

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Saluda County

William P. Keesley, Circuit Court Judge

RECEIVED

MAR 14 2013

S.C. Supreme Court

JOSE ANTONIO ANZALDO,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2012-213423

APPENDIX

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Appellate Defender

ALAN WILSON
Attorney General

South Carolina Commission on Indigent
Defense
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ATTORNEY FOR PETITIONER

ATTORNEYS FOR RESPONDENT

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FILED

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1

STATE OF SOUTH CAROLINA
CLERK OF COURT
COUNTY OF SALUDA CO. S.C. COURT OF GENERAL SESSIONS

STATE)
)
)
 V.) TRANSCRIPT OF RECORD
)
 JOSE A. ANZALDO) 08-GS-41-507
) 08-GS-41-508
)
 DEFENDANT.)

APRIL 7, 2009
SALUDA, SOUTH CAROLINA

B E F O R E:

THE HONORABLE L. CASEY MANNING, JUDGE.

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

H. FRANKLIN YOUNG, III, ASSIST. SOLICITOR
ATTORNEY FOR THE STATE

JOHN EARL DUNCAN, ESQUIRE
ATTORNEY FOR THE DEFENDANT

STACY L. SHEPPARD, RPR
CIRCUIT COURT REPORTER

1	I N D E X				
2	<u>WITNESSES</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>
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4					
5	(There were no witnesses.)				
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	E X H I B I T S		
	<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID.</u> <u>EVD.</u>
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5		(There were no exhibits.)	
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1 (The following proceedings were held on
2 April 7, 2009.)

3 (Whereupon, the Interpreter was duly sworn
4 by the Court.)

5 **THE COURT:** What's your name?

6 **INTERPRETER:** Britt Hunt, Your Honor.

7 **THE COURT:** Are you ready now, Solicitor?

8 **MR. YOUNG:** Okay, Your Honor. This is Jose
9 Anzaldo. He is indicted on two counts of criminal
10 sexual conduct with a minor.

11 Your Honor, the victims in this case are his
12 children, his daughters. These victims are Minor 2
13 Minor 2 with a date of birth of Minor 1
14 and also Minor 1 (ph) Anzaldo, date of birth, Minor 1
15 Minor . Because of the difference in their ages,
16 the CSC in the case of Minor 1 is in the second
17 degree and the case of Minor 2 it is in the first
18 degree. The State is requesting that these -- both
19 of these sentences be ten years to run concurrent.
20 And this is with the advice and consent of the
21 victim and the mother.

22 **THE COURT:** Do you understand everything that's
23 happening so far, Mr. Anzaldo?

24 **INTERPRETER:** Yes, sir.

25 **THE COURT:** Now, Mr. Duncan, you represent Jose

1 Antonio Anzaldo?

2 MR. DUNCAN: Yes, Your Honor.

3 THE COURT: Have you explained to Mr. Anzaldo
4 the charges contained in these two indictments, the
5 possible punishments and his rights?

6 MR. DUNCAN: I have.

7 THE COURT: In your opinion, does Mr. Anzaldo
8 understand the charges, the punishments and his
9 rights, including his right to a jury trial?

10 MR. DUNCAN: Yes.

11 THE COURT: In your opinion, does he understand
12 the charges, the punishments and his rights?

13 MR. DUNCAN: He does.

14 THE COURT: How does Mr. Anzaldo indicate to
15 you he wishes to plead, guilty or not guilty?

16 MR. DUNCAN: I agree with his decision to plead
17 guilty.

18 THE COURT: You are Jose Anzaldo; is that
19 correct?

20 INTERPRETER: Yes, sir.

21 THE COURT: Mr. Anzaldo, you just heard your
22 lawyer, Mr. Duncan, tell me that he has explained to
23 you the charges contained in these two indictments,
24 the possible punishments and your rights, including
25 your constitutional right to a jury trial and that

1 you understand these things; is that correct?

2 **INTERPRETER:** Yes.

3 **THE COURT:** So you understand these things?

4 **INTERPRETER:** Yes.

5 **THE COURT:** Now, Mr. Anzaldo, you're first
6 before me on indictment number 2008-507, the State
7 of South Carolina of versus Jose Anzaldo. This is
8 an indictment for criminal sexual conduct with a
9 minor in the second degree. Do you understand this
10 charge, sir?

11 **INTERPRETER:** Yes.

12 **THE COURT:** This indictment, Mr. Anzaldo,
13 alleges or says that you did here in Saluda County
14 between January 1st, 2004 and March the 7th of 2005,
15 engage in a sexual battery with a minor, I think,
16 it's Minor1 Anzaldo, by inserting your fingers
17 and/or penis into her vagina or rectum and that
18 Minor1 was between 14 years of age or less, but who
19 was at least 11 years of age and you were older than
20 your daughter.

21 Do you understand this allegation? Do you
22 understand what I just said to you?

23 **INTERPRETER:** Yes.

24 **THE COURT:** And this is what you want to plead
25 guilty to; is that correct?

1 **INTERPRETER:** Yes.

2 **THE COURT:** Do you realize that by pleading
3 guilty to this charge, Mr. Anzaldo, that you could
4 go to jail for 20 years?

5 **INTERPRETER:** Yes.

6 **THE COURT:** Knowing that, Mr. Anzaldo, that you
7 can go to jail for 20 years, do you still want to
8 plead guilty?

9 **INTERPRETER:** Yes, that's right.

10 **THE COURT:** Next, Mr. Anzaldo, I have before me
11 indictment number 2008-508, once again, the State
12 versus Jose Anzaldo. And this is an indictment for
13 criminal sexual conduct in the first degree. Do you
14 understand this charge, sir?

15 **INTERPRETER:** Yes.

16 **THE COURT:** This indictment, Mr. Anzaldo, says
17 that you did here in Saluda County between November
18 the 24th, 2004 and November the 24th of 2005, engage
19 in a sexual battery. This was on or with Minor2
20 Minor2 , that you penetrated her vagina and/or
21 rectum and that Minor2 was less than 11 years of
22 age. Do you understand this allegation,
23 Mr. Anzaldo?

24 **INTERPRETER:** Yes.

25 **THE COURT:** And this is what you want to plead

1 guilty to; is that correct?

2 INTERPRETER: That's right.

3 THE COURT: You realize that by pleading guilty
4 to this charge, Mr. Anzaldo, that you could go to
5 jail for 30 years; you understand that?

6 INTERPRETER: Yes.

7 THE COURT: Knowing then, Mr. Anzaldo, that you
8 could go to jail for 30 years by pleading guilty to
9 criminal sexual conduct in the first degree, do you
10 still want to plead guilty to it?

