

STATE OF SOUTH CAROLINA
In The Supreme Court

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CERTIORARI TO HORRY COUNTY
Court of Common Pleas

S.C. SUPREME COURT

The Honorable Edward B. Cottingham, Plea Judge
The Honorable Thomas A. Russo, PCR Judge

Appellate Case No. 2020-000903

ERICK HERNANDEZ Petitioner,

v.

STATE OF SOUTH CAROLINA, Respondent.

**RETURN TO PETITION FOR WRIT OF
CERTIORARI TO THE COURT OF APPEALS**

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STATEMENTS OF ISSUES ON CERTIORARI

Petitioner's Issue Presented

Did the Court of Appeals err in holding that petitioner's plea was not involuntarily given per its finding that no actual conflict of interest existed when counsel admitted that a conflict of interest existed based on his dual representation of petitioner and petitioner's co-defendant in a drug conspiracy ring, and where the plea judge removed counsel from the case after granting the conflict of interest motions filed by both counsel and petitioner outlining how the conflict of interest existed in the case?

Respondent's Issue Presented

Did the Court of Appeals properly affirm the PCR Court's dismissal of Petitioner's post-conviction relief application because no actual conflict of interest existed, Petitioner knowingly and voluntarily waived any potential conflict of interest, and the plea was otherwise entered validly and cannot be withdrawn now?

STATEMENT OF THE CASE

Erick Hernandez (hereafter “Petitioner”) is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Horry County Clerk of Court. During its August 2012 term, the Horry County Grand Jury indicted Petitioner 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 twenty-eight and one hundred grams (2012-GS-26-03383); and possession with intent to distribute marijuana (2012-GS-26-03385). Petitioner was represented by Fran Humphries, Esquire (hereafter “Counsel”). Assistant Solicitor Donna Elder Esquire, from the Fifteenth Circuit Solicitor’s Office, represented the State. On October 8, 2012, Petitioner pled to trafficking in cocaine with an exposure to seven to twenty-five years imprisonment. The State *nolle prosequi* indicted the remaining charges, in accordance with the plea agreement, before the Honorable Edward B. Cottingham. Judge Cottingham sentenced Petitioner to fifteen years’ imprisonment. Petitioner did not appeal his plea or sentence.

Petitioner filed his PCR application on June 11, 2013 (2013-CP-26-4030), in which he alleged the following:

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. Petitioner was present at the hearing and represented by Tristan M. Shaffer, Esquire. Assistant Attorney General J. Croom Hunter, of the South Carolina Attorney General’s Office, represented

Respondent. By written order dated April 13, 2016, and filed April 21, 2016, Judge Russo denied and dismissed the application.

Petitioner thereafter filed a notice of appeal, which was perfected through a petition for writ of certiorari filed by Wanda H. Carter, Esquire, on March 1, 2017. Johnny Ellis James Jr., Esquire, 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. Briefing by both parties was completed in May 2019. The Court of Appeals affirmed the PCR court's decision in an unpublished decision filed April 8, 2020. *State v. Hernandez*, 2020-UP-101 (S.C. Ct. App. Dated April 8, 2020). Petitioner petitioned for rehearing on April 23, 2020. The South Carolina Court of Appeals denied the petition for rehearing, filed on May, 22, 2020. The petition for writ of certiorari was submitted to the South Carolina Supreme Court on June 23, 2020. This return to the petition follows.

STATEMENT OF FACTS

On June 2, 2012, United States Drug Enforcement Agency Agents and Horry County Sheriff's Department Officers recorded a drug transaction involving a quarter kilo of cocaine between a wired confidential informant and "Codefendant Vargas" at a location on Clay Pond Road. (Appx. 28-30). The narcotics were taken into custody, tested, and confirmed as cocaine. (Appx. 29-30). Two weeks later, law enforcement recorded a phone conversation between the confidential informant and Petitioner where Petitioner demanded money for the drugs supplied to "Vargas", which were given to the confidential informant. (Appx. 29).

