitioner at 8). The record does not support this assertion, but to the contrary, is replete with indications that Villamazar had no part to play in Hernandez's looming trial. See (Appx. 32, ll. 20-24) (Villamazar not listed as a witness of concern by Counsel); (Appx. 65, ll. 13-18) (State informed Counsel Villamazar was not a witness); (Appx. 71, ll. 5-22) (State informed Counsel Villamazar would not be a witness in any case that they tried); (Appx. 72, ll. 4-15) (Villamazar was served the search warrant and either Villamazar or Hernandez called the other to ask why the police were at the house). No evidence regarding Villamazar's charges was introduced other than the vague description of "drug charges." (Appx. 70, ll. 1-14).

Hernandez further argues that "the argument by the solicitor that the charge petitioner pled to was not connected to any of the charges against [Villamazar] cannot stand because the case and facts *surely bled over boundary lines* and blended into each other's cases." (Brief of Petitioner at 9) (emphasis added, citing Appx. 71, ll. 13-22). There is *no basis in the record* for this bald assertion, and Hernandez's associated citation refers to Counsel's recollection of the State stating the exact opposite of the above quoted assertion. Counsel, at the end in lines 21-22, merely expresses her reservation and why she wisely took the time to look into the matter.

Hernandez additionally asserts that "the inference was that [Villamazar], who was represented by petitioner's counsel also, would most likely have testified against petitioner as well if a trial had been held on the petitioner's behalf." (Brief of Petitioner at 9). Again, there is

no basis in the record for this inference, and every bit of evidence in the record points exclusively to the absolute opposite conclusion: Villamazar was not a witness in the State's case against Hernandez.

Judge Cottingham, out of an extraordinary amount of precaution, relieved Counsel based on the fleeting whiff of a conflict. Extrapolating from that thin scent alone, Hernandez endeavors to craft a conflict robust enough to earn this Court's concern, but the record simply does not support it. The extrapolations and inferences are nothing more than speculation, which fails to establish the basest necessary details of a conflict, and can only at best conjure the "mere possibility of a conflict of interest," which is insufficient to merit relief. Fuller at 634, 557 S.E.2d at 665.

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

b. Hernandez waived the conflict on the record, and his efforts after his plea and in post-conviction relief do not show that he was coerced, but rather show reflect his continued efforts to play games with the court.

"The Sixth Amendment right to conflict-free representation, like the right to counsel itself, may be the subject of a waiver." United States v. Swartz, 975 F.2d 1042, 1048 (4th Cir. 1992). "To be valid, a waiver of a conflict of interest must not only be voluntary, it must be done knowingly and intelligently." Thomas v. State, 346 S.C. 140, 144, 551 S.E.2d 254, 256 (2001) (citing Swartz at 1048-49). "The test to be applied in determining whether a fundamental right, such as the right to effective counsel, has been waived is well settled. The state can

establish a waiver only by proving an intentional relinquishment or abandonment of the right.” Hoffman v. Leeke, 903 F.2d 280, 288 (4th Cir. 1990). “Whether there has been a waiver depends on the particular facts of each case and the court must make as thorough and long an inquiry as necessary to determine whether the accused is voluntarily, knowingly[,] and intelligently waiving his right.” Id.

Even if Hernandez meets his burden of showing an actual conflict of interest and that it adversely affected Counsel’s representation, he was obviously aware of it by virtue of the fact that he moved to relieve Counsel in the first place, and succeeded on that motion. Hernandez knew of Counsel’s relationship with Villamazar, that it had been investigated, and was aware of whatever intersection she had with his own pending charges. Compare Jordan v. State, 406 S.C. 443, 752 S.E.2d 538 (2013) (finding no evidence to support the PCR court’s finding an applicant waived any potential conflict of interest where there was no evidence the applicant was informed of dual representation, or of the precise nature of the conflict of interest). He cannot now come before the Court and avail himself of any relief when, by his own admissions, he sought to deceive the plea court of his true feelings and intentions regarding Counsel in order to obtain the plea deal set to expire at the end of the day. Hernandez’s gamesmanship serves only to justify and confirm Judge Cottingham’s frustrations, such that reversal and relief is inappropriate.