11 INTERPRETER: Yes, sir.

12 THE COURT: Mr. Anzaldo, are you currently on
13 probation or parole for any prior offenses?

14 INTERPRETER: No.

15 THE COURT: Mr. Anzaldo, I can add up the two
16 sentences on these two indictments. If I did so,
17 you're looking at 50 years in jail; do you
18 understand that, sir?

19 INTERPRETER: Yes.

20 THE COURT: Knowing that, you still wish to
21 continue to plead guilty; is that correct?

22 INTERPRETER: Yes.

23 THE COURT: Mr. Anzaldo, when you plead guilty
24 you have to give up certain basic rights. First,
25 your right to remain silent and say nothing at all;

1 do you understand this right, sir?

2 INTERPRETER: Yes.

3 THE COURT: You want to waive or give this
4 right up and plead guilty; is that correct?

5 INTERPRETER: That's correct.

6 THE COURT: Also, Mr. Anzaldo, when you plead
7 guilty, you have to give up your right to a jury
8 trial. Now, do you know and understand what a jury
9 trial is?

10 INTERPRETER: Yes.

11 THE COURT: Do you want a jury trial?

12 INTERPRETER: No.

13 THE COURT: Mr. Anzaldo, has anyone threatened
14 you in any way in order to get you to plead guilty?

15 INTERPRETER: No.

16 THE COURT: And, Solicitor, plea negotiations
17 to ten years concurrent on both charges; is that
18 correct?

19 MR. YOUNG: Yes, sir.

20 THE COURT: And, Mr. Duncan, you agree that
21 negotiations, of course, to the ten years concurrent
22 sentence?

23 MR. DUNCAN: Yes, sir.

24 THE COURT: Does that cover everything?

25 MR. DUNCAN: Yes, sir.

1 **THE COURT:** Do you still wish to continue to
2 plead guilty, Mr. Anzaldo?

3 **INTERPRETER:** Yes, sir.

4 **THE COURT:** Now, are you fully satisfied with
5 the services of your lawyer, Mr. Jack Duncan, here?

6 **INTERPRETER:** Yes.

7 **THE COURT:** Have you talked with him for as
8 long and for as often as you feel it necessary for
9 him to properly represent you?

10 **INTERPRETER:** Yes.

11 **THE COURT:** Have you understood your talks with
12 your lawyer, Mr. Duncan?

13 **INTERPRETER:** Yes.

14 **THE COURT:** Do you need to talk to him any
15 further?

16 **INTERPRETER:** No.

17 **THE COURT:** Has he done everything for you, Mr.
18 Anzaldo -- Mr. Duncan that is, that you feel he
19 should do or could do in helping you?

20 **INTERPRETER:** Yes.

21 **THE COURT:** Has he done anything you feel he
22 shouldn't have done or anything that would hurt you?

23 **INTERPRETER:** No.

24 **THE COURT:** Are you completely satisfied with
25 his services?

1 **INTERPRETER:** Yes.

2 **THE COURT:** Do you have any complaints,
3 Mr. Anzaldo, against anyone at the Saluda County
4 Sheriff's Office?

5 **INTERPRETER:** No.

6 **THE COURT:** Do you have any complaints against
7 anyone prosecuting you at the Solicitor's office?

8 **INTERPRETER:** No.

9 **THE COURT:** Are you right now under the
10 influence of any intoxicating liquors or drugs?

11 **INTERPRETER:** No.

12 **THE COURT:** Are you pleading guilty of your own
13 free will and accord?

14 **INTERPRETER:** That's correct.

15 **THE COURT:** And, once again, you're pleading
16 guilty to indictment 2008-507, criminal sexual
17 conduct with a minor in the second degree, because
18 you did here in Saluda County between January the
19 1st, 2004 and March the 7th, 2005, commit a sexual
20 battery on Minor 1 Anzaldo. You are pleading guilty
21 because you actually did this; is that correct?

22 **INTERPRETER:** Yes.

23 **THE COURT:** And, once again, Mr. Anzaldo, in
24 connection with indictment 2008-508, this is the
25 indictment for criminal sexual conduct with a minor

1 in the first degree, and you're telling me, once
2 again, you're pleading guilty because you did, in
3 fact, here in Saluda County between November 24th,
4 2004 and November the 25th, 2005, engage in a sexual
5 battery on or with Minor2

6 **INTERPRETER:** Yes.

7 **THE COURT:** You are pleading guilty to both of
8 these charges because you are guilty of both of
9 these charges?

10 **INTERPRETER:** That's correct.

11 **THE COURT:** Solicitor, I'll be happy to hear
12 from you.

13 **MR. YOUNG:** Thank you, Your Honor.

14 On the dates and times alleged, Your Honor, the
15 two children of Jose Anzaldo, Minor1 Anzaldo and
16 Minor2 were assaulted by him at various
17 times over a course of years. He used his fingers
18 to actually penetrate the girls. And he also
19 touched their bodies, kissed -- made some one -- in
20 one or more cases, kissed the breast of Minor1 and
21 even gave her money if she would pull down her pants
22 and expose herself. Minor1 indicated this began
23 when she was nine or ten years old. And she is the
24 older of the two girls.

25 Again, Your Honor, I am making these

1 recommendations at the request of the victim.

2 THE COURT: Do you understand all of these
3 things and do you agree with what the Solicitor just
4 told me, Mr. Anzaldo?

5 INTERPRETER: May I speak with my attorney for
6 a second?

7 THE COURT: Sure.

8 (Pause.)

9 THE COURT: Is there a problem we need to
10 resolve?

11 INTERPRETER: No. You can continue, please.

12 THE COURT: Very well, Mr. Anzaldo. I find
13 that there's a substantial, factual basis for your
14 plea. I further find your decision to plead guilty
15 to be free, voluntarily, knowingly and intelligently
16 made. That you had the advice of competent counsel,
17 Mr. Duncan here, whom you indicate to me you're
18 completely satisfied with. Therefore, I will accept
19 your plea, sir.

20 Mr. Duncan, I'll be happy to hear from you,
21 sir.

22 MR. DUNCAN: Your Honor, very briefly, the
23 defendant is 41. He was a long distance truck
24 driver. No prior record. I would ask Your Honor to
25 go along with the recommendation. We have

1 cooperated fully with his wife as far as signing the
2 paperwork for her with her immigration attorney.

3 THE COURT: Is there anything you want to tell
4 me, Mr. Anzaldo?

5 INTERPRETER: No.

6 THE COURT: Very well, sir.

7 On indictments number 2008-508 and 507, the
8 sentence of the Court, that you, Jose Anzaldo, be
9 committed to the South Carolina Department of
10 Corrections for ten years. That's on both
11 indictments, the sentences to run together
12 concurrently. Do you understand your sentence,
13 Mr. Anzaldo?