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, 64). Petitioner was arrested at the scene and law enforcement secured utility bills indicating Hernandez's residence at the location. (Appx. 30, 64). Law enforcement seized a cell phone, confirmed as Petitioner's, based upon the use of its number for Petitioner's utility account, and as the phone used to call the confidential informant in demanding drug money. (Appx. 30). The State confirmed Vargas's and Herman Diaz's, who provided the drugs to Petitioner, cooperation. (Appx. 30-31).

Petitioner retained Counsel, who secured a cooperation agreement involving Petitioner's agreement to provide substantial intelligence to facilitate the DEA's investigation, in exchange for Petitioner receiving "four to five years on one third parole eligible time and essentially be a turnaround sentence[.]" (Appx. 57-60). However, against Counsel's advice, Petitioner instead posted bond and was taken into custody by U.S. Immigration and Customs Enforcement; the

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.

assistant solicitor informed Counsel that the action violated the agreement, because Petitioner was no longer available to cooperate. (Appx. 60-61).

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

While reviewing supplemental discovery provided "maybe a month more or less before the trial date," Counsel recognized Karen Villamazar as both a client and the person who referred Petitioner to him for representation. (Appx. 64). The State informed Counsel that Villamazar was merely incidental to the charges brought against Petitioner and that she would not be a witness. (Appx. 64-65, 71). Petitioner 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 his degraded relationship with Petitioner. (Appx. 65, 72, 100-04).

Petitioner appeared before Judge Cottingham on October 8, 2012, four days before trial. Counsel communicated Petitioner's willingness to plead in exchange for a seven years sentence, the minimum of the seven to twenty-five year range in the State's plea offer, but Judge Cottingham rejected this, stating that "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 no further offers would be made. (Appx. 7).

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). 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 tried the following December, just under two months later. (Appx. 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). The court determined that “there’s a vague possibility that [a conflict] exists[.]” (Appx. 9-10). Accordingly, Judge Cottingham granted the motion to relieve counsel and indicated that the Court would appoint a public defender that day. (Appx. 10).

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 Petitioner changed his mind regarding the plea offer. (Appx. 13-14). The court granted the request. (Appx. 13-14). Petitioner returned to courthouse detention, where he requested Counsel speak with him; Petitioner then asked Counsel to secure a deal for fifteen years. (Appx. 18-19, 67). Counsel obtained a fifteen year negotiated plea offer and Petitioner again appeared before Judge Cottingham. (Appx. 18-19, 67). In a thorough colloquy between Judge Cottingham and Petitioner, Petitioner indicated he understood Counsel was relieved and now wanted him restored, that Counsel explained everything to him, that he was entering his plea freely and voluntarily, that he did not wish to go to trial, that he knew he was waiving his constitutional rights in pleading, and that he was completely satisfied with Counsel’s services. (Appx. 20-28). Judge Cottingham affirmatively expressed his belief that the alleged conflict did not cause any deficiency:

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). Hernandez pled guilty and was sentenced to fifteen years. (Appx. 34, 36).

Though Counsel indicated his belief, and Judge Cottingham agreed, that the conflict waiver on record was sufficient, the court ordered production of a written waiver “in an abundance of precaution[.]” (Appx. 22-23). Petitioner refused to sign the written waiver and, the next day, Judge Cottingham found him in contempt of court. (Appx. 69).

At the evidentiary hearing, Counsel testified that throughout the process, Petitioner never asked for a trial, but always expressed desire for a better deal. (Appx. 63, 77). Petitioner informed the court that he pled guilty because he did not want to go to trial and because he was afraid of receiving a harsher sentence at trial. (Appx. 87, 89). Petitioner claimed he lied to the court during his plea proceeding when asked if he was satisfied with Counsel. (Appx. 87-88).