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

A defendant has no constitutional right to plea bargain. State v. Chisolm, 312 S.C. 235, 237, 439 S.E.2d 850, 852 (1994) (citing Weatherford v. Bursey, 429 U.S. 545 (1977)). The decision whether to offer a plea bargain is a matter wholly within the solicitor’s discretion. State v. Whipple, 324 S.C. 43, 49, 476 S.E.2d 683, 686 (1996) (citing Chisolm at 238, 439 S.E.2d at

852). Accordingly, the State may establish an expiration date for any plea offer it may make, and, but for some deficiency in communicating that offer to a defendant, that expiration is a matter within the State's discretion. See, generally Hyman v. State, 397 S.C. 35, 723 S.E.2d 375 (2012) (affirming denial of PCR where petitioner refused to accept a plea offer before expiration because he wished to watch a videotape of a confidential informant, which the State had already disclosed to counsel); Davie v. State, 381 S.C. 601, 675 S.E.2d 416 (2009) (finding counsel was ineffective for not objecting upon late discovery of a plea offer after its expiration, where it was mailed to the wrong address).

The conditions and time limitations of a plea offer simply cannot amount to coercion upon a defendant, however strong a motivating factor it may be, and do not play a role in the determination of the voluntariness of a plea—"[a]ll that is required to knowingly and voluntarily enter a plea of guilty is that a defendant have a full understanding of the consequences of his plea and of the charges against him." Gustine v. State, 325 S.C. 123, 128, 480 S.E.2d 444, 446 (1997) (citing Simpson v. State, 317 S.C. 506, 455 S.E.2d 175 (1995)). To that end, Hernandez knowingly and voluntarily pled guilty. The record demonstrates Hernandez fully understood the charges against him, the consequences of pleading guilty, and that Counsel effectively addressed any and all questions he had. Hernandez ultimately demonstrated understanding of the charges against him, the elements necessary to prove those charges, and the potential punishment he faced if convicted. Hernandez was granted the assistance of an interpreter, despite his strong command of the English language as evident in Counsel's testimony and his handwritten motion to relieve counsel. Hernandez motivation to avoid trial and a much more severe sentence, as he affirmed at the PCR hearing, neither impacts the relevant question under Gustine, nor amounts to

any other constitutional infraction.³ That Hernandez “felt pressured to waive a conflict of counsel issue” in order to gain the benefit of a favorable plea bargain is of no consequence, especially when there is no indication in any part of the record that Hernandez would have been prohibited from turning around and accepting the offer *pro se*.

The same reasoning applies to the question of whether the waiver was knowing and voluntary. A conflict of interest on the part of counsel can be waived by a defendant. See Thomas, 346 S.C. at 144, 551 S.E.2d at 256; Jordan, 406 S.C. at 450, 752 S.E.2d at 541; State v. Stanko, 402 S.C. 252, 270, 741 S.E.2d 708, 719 (2013); Fuller at 635 n. 5, 557 S.E.2d at 666 n. 5. Waiver must be done knowingly, intelligently, and voluntarily. Thomas, 346 S.C. at 144, 551 S.E.2d at 256. Hernandez knew the parameters of the potential conflict, achieved the relief he desired, and then firmly reversed course in open court. Nothing additional was necessary.

³ Hernandez notes that he did not sign the written waiver as required by Judge Cottingham. Given the clarity of the transcript, and Hernandez’s inconsistent representations as to his English proficiency, Hernandez’s refusal to sign the written waiver after he pled can only support Judge Cottingham’s conclusion that he is “playing games with the Court.” (Appx. 9, line 24).

CONCLUSION

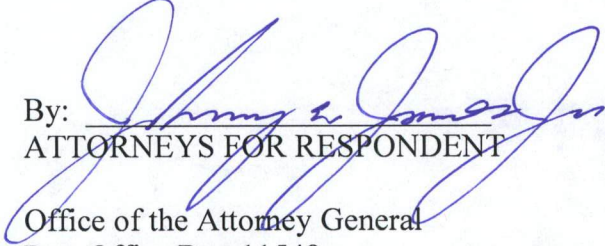
For the foregoing reasons, this Court should affirm the lower court's denial of post-conviction relief.

Respectfully submitted,

ALAN WILSON
Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General

JOHNNY ELLIS JAMES JR.
S.C. Bar No. 101260
Assistant Attorney General

By: 
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737

13 May, 2019

STATE OF SOUTH CAROLINA
In the Court of Appeals

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

Appellate Case No. 2016-001142

RECEIVED
MAY 13 2019
SC Court of Appeals

Erick Hernandez,

Petitioner,

v.

State of South Carolina,

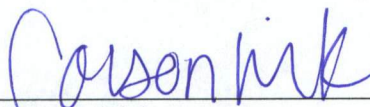
Respondent.

PROOF OF SERVICE

I, Carson Kirk, certify that I have served the within **Brief of Respondent** on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Wanda H. Carter, Esquire
S.C. Commission on Indigent Defense, Appellate Defense
Post Office Box 11589
Columbia, South Carolina 29211

This 13th day of May, 2019.



Carson Kirk
Legal Assistant
Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-2227