14 INTERPRETER: Yes.

15 THE COURT: How long have you been in jail,
16 Mr. Anzaldo?

17 INTERPRETER: A year or ten months.

18 THE COURT: Mr. Duncan?

19 MR. DUNCAN: I'm sorry, Your Honor, July 21st,
20 2008.

21 THE COURT: You will get credit for time
22 served, Mr. Anzaldo, that will be deducted from the
23 ten years; do you understand, sir?

24 INTERPRETER: Yes.

25 THE COURT: Good luck to you, Mr. Anzaldo.

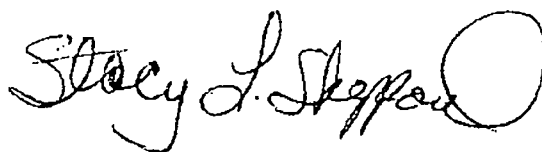
C E R T I F I C A T E

STATE OF SOUTH CAROLINA
COUNTY OF SALUDA

I, the undersigned, Stacy L. Sheppard, Circuit Court Reporter for the Eleventh Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete transcript of record of all the proceedings had and the evidence introduced in the guilty plea of the captioned cause, relative to appeal in the Criminal Court for Saluda County, South Carolina, on the 7th of April, 2009.

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

April 28, 2010



Stacy L. Sheppard, RPR
Circuit Court Reporter

FORM 5

STATE OF SOUTH CAROLINA)

COUNTY OF Saluda)Jose Antonio Anzaldo 334118)
Full name and prison number (if any) of Applicant.)

v.)

State of South Carolina)

IN THE COURT OF COMMON PLEAS

2010-CP-41-33

APPLICATION FOR

POST-CONVICTION RELIEF

2010 FEB 17 PM 4:26

FILED

INSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention Kershaw Correctional Institution
4848 Goldmine Hwy
Kershaw S.C 29067
2. Name and location of Court which imposed sentence 11th Judicial Court
3. Name(s) of co-defendant(s) (if any) None
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) 2008-GS-41-507
 - (b) 2008-GS-41-508
 - (c) _____
5. The date upon which sentence was imposed and the terms of the sentence:
 - (a) April 9th 2009 4/7/09
 - (b) 10 year Sentence

- (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. _____ N/A
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. _____
- ii. _____ N/A
- iii. _____
- (c) the date of each such result:
- i. _____
- ii. _____ N/A
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. _____
- ii. _____ N/A
- iii. _____
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) Attorney fail to let me know I could appeal
- (b) _____
- (c) _____
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully: "See Attached Pages 1 of 2 and 2 of 2"

- (a) Counsel failed to adequately investigate my case
- (b) Counsel failed to motion for a pre-trial Conference
- (c) Subject matter Jurisdiction on indictments failure to put me on notice.

11. State concisely and in the same order the facts which support each of the grounds set out in (10): "See attached pages 1 of 2 and 2 of 2"

- (a) Had Counsel investigated to prepare for a defense and challenge
- (b) the sufficiency of the chain of custody and evidence against me
- (c) and informed me of the essential elements of the crime of
1st and 2nd Criminal Sexual Conduct w/A minor I would not have.

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

- (a) any petition in a State Court under South Carolina Law? N/A
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? N/A
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? N/A
- (d) any other petitions, motions or applications in this or any other Court? N/A

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

(a) the specific nature thereof:

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

N/A

(b) the name and location of the Court in which each was filed:

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

N/A

(c) the disposition thereof:

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

N/A

iv. N/A

(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?

N/A

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) _____

(b) _____

(c) _____

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

- (a) your arraignment and plea? ☒
- (b) your trial, if any? _____
- (c) your sentencing? ☒
- (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? _____
- (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? _____
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. _____ Mr. John Duncan Attorney at Law
137 East Butler Street, Suite 3
Lexington S.C. 29072
- ii. _____
- iii. _____
- (b) the proceedings at which each such attorney represented you:
- i. Sentencing
- ii. _____
- iii. _____
19. State clearly the relief you seek in filing this application: To have my sentence vacated due to prejudice and error of law as well as due process violation by counsel of my 5th 6th and 14th amendments.
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**

I, _____, 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.

Jose A Anzaldo

Applicant

SWORN or affirmed to and subscribed before me this
12 day of February, 2016.

Carlisle A. Arnesen

Notary Public

My Commission Expires December 29, 2019

My Commission Expires: _____

STATE OF SOUTH CAROLINA)

County of)

VERIFICATION

I, _____, 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.

Jose A Anzaldo

SWORN to and subscribed before me this 12
day of February, 2016.

Caroline A. Correa (L.S.)
Notary Public

My Commission Expires December 22, 2019
My Commission Expires: _____

"Ineffective Assistance of Counsel" Strickland v. Washington

Pled guilty, but insisted on going to trial, Counsel never went over the chain of custody with me nor did he inform me of the requirements of the individuals having possession / custody of the evidence that is required by South Carolina Criminal Rules of Court (Rule) (6)(B), nor did Counsel ever show / go over the Brady discovery documents of any and all of the alleged evidence that was against me, further more Counsel's failure to inform me of any of the applicable laws / Rules of the State of South Carolina as well as any chances I had at trial made me and my guilty plea unknowingly and unintelligently because of Counsel's performance I was not fully aware nor did I have a full understanding of any and all of the evidence as well as chances that I may have had if I would have gone to trial. Had Counsel challenged the sufficiency of the chain of custody / evidence there is a reasonable probability that I would not have pled guilty but insisted on going to trial, Counsel failure to investigate and inform me of my due process right to have a pre-trial conference to challenge the evidence against me violated my 5th, 6th and 14th amendments due process rights of the S.C. Const. and the U.S. Const.

Ineffective Assistance of Counsel:

(#1)

- A) Failed to investigate
- B) Failed to review discovery
- C) Failed to "motion for a pre-trial conference"
- D) Failed to challenge chain of custody
- E) Failed to inform of the essential elements of the Crime

(#2)

Subject matter Jurisdiction

- Indictment and information without valid indictment district Court is without jurisdiction over Criminal proceeding
FED. Rules CR. Proc. Rule 7(A), 18 U.S.C. A. Const. Amend. 5 and under § 5. C Code of law (17 title). Also see 503 F. 2d 193 (1975) For example, in United States v. Maklin, Supra, where the term of the grand jury had expired and the indictment returned by it was legally null and void, Absent an indictment, also see 339 S.E. 2d 127, Requirement true billed. Also see where as in defendant case he was not indicted within 90 days time limit by law, where as here in vein, 504 F 2d at 1177. An indictment returned by grand jury sitting beyond its legally authorized time is a "nullity" and see U.S. v. Smith 669 F. Supp 182 I can show where the Court Violated its own Rule (5) within itself Since I was not indicted within the 90 days, Rules under Rule 3(C) Administrative Law and Civil Procedure the Law is the Law (2)

and we must follow the law or evidence irrelevant to the issue or otherwise its not the law. in other words the defendant can not be guilty or legally convicted when the state has violated there own Rule(s). Rather its only law which simply makes the chief justice the administrative head of S.C. Courts with the power to make rules governing the practice and procedure in all such Courts. If the chief justice has the power from S.C. Court to make rules governing the practice and procedure in all Courts it is the Court duty to make sure my rights / case is conformity with those rules and procedures and laws. So therefore the defendant ask that his indictment be dismissed with prejudice since the state fail to follow the law.