STANDARD OF REVIEW

The PCR Court's findings of fact receive great deference during appellate review and will be upheld if "any evidence of probative value" exists in the records 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 PCR 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 Court of Appeals properly affirmed the PCR Court’s dismissal of Petitioner’s post-conviction relief application because no actual conflict existed, Petitioner knowingly and voluntarily waived any potential conflict of interest and the plea was otherwise entered validly and cannot be withdrawn now.

Petitioner argues the Court of Appeals erred in affirming the PCR court’s dismissal of Petitioner’s application challenging the alleged conflict of interest consequent to Counsel’s dual representation of Petitioner and his co-defendant in a drug conspiracy ring. However, the PCR court properly rejected this argument, finding that Petitioner failed to show any actual conflict or how said conflict affected counsel’s performance. The Court of Appeals properly affirmed the PCR Court’s dismissal. Consequently, this Court should deny certiorari.

In a PCR action, the petitioner bears the burden of proving allegations contained in the application. *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). When a petitioner requests relief based upon an ineffective assistance of counsel claim, the petitioner must show “counsel’s conduct so undermined the proper functioning of the adversarial process that [it] 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. Ineffective assistance of counsel is governed by the Sixth Amendment, as explained by the United States Supreme Court in *Strickland v. Washington*.

Pursuant to the first prong of the *Strickland* analysis, the petitioner must prove defense counsel’s performance was deficient. *Id.* at 686; *Cherry v. State*, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). To show deficiency, the petitioner must prove by a preponderance of the evidence that counsel’s actions fell outside of the zone of “reasonableness under prevailing professional norms.” *Strickland*, 466 U.S. at 688. *See also* Rule 71.1(e), SCRPC (“The applicant has the burden of establishing his entitlement to relief by a preponderance of the evidence.”).

Reasonableness is determined by the “variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how to best represent a criminal defendant,” and the scope of the reasonableness inquiry is limited to facts counsel had available at the time of representation. *Id.* at 689. “Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” *Yarborough v. Gentry*, 540 U.S. 1, 5 (2003) (citing *Strickland*, 466 U.S. at 690). Judicial scrutiny of counsel’s performance remains highly deferential towards defense counsel with a strong presumption that counsel acted competently, because competent representation may be executed in virtually “countless” ways. *Strickland*, 466 U.S. at 688-89.

Second, counsel’s deficient performance must have prejudiced the petitioner so 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. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Strickland*, 466 U.S. at 694. The court makes this determination based upon the totality of the evidence. *Id.* at 695. Realistically, this matters “only in the rarest case” because “[t]he likelihood of a different result must be substantial, not just conceivable.” *Harrington v. Richter*, 562 U.S. 86, 111-12 (2011) (quoting *Strickland*, 466 U.S. at 697).

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 petitioner as a result of the alleged deficiencies; if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. *Id.* at 696-97.

In the context of a guilty plea, the applicant must show there is a reasonable probability that, but for ineffective assistance of counsel, he or she would not have pled guilty but, instead, would have insisted on going to trial. *Hill v. Lockhart*, 474 U.S. 52, 59 (1985). Applicant's right to contest the validity of a plea is usually, but not invariably, foreclosed because of the inherent solemnity and truthfulness included in the guilty plea process. *See Blackledge v. Allison*, 431 U.S. 63, 73-74 (1977) ("Solemn declarations in open court carry a strong presumption of verity. The subsequent presentation of conclusory allegations unsupported by specifics is subject to summary dismissal, as are contentions that in the face of the record are wholly incredible."). Absent valid reasons why the petitioner is entitled to depart from previous judicial admissions made at the plea hearing, statements made during the original proceeding remain conclusive. *Dalton v. State*, 376 S.C. 130, 137-38, 654 S.E.2d 870, 874 (Ct. App. 2007) (citing *Crawford v. United States*, 519 F.2d 347, 350 (4th Cir. 1975)).