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS
ELEVENTH JUDICIAL CIRCUIT

COUNTY OF SALUDA)

2010-CP-41-0033

Jose Antonio Anzaldo, #334118,
Applicant,)

v.)

RETURN

State of South Carolina,
Respondent.)CLERK OF COURT
SALUDA CO. S.C.

2010 MAY -4 PM 12:01

FILED

The Respondent, making its Return to the application for post conviction relief (PCR) filed February 17, 2010, would respectfully show this Court:

I.

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Saluda County Clerk of Court. The Applicant was indicted at the October 2008 term of the Saluda County Grand Jury for Criminal Sexual Conduct with a Minor—2nd Degree (2008-GS-41-0507) and Criminal Sexual Conduct with a Minor—1st Degree (2008-GS-41-0508). He was represented by John Duncan, Esquire. On or about April 7, 2009, the Applicant pled guilty as charged. He was sentenced by the Honorable L. Casey Manning to confinement for a period of ten (10) years. The Applicant did not appeal his guilty plea or sentence.

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

II.

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

1. Ineffective assistance of counsel;
 - a. "Attorney fail to let me know I could appeal."
 - b. "Counsel failed to adequately investigate my case."
 - c. "Counsel failed to motion for a pre-trial conference."
 - d. "Had counsel investigated to prepare for a defense and challenge the sufficiency of the chain of custody and evidence against me and informed me of the essential elements of the crime of 1st and 2nd criminal sexual conduct with a minor I would not have pled guilty, but insisted on going to trial."
 - e. "No did counsel ever show/go over the Brady discovery documents of any and all of the alleged evidence that was against me."
2. Involuntary Guilty Plea
 - a. "Furthermore Counsel's failure to inform me of any of the applicable laws/rules of the state of south Carolina as well as any chances I had at trial made me and my guilty plea unknowingly and unintelligently entered."
3. Subject matter jurisdiction: indictments failed to put Applicant on notice.

III.

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

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

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of plea counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland. Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

Respondent submits that the Applicant cannot satisfy either requirement of the Strickland test. Nevertheless, the allegation of ineffective assistance of counsel probably raises a question of fact which cannot be conclusively refuted by the record and, therefore, requires that an evidentiary hearing be held. Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983); Delaney v. State, 269 S.C. 555, 238 S.E.2d 679 (1977).

IV.

Here, in addition to making general allegations pertaining to Plea Counsel's performance, the Applicant also specifically claims that he was denied effective assistance of counsel because his attorney did not inform him of his right to appeal his guilty plea conviction. Absent extraordinary circumstances, there is no constitutional requirement that a defendant be informed of the right to a

direct appeal from a guilty plea. Jones v. State, 677 S.E.2d 20 (2009). Counsel has a constitutionally imposed duty to consult with the defendant about an appeal only when there is reason to think either: (1) that a rational defendant would want to appeal (for example, because there are non-frivolous grounds for appeal); or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing. Roe v. Flores-Ortega, 120 S.Ct. 1029 (2000). In making this determination, courts must take into account all the information counsel knew or should have known. Id. Although not determinative, a highly relevant factor in this inquiry will be whether the conviction follows a trial or a guilty plea, both because a guilty plea reduces the scope of potentially appealable issues and because such a plea may indicate that the defendant seeks an end to judicial proceedings. Id.

There being nothing in the record to indicate that the Applicant reasonably demonstrated to Counsel that he was interested in appealing, the State submits that the allegation is totally without merit and should be dismissed. Nevertheless, the allegation probably raises a question of fact which may not be conclusively refuted by the record and therefore requires that an evidentiary hearing be convened. Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

V.

Respondent submits that the Applicant's allegation that his guilty plea was involuntary is without merit. In PCR cases, a defendant asserting a constitutional violation must frame the issue as one of ineffective assistance of counsel. Al-Shabazz v. State, 338 S.C. 354, 527 S.E.2d 742 (1999). A defendant who pleads guilty on the advice of counsel may collaterally attack the plea only by showing that (1) counsel was ineffective and (2) there is a reasonable probability that but for counsel's errors, the defendant would not have pled guilty and would have insisted on going to trial.

Roscoe v. State, 345 S.C. 16, 546 S.E.2d 417 (2001). A defendant alleging that his guilty plea was induced by ineffective assistance of counsel must prove that counsel's advice was not "within the competence demanded of attorneys in criminal cases." Hill v. Lockhart, 474 U.S. 52, 56, 106 S. Ct. 366, 369 (1985). A guilty plea is a solemn, judicial admission of the truth of the charges against the defendant. Statements made during the plea should be considered conclusive unless the defendant presents reasons why he should be allowed to depart from the truth of those statements. Crawford v. U.S., 519 F.2d 347 (4th Cir. 1975); Edmonds v. Lewis, 546 F.2d 566 (4th Cir. 1976).

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

VI.

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

VII.

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

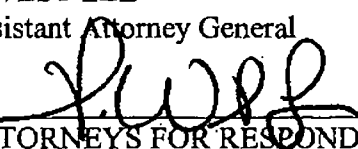
Respectfully submitted,

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May 3, 2010.

STATE OF SOUTH CAROLINA)

COUNTY OF SALUDA)

Jose Anzaldo #334118,)

Applicant,)

vs)

State of South Carolina,)

Respondent.)

IN THE COURT OF COMMON PLEAS

2010-CP-41-00033

PROOF OF SERVICE BY MAIL

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STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

Personally appeared before me, Lisa A. Suber, who being first duly sworn, states:

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

Alecia T. Compton, Esquire
212 Grace Street
Greenwood, South Carolina 29649

DATED this 3rd day of May, 2010

Lisa A. Suber
LISA A. SUBER

STATE OF SOUTH CAROLINA
COUNTY OF SALUDA

IN THE COURT OF COMMON PLEAS

JOSE ANTONIO ANZALDO,
APPLICANT,

10-DR-41-0033

-vs-

TRANSCRIPT

STATE OF SOUTH CAROLINA,
RESPONDENT.