For a plea to be valid, the petitioner must have been aware of the nature and crucial elements of the offense the maximum and minimum penalties, and the rights he is waiving by accepting the plea. *Boykin v. Alabama*, 395 U.S. 238 (1969); *Roddy v. State*, 339 S.C. 29 (2000). A plea is not knowing or voluntary if a petitioner "lacks knowledge of material evidence in the prosecution's possession." *Gibson v. State*, 334 S.C. 515, 523, 514 S.E.2d 320, 324 (1999). A petitioner's knowing and voluntary waiver of statutory or constitutional rights must be established by a complete record, and "may be accomplished by colloquy between the court and defendant, between the court and defendant's counsel, or both." *Roddy v. State*, 339 S.C. at 34, 528 S.E.2d at 421 (citing *State v. Ray*, 310 S.C. 431, 437, 427 S.E.2d 171, 174 (1993)). "[T]he voluntariness of a guilty plea is not determined by an examination of the specific inquiry made by the sentencing judge alone, but is determined from both the record made at the time of the

entry of the guilty plea and the record of the post-conviction hearing.” *Dalton*, 376 S.C. at 138, 654 S.E.2d at 874 (quoting *Harres v. Leeke*, 282 S.C. 131, 133, 318 S.E.2d 360, 361 (1984)). Further, “guilty pleas, freely and voluntarily entered, act as a waiver of all non-jurisdictional defects and defenses, including claims of a violation of a constitutional right prior to the plea.” *Whetsell v. State*, 276 S.C. 295, 297, 277 S.E.2d 891, 892 (1981).

1. No actual conflict of interest exists in this case.

“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 counsel owes a duty to a party whose interests are adverse to the petitioner’s. *Fuller v. State*, 347 S.C. 630, 633-34, 557 S.E.2d 664, 665 (2001). Where a petitioner 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.

Here, the alleged actual conflict of interest is speculative, at best. Petitioner’s allegation that because co-defendants Vargas and Diaz were likely to testify against Petitioner, Viamazar likely would as well is entirely unfounded and, in fact, repetitively refuted by the record through Counsel’s statements made at the plea and PCR hearings. Specifically, the only connection Viamazar had pending drug charges that were unrelated to Petitioner’s own case. (Appx. 69-70).

The State told Counsel that Viamazar would not be involved or be a witness in Petitioner's pending trial level case. (Appx. 65, 71). Additionally, Counsel was told that the State decided to bring the relevant charge because it had no reference or involvement with Viamazar. (Appx. 71). Viamazar was not involved in the trafficking scheme. (App. 71-72). Specifically, the only reference to Viamazar in the case was that she was at the residence when the officers executed the search warrant, she was given a copy of the warrant, and when the officers arrived at the house she called Petitioner to ask why they were at the house. (Appx. 72). Viamazar was not listed as a witness of concern by Counsel when at the plea hearing. (Appx. 32). All of these facts, taken together, undermine Petitioner's argument that Viamazar would have testified against him and that a conflict existed between the parties. The charges both parties faced were unrelated to one another, the connection Viamazar had to Petitioner's case was incredibly weak, if existent, and there was no indication that dual representation would have affected either party whatsoever.

Petitioner grossly mischaracterizes the plea judge's finding on the potential conflict issue. Though Counsel was relieved as counsel, Counsel stated at the PCR hearing that the motion was primarily pursued because of the weakened relationship and potential conflict between Counsel and Petitioner; not Petitioner and Viamazar. (Appx. 62-68, 72). Additionally, the Court did not find a conflict exists at all, unlike what Petitioner alleges. Instead the judge stated, ". . . I conclude that there may be possibly a conflict. I'm not sure that there is but there's a vague possibility that one exists and based on that, I'm going to excuse you." (Appx. 10). There is a strong distinction between an actual conflict of interest and a "vague possibility" that a conflict exists. Further, both Counsel and the Plea Judge stated at the plea hearing that they did not think any dual representation on Counsel's part affected his ability to represent Petitioner. (Appx. 22). Petitioner's mischaracterization of the plea court's finding flies in the face of the judge's actual

finding and Petitioner's baseless extrapolation is insufficient to warrant relief.