AUGUST 31, 2011.
LEXINGTON, S. C.

BEFORE:

HONORABLE WILLIAM P. KEESLEY, JUDGE.

APPEARANCES:

STEPHEN D. GEOLY
Greenwood, S. C.
Attorney for Applicant.

KAELOE E. MAY
S. C. Attorney General's Office
Attorney for Respondent.

ALEJANDRO GARCIA, M.A.
Certified Spanish Interpreter.

RECORDED BY:
STACY L. SHEPPARD
COURT REPORTER.

TRANSCRIBED BY:
CAROLE R. SHEALY
COURT REPORTER.

1	I N D E X				
2	<u>WITNESSES</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RE CROSS</u>
3	FOR APPLICANT:				
4	1. Jose Anzaldo	6	20	28	
5	2. John E. Duncan	29	45	50	56
6	FOR THE STATE:				
7	(No witnesses were presented for the State)				
8					
9	<u>EXHIBITS</u>				
10	(No exhibits were introduced)				
11					
12	CLOSING ARGUMENTS:				
13	BY MR. GEOLY				57
14	BY MS. MAY				61
15	COURT'S RULING				63
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1 MS. MAY: May it please the Court, Your Honor, the
2 State would call Jose Antonio Anzaldo vs. the State of
3 South Carolina, case number 2010-CP-41-0033. This case
4 comes before the Court on a PCR application filed February
5 17th, 2010, by Jose Anzaldo. He came before the Honorable
6 Judge Manning on April 7th, 2009. He was charged with
7 criminal sexual conduct with a minor in the first degree,
8 criminal sexual conduct with a minor in the second degree.
9 He pled guilty as charged and was sentenced to 10 years on
10 each charge concurrent. There was no appeal, and Mr. Geoly
11 is present representing Mr. Anzaldo. And I believe there's
12 a need for an interpreter this morning.

13 MR. GEOLY: If it please the Court, Judge, just kind
14 of as a pretrial.

15 THE COURT: Before we get too far into this, I'm
16 nervous about us talking about all this, talking and him
17 not knowing what we're saying.

18 MR. GEOLY: Okay.

19 THE COURT: What's your name, sir?

20 MR. GARCIA: My name is Alejandro Garcia.

21 THE COURT: Spell it for the court reporter.

22 MR. GARCIA: A-L-E-J-A-N-D-R-O, last name Garcia,
23 G-A-R-C-I-A.

24 THE COURT: Raise your right hand.

25 (INTERPRETER WAS SWORN BY THE COURT.)

1 THE COURT: And are you on the list of qualified
2 interpreters for Court Administration?

3 MR. GARCIA: Yes, Your Honor.

4 THE COURT: Do you have any connection with this case
5 or anyone in it?

6 MR. GARCIA: No, Your Honor.

7 THE COURT: Have you talked with Mr. Anzaldo?

8 MR. GARCIA: I've been interpreting for Mr. Alzaldo
9 since a few minutes ago.

10 THE COURT: What language does he speak?

11 MR. GARCIA: Spanish.

12 THE COURT: And how were you trained to speak Spanish
13 or how did you learn to speak Spanish?

14 MR. GARCIA: I was born in South America.

15 THE COURT: You were born in Colombia, South America?

16 MR. GARCIA: Yes, sir.

17 THE COURT: Is there any dialect issue or any
18 difficulty that seems to be apparent between you all
19 understanding each other?

20 MR. GARCIA: No, Your Honor.

21 THE COURT: Do you swear or affirm that you will
22 translate verbatim Spanish to English and English to
23 Spanish so that the applicant will know what we are saying
24 and we will know what he is saying?

25 MR. GARCIA: Yes, I do.

1 THE COURT: Thank you. Any other issues related to
2 the interpreter?

3 MR. GEOLY: If it please the Court, Judge, that's what
4 I was going into was, before the hearing, that it came to
5 my attention -- Your Honor, I'm remiss that I didn't
6 realize that it is my responsibility as the petitioner to
7 arrange for the interpreter. Your Honor, my client's
8 indigent; he's been incarcerated since 2009. And I'm not
9 sure of the proper procedure but would ask that you
10 basically appoint, or whatever mechanism you have,
11 Alejandro Garcia -- it is my understanding that he is on
12 the approved list, Judge -- that you appoint him so that he
13 can be compensated for his services today.

14 THE COURT: I think he just submits one of those forms
15 to Court Administration and I sign it.

16 MR. GARCIA: Yes, sir.

17 MR. GEOLY: Thank you, Judge.

18 THE COURT: The interpreter is recognized as an expert
19 in the translation of English to Spanish and Spanish to
20 English. He's on the register with Court Administration,
21 and he's qualified to interpret. All right. Make sure you
22 interpret everything verbatim, and let me know if you need
23 to stop.

24 MR. GARCIA: Yes, Your Honor.

25 THE COURT: Okay. Mr. Geoly?

1 MR. GEOLY: If it please the Court, Your Honor, I'd
2 call my client, Jose Antonio Anzaldo.

3 THE COURT: Have him come up here, please.

4 JOSE ANTONIO ANZALDO,

5 HAVING BEEN DULY SWORN, TESTIFIED AS FOLLOWS

6 AS INTERPRETED BY ALEJANDRO GARCIA:

7 THE CLERK: Have a seat and state your full name for
8 the record.

9 MR. GARCIA: My name is Jose Anzaldo.

10 DIRECT EXAMINATION

11 BY MR. GEOLY:

12 Q Jose, are you an American citizen?

13 A Yes, sir.

14 Q When did you become an American citizen?

15 A Around 14 years ago.

16 Q And are you married?

17 A Yes.

18 Q How long have you been married?

19 A For about 24 years.

20 Q Okay. And you and your wife are still married?

21 A Yes.

22 Q How many children do you have together?

23 A Four.

24 Q Okay. And do you understand we're here today upon
25 your application?

1 A That's it.

2 Q And you do understand what we're asking the Judge to
3 do is to grant post-conviction relief which would undo the
4 10-year sentence you have and, if he were to do that, you
5 would go back and be looking at 50 years in prison?

6 A Yes, that's it.

7 Q Do you understand that?

8 A Yes.

9 Q Who was your attorney in this matter?

10 A Mr. Duncan.

11 Q Did you hire him?

12 A Yes.

13 Q When you hired him, were you already incarcerated?

14 A Yes.

15 Q Did you commit the crimes that you pled guilty to?

16 A No.

17 Q Did Mr. Jack Duncan come visit you at the jail?

18 A In two opportunities.

19 Q Two times?

20 A Yes.

21 Q How long were you his client?

22 A I don't remember exactly, 2 months, 2 or 3 months.

23 Q Okay. And, during those 2 or 3 months, he made two
24 visits. How long did he stay when he came to visit you?

25 A He asked for a couple of questions, and I gave my

1 answer to those questions.