Even if an actual conflict did exist, Petitioner has not shown how that adversely affected him during his plea level proceedings. Instead, the record reflects that Counsel negotiated a highly favorable plea agreement in Petitioner's favor despite Petitioner's combativeness and the games he attempted to play with the court to delay proceedings. Thus, no actual conflict exists in this case.

2. Even if a conflict of interest existed in this case, Petitioner waived the conflict.

“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). “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). “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). “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.” *Hoffman*, 903 F.2d at 288.

Petitioner's contention that the conflict was not voluntarily, knowingly, and intelligently waived is without merit. Petitioner was seemingly well aware that a potential conflict existed when he moved to relieve Counsel and succeeded on his motion. In fact, Petitioner filed a motion to relieve counsel four days before trial because of the alleged conflict, which the judge granted the motion based upon the “vague possibility” of a conflict. (Appx. 9-10). The judge stated he thought Petitioner was playing with the court to delay his case, but pushed the trial back to December 2, 2012. (Appx. 11-12). After the motion was granted, Petitioner waived the conflict

of interest so he could enter the plea set to expire that day. (Appx. 19). Petitioner waived the conflict of interest on record, but refused to reduce it to writing after the Judge requested writing as an extra precaution in this case specifically. (Appx. 19-23, 67-69). Even if it was not reduced to writing, however, both Counsel and the Judge agreed that Petitioner properly waived the right on record at the plea hearing and that it was only requested in writing out of an abundance of caution. (Appx. 22-23).

The record reflects that Petitioner decided to waive the conflict, knowingly and voluntarily, to accept the plea offer set to expire that day and any further allegations concerning the alleged conflict merely substantiate the plea Judge's accusations of Petitioner trying to needlessly delay the proceedings. Any further refusal to sign a waiver and pursuit of a claim through the PCR process does not undermine the waiver but, instead, substantiates Judge Cottingham's claim that Petitioner kept going back and forth on the conflict issue to game the system and delay his hearing. (Appx. 68-69). Thus, because the conflict was raised, Petitioner cannot reassert this claim now.

3. Petitioner entered his plea freely, knowingly, intelligently, and voluntarily.

Petitioner's claim that he was coerced into taking the plea is without merit. 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, by themselves, 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)).

Petitioner attempts to color his decision to plead as if one of the conditions of the plea was a requirement to waive the alleged conflict of interest. Again, this is a mischaracterization of what happened. The plea offer that was quite favorable to Petitioner was set to expire that day and the State made clear that they would not offer another plea offer in this case. The record does not indicate that he was prohibited from accepting the offer *pro se*, nor from rejecting the offer and proceeding to trial. Recognizing the offer was favorable to him and trial most likely would have led to harsher sentencing, Petitioner decided to waive the conflict and keep Counsel as representation at the hearing. This was a valid strategy Petitioner wisely acted upon and he was not coerced into accepting the offer, nor into waiving the alleged conflict to do so.

Further, the record clearly reflects that the plea was knowingly, intelligently, and voluntarily entered. Petitioner understood the charges against him the rights he was surrendering, the consequences of pleading, and acknowledged Counsel effectively represented him. (Appx. 21-28). He was also provided an interpreter at the hearing, to ensure his full understanding of the matter. (Appx. 21). Further, though Respondent concedes Petitioner presumably decided to plea because he was limited by a State-imposed time constraint, this time constraint did not coerce Petitioner into pleading. Rather, the plea was knowingly, intelligently, and voluntarily entered despite a time constraint, because Petitioner recognized the plea was in

his best interest. Thus, because the plea was validly entered it cannot be withdrawn now that Petitioner, yet again, has decided to re-litigate the conflict of interest claim.

CONCLUSION

For the reasons stated above, this court should deny certiorari and affirm the PCR Court's and the Court of Appeals' findings that Petitioner had effective assistance of counsel. However, if this Court decides to grant the petition of writ of certiorari, Respondent respectfully requests permission to more fully brief the issues herein.

Respectfully submitted,

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