2 Q Five or 10 minutes would be fair to say?

3 A Five would be better.

4 Q Okay. So about 5 minutes each visit?

5 A More or less.

6 Q Do you feel like he investigated your case?

7 A It's not that I feel that he didn't investigate it. I
8 know he didn't.

9 Q Did he ever ask you were you guilty?

10 MR. GARCIA: The interpreter needs repetition.

11 Q Did he ever ask you if you were guilty?

12 A No.

13 Q He never asked you if you did this?

14 A No.

15 Q Did you ever talk about why your daughters might have
16 accused you of this?

17 A He never gave me the opportunity. I wanted to explain
18 that to him, but he never gave me the opportunity.

19 Q So he never asked you were you guilty or innocent?

20 A No.

21 Q Did he ever talk to you about how big your house was
22 or the arrangement of your house and whether or not this
23 could have happened with six people living in a mobile
24 home?

25 A No, never. He never asked me any --

1 MR. GARCIA: Scratch that.

2 A He never talked to me about that matter.

3 Q Did he ever go over the discovery information he
4 received from the Solicitor's office with you?

5 A No. I received the discovery later on or, in other
6 words, after the court date; and some other person had to
7 give me an explanation about those.

8 Q Did he ever talk to you about the fact that your
9 daughters were claiming that you took off their clothes
10 while they were asleep?

11 A Never.

12 Q Did he ever tell you that your daughter was accusing
13 you of taking your fingers and putting them in her vagina
14 and in her butt?

15 A No.

16 Q Did you ever do that?

17 A No, sir.

18 Q Did he ever ask you did you ever do that?

19 A No.

20 Q To your knowledge, did anybody for the State, the
21 Solicitor's office, ever have either of your daughters
22 examined by a medical professional?

23 A I was expecting them to do that because that was the
24 only way for me to show my innocence.

25 Q Did they ever to your knowledge?

1 A Not that I know of.

2 Q Did you ever talk to your lawyer about getting an
3 examination like that done?

4 A I never had the opportunity.

5 Q What do you mean you never had the opportunity?

6 A He didn't talk to me. He didn't give me the
7 opportunity to talk about it, to ask the question and ask
8 them to do so.

9 Q Well, how did it come that you pled to 10 years?

10 A When we went to the courthouse and we went to the
11 waiting room, he came in and he told me to sign here. So I
12 asked him, what's that. He told me, well, they want to
13 give you 10 years. And then I told him why, why, why
14 that's going to happen, what I'm going to serve for such a
15 long time, I never do anything.

16 Q Had you told him at that time that you didn't do this?

17 A That's it.

18 Q Did he ask you any questions at that point?

19 A He raised his voice and he said, or do you want
20 50 years.

21 Q Okay. So, in your mind, was that your choice, either
22 take this 10 years or you're getting 50 years?

23 A No. In my mind, I didn't have that. Can you ask me
24 that question again?

25 Q Well, tell me what you were thinking.

1 A Oh, well, I was thinking that he was going to
2 investigate the case and he was going to be able to get to
3 some conclusions or he was going to talk to me or he was
4 going to present me in front of a jury or something like
5 that.

6 Q Okay. Why didn't you insist that he do that?

7 A When he asked me right there if I wanted 50 years, I
8 said, no, that is too long. And then I told him, go and
9 fight because 10 years is still too much.

10 Q Did y'all ever, at that time, talk about the fact that
11 you had said that you didn't do it?

12 A No, only until I asked him, why I'm going to sign this
13 if I didn't do it.

14 Q Did you ever tell him that you had committed this
15 crime?

16 A No, he never talked about it.

17 Q But a few minutes later, you went into a courtroom
18 kind of like this one and told the Judge you had committed
19 that crime, didn't you?

20 A Yeah, that's it, but because he asked me, do you want
21 50 years. And I asked him, you should go and fight for it.
22 Then is when I realized that he wasn't really working for
23 me, he was more like working against me. So it's like,
24 okay, who's helping me here. So, when I went to the
25 courthouse, I answered to all the questions, yes, because

1 -- let me see if I can put this in different words -- it's
2 like I felt like there was like an invisible gun behind me,
3 on my back, telling me, say yes, say yes.

4 Q Did you feel like, at that point, your choices were
5 take 10 years or go to trial and get 50 years?

6 A At that moment, I thought that, if I didn't take the
7 10 years, I would be forced to take the 50 years.

8 Q Did he ever talk to you about the fact that you could
9 go to a jury trial and be found not guilty?

10 A He never talked to me. He never mentioned anything
11 about that.

12 Q Did he ever ask you if your oldest daughter was
13 sexually active to your knowledge?

14 A He never asked me anything.

15 Q Did he ever go to your house, to your knowledge, to
16 look at the setup of your house where these events
17 supposedly occurred?

18 A Not that I know of.

19 Q Okay. Were you and your daughter, your oldest
20 daughter, having problems at this time?

21 A No. Just me, my wife and me, we were having problems
22 with her.

23 Q What problems were you having?

24 A For example, she was trying, in two opportunities, to
25 find an excuse not to go to school. And, because I sent

1 her to school because there was no reason for her not to go
2 to school, she got mad. And, later, she asked once for
3 permission, both to me and my wife, to stay overnight for
4 two nights with a friend, a girlfriend; and we denied her
5 the permission, and she got mad. And we told her that, in
6 a different opportunity, she would be able to do it; and
7 then she responded that, once she turned 18 years old, she
8 would be able to do whatever she wanted to. So we told her
9 that there was no reason for her to get so extreme, that we
10 would be willing to take care of her as long as possible.

11 So she said that she was going to leave the house and that
12 you -- She said, and you will see what happens. She said
13 that to me and my wife. She said, you all know about this.

14 Q You said you have four children. Right?

15 A That's it.

16 Q They all live with you?

17 A Yes.

18 Q How big is your trailer?

19 A It's single trailer, three bedrooms.

20 Q Okay. So everyone's close together?

21 A That's it.

22 Q What time would you normally get home?

23 A Well, before I went to jail, I didn't really spend
24 much time there. I was going to Mexico; and I was just
25 staying just 1 or 2 days there.

1 Q Okay. What were the staying arrangements when you
2 were home? Who stayed in what bedroom?

3 A Me, meaning my wife and I, we gave them one bedroom
4 for the two boys and one bedroom for the two girls.

5 Q All right. Would the two girls always sleep in the
6 bedroom together?

7 A Yes; but, at the end, I realized that the youngest
8 daughter was sleeping in the living room.

9 Q Why was she sleeping in the living room?

10 A I don't really know exactly; but, after a while, I
11 asked her in front of my wife and my other children, why
12 are you staying overnight there. And, at that point, she
13 didn't tell me anything; but, after a few days, she told me
14 that her sister was paying her to stay in the living room
15 overnight.

16 Q Do you have any idea why she was paying her to stay in
17 the living room overnight?

18 A That's what I was trying to investigate. I was trying
19 to find out what's going on, so I talked to the oldest one.
20 And then I asked her, why are you doing that, why are you
21 paying her -- to the other one -- to sleep in the living
22 room. And there was no answer, no answer. And so I told
23 her not to do it again.

24 Q Did you ever catch her late at night alone in the
25 bedroom on the telephone?

1 A Yes. One opportunity when I got home, it was probably
2 11:00 p.m., probably midnight. I don't remember. So I
3 went to my wife's bedroom, and I heard something talking,
4 somebody talking. And then I went to my daughter's
5 bedroom, and I saw that the telephone light was on
6 underneath the blanket. And she pretended that she was
7 asleep. And, the following day, I asked her, what were you
8 doing there. And then she said nothing; she said nothing.
9 And the thing is she erased the calls that she make.

10 Q She erased the calls?

11 A Yes, that's it.

12 Q Did you ever feel like there was somebody maybe
13 sneaking in your house at night?

14 A I was getting that idea because, at some point, both
15 my wife and I, we heard some noises. And one of those
16 opportunities, actually I went out to see what happened.
17 As a matter of fact, the dog barked. But I didn't see
18 anyone; I didn't see anyone there.

19 Q So you think some boy may have been sneaking in to see
20 your daughter?

21 A That was the impression that I had, but I was never
22 sure about it.

23 Q Is it fair to say that you were strict with your
24 daughter about not going off with boys?

25 A Yes, that is fair. I was strict; I was strict.

1 Q Did all this go on right before these accusations
2 came?

3 A Yes.

4 Q Did you ever talk to Mr. Duncan about all of this?

5 A I was waiting for that opportunity.

6 Q Did you ever do it?

7 A No.

8 Q Didn't you feel like this is information he should
9 have known?

10 A I was expecting him -- I was expecting him to ask me
11 some questions so I would be able to give to him all this
12 information.

13 Q Why didn't you insist upon telling him?

14 A Well, when he came to visit, he asked me if I had a
15 question; and I said, yes. I asked him then, how is my
16 case going. Then he told me, we'll talk about that later.
17 And, after that, he told me, do you have any other
18 questions. And I asked him, did you talk to a solicitor.
19 And then he told me, we will talk about that later. And
20 that's all that he said.

21 Q So what did you talk about when he came to meet with
22 you?

23 A Nothing really; only those two questions.

24 Q And you never told him about your concerns with your
25 daughter?

1 A That's what I was expecting. I was looking forward to
2 an opportunity to talk to him about it.

3 Q When is the first time you told him either, yes, you
4 did this or, no, you didn't do this?

5 A When he asked me to sign for the 10 years, I asked
6 him, why if I didn't do that.

7 Q And what did he say?

8 A That's when he told me, or you want 50 years.

9 Q Where were you born?

10 A In Mexico.

11 Q When you're charged with a crime where you come from,
12 do you expect justice? Do you get justice normally?

13 A Over there, things are very iffy because it's very
14 unjust.

15 Q Do you get a feeling sometimes you get what you pay
16 for?

17 A Yes, of course.

18 Q Did you pay Mr. Duncan a lot of money?

19 A No, not much money, just about \$1,500.

20 Q Okay. When he told you, sign this, did you feel like
21 that was your only option?

22 A He didn't give me any other option.

23 Q Since we've been here in front of the Judge right now
24 talking with the interpreter, have we talked longer now
25 than you did with your lawyer while he was representing

1 you?

2 A Like 20 [sic] or 3 times longer.

3 Q You understand you're asking the Judge to say that
4 your lawyer didn't do his job good and to grant you relief
5 for ineffective assistance of counsel. Do you understand
6 that?

7 A Yes.

8 Q Do you think your lawyer did a good job for you?

9 A No, no, no.

10 Q Do you feel like your lawyer worked for you?

11 A No, I feel like he worked against me.

12 Q You understand this Judge can't undo -- Well, he can
13 undo what was done, but he can't make it go away. If he
14 does that and if he granted what you want today, you would
15 leave this courtroom and go back to square one looking at
16 50 years in prison. Do you understand that?

17 A Yes.

18 Q Is that what you want?

19 A Yes, yes, I do.

20 Q Why?

21 A Because I want to demonstrate that I am innocent.

22 Q Did you ever touch your girls in an improper manner?

23 A Never.

24 Q Did you ever take off your girls' clothes while they
25 were asleep?

1 A Never.

2 Q Did you ever put your fingers in your daughter's
3 vagina or behind?

4 A Never.

5 Q At one point in your transcript when you're in front
6 of the Judge, you answer a lot of questions and say you're
7 guilty. You realize that. Right?

8 A Yes.

9 Q Was that the truth?

10 A Yes, but I did that because I didn't have any other
11 choice.

12 Q Was it the truth, that you were guilty?

13 A No, no.

14 Q Did you do these things they accused you of?

15 A No.

16 Q At one point, the State puts up what they say
17 happened. And you say, may I speak with my attorney for a
18 second, on page 13. Do you remember that?

19 A Yes.

20 Q And you told your attorney then you didn't want to do
21 this, didn't you?

22 A I told him that I wasn't happy to take that charge, to
23 accept that charge.

24 Q In fact, you had already told him that you didn't do
25 this. Correct?

1 A Yes.

2 MR. GEOLY: I have no further questions for this
3 witness.

4 Q Please answer any questions that Madame Attorney
5 General has.

6 MS. MAY: May it please the Court, Your Honor.

7 **CROSS-EXAMINATION**

8 **BY MS. MAY:**

9 Q Mr. Anzaldo, am I pronouncing that correctly? I
10 apologize if I mispronounce your name. Earlier, did you
11 testify about wanting to have an exam done on your
12 daughters or the existence of an exam?

13 A Yes.

14 Q Was there an exam conducted that you know of?

15 A Not that I know of.

16 Q Have you tried to procure an exam since your guilty
17 plea?

18 A No, I didn't try to get a paper, but I figured that
19 they were going to do that because somebody had to have
20 done that exam or prove that they have done the exam.

21 Q But you didn't -- You don't have that exam here today
22 if it exists?

23 A No.

24 Q In regards to the choice that you had to make between
25 pleading to 10 years and going to trial, do you acknowledge

1 that you did have a choice?

2 A No. Well, I didn't know I had a choice.

3 Q So, when you said that you could either plead to
4 10 years or go to trial and face 50, that's not a choice?

5 A No, because, if the attorney had told me that I was
6 able to go in front of a jury, I would have accepted that.

7 Q But you made the choice not to because --

8 MR. GEOLY: Objection, Your Honor. He just testified
9 that he didn't understand that he could have a jury trial.
10 I think he's testified he thought he could get 10 years or
11 50. He just answered a question saying he didn't
12 understand that he could go to a jury trial.

13 MS. MAY: I think he testified earlier --

14 THE COURT: Overruled. Go ahead.

15 BY MS. MAY:

16 Q Did you testify earlier that you were aware that you
17 could go to a jury trial but you could face 50 years?

18 A Yes.

19 Q And, during the times that you were having these
20 problems with your oldest daughter, was she 14 years old?

21 A Yes, possibly, yes.

22 Q And, when you would meet with Mr. Duncan for the
23 allegedly short amount of time that you testified to
24 earlier, why didn't you just tell him what you wanted to
25 tell him?

1 A Well, that's what I was looking for, but he didn't
2 give me the opportunity to do so.

3 Q So, after he asked you questions for 5 minutes, he
4 immediately left?

5 A Yes.

6 Q But you did testify that you had the opportunity to
7 ask him about the solicitor?

8 A Yes, I asked him that, yes.

9 Q And you did ask him how your case was going?

10 A Yes.

11 Q But you did not to tell him what you felt was
12 necessary to tell him?

13 A Well, he told me that we were going to talk later on.

14 Q So you didn't feel the need to push it forward because
15 it was so important to you?

16 A Well, I wanted that, but I really -- I didn't know how
17 the attorneys work. You know, this is the first
18 opportunity that I'm with an attorney; this is the first
19 time I'm in jail here. So I was kind of expecting for him
20 to do that.

21 Q So you didn't feel the need, when he didn't ask what
22 you expected him to ask, to tell him what you wanted to
23 tell him?

24 A I don't understand the question. Can you repeat that?

25 Q You were expecting certain questions for your attorney

1 to ask you. Correct?

2 A Yes.

3 Q And, when he didn't ask those questions, why didn't
4 you tell him what you wanted to tell him?

5 A That's the only thing he told me, and then he got up.
6 He said, again, do you have any other questions. And I was
7 like expecting for him to do something else. That's it.

8 Q So, after he asked you if you had any other questions,
9 you didn't ask any other questions?

10 A Well, no, because, when I asked him the questions, how
11 is my case going and if he had talked to the solicitor, in
12 other words, that means I have to know those answers in
13 order to follow up and tell him what I think about it.

14 Q Mr. Anzaldo, do you understand that you are sworn to
15 tell the truth today?

16 A Yes.

17 Q And, at your guilty plea, you were also sworn to tell
18 the truth to the Judge?

19 A Yes.

20 Q Did you tell the truth to the Judge at your guilty
21 plea?

22 A That's it.

23 Q Do you remember, at your plea hearing, telling the
24 Judge that your attorney explained the charges against you?

25 MR. GARCIA: Please repeat that question.

1 Q At your plea hearing, do you recall the Judge asking
2 you if your attorney had explained your charges, the
3 charges against you?

4 A I don't remember that, but I figured that he asked me
5 that.

6 Q If it's in the transcript, do you dispute it?

7 A If it's in the transcript, yes, of course, I would
8 dispute that because what I'm saying here is I didn't do
9 it.

10 Q The transcript is a recording of the guilty plea, what
11 was said; so the court reporter, she's writing down
12 everything that's being said, and that was under your
13 guilty plea hearing. So would you agree with me that the
14 transcript of your guilty plea hearing is a fair and
15 accurate representation of what transpired?

16 A Well, if we're only talking about papers here, I
17 guess, yes. But all those questions that are answered, I
18 didn't answer those entirely, you know.

19 MS. MAY: Your Honor, may I approach?

20 THE COURT: Yes.

21 BY MS. MAY:

22 Q I'm going to give you my copy of the transcript for
23 your review. Mr. Anzaldo, that's a copy of the transcript
24 of your guilty plea hearing. I'm going to ask you the same
25 question again. At the plea hearing, do you remember the

1 Judge asking you if your attorney explained the charges to
2 you? And you can refer to pages 5 and 6 if you don't
3 remember.

4 A Tell him that I don't remember anything. The only
5 thing I did is I just say, yes, yes, to everything.

6 Q Okay. So you weren't listening to what the Judge was
7 asking you?

8 A Well, I was nervous, you know. I was nervous and
9 things were happening like this. I was very nervous in
10 that case.

11 Q I mean, this was a big deal, big day for you.
12 Correct?

13 A Yes.

14 Q Wouldn't it be very important for you to listen to
15 what was going on during this?

16 A Yes, of course -- and I respect the judges and all
17 that -- but that doesn't mean that I answered the things.

18 Q At your plea hearing, the Judge read the charges and
19 the indictment for the criminal sexual conduct, second
20 degree charge. That's on page 6 if you'd like to refer to
21 it.

22 A Is that a question?

23 Q Do you recall him reciting to you the indictment, the
24 facts in the indictment?

25 A Yes, I do remember that.

1 Q And the Judge asked you if you understood those facts
2 in the indictment. Correct?

3 A Yes, yes, he asked me that, yes.

4 Q And you answered, yes, that you understood. Was that
5 the truth?

6 A Yes, yes, I answered that.

7 Q And he did -- The Judge did the same thing; he read
8 the facts in the indictment for the criminal sexual
9 conduct, first degree charge. Correct?

10 A Well, yes, yes. I don't remember. Probably. I don't
11 understand -- I didn't understand anything about first
12 degree, second degree or anything like that. At that time,
13 I didn't understand anything of this.

14 Q Okay. Then why did you tell the Judge that you did
15 understand?

16 A As I told you, at that point, I was very nervous and I
17 was like, okay, I'm supposed to be answering here, I feel
18 obligated to answer to all the questions here. At that
19 point, I realized that my attorney was not working with me
20 but against me, so I just answered the questions.

21 Q Okay. So you realized at the plea hearing that your
22 attorney was working against you?

23 A Yes. When he told me -- When he told me that, he --
24 like he was threatening me with 50 years.

25 Q Do you understand that 50 years is a potential

1 sentence that you could face?

2 A Now, I understand that.

3 Q Okay. So wouldn't you want to be aware of what the
4 maximum was you could face?

5 A I didn't understand. I felt like I didn't have any
6 other choice. It was either 10 or 50.

7 Q And do you remember the plea judge asking you if you
8 were satisfied with Mr. Duncan's services?

9 A Yes.

10 Q Okay. And you answered, yes. Correct?

11 A Yes, uh-huh.

12 Q If you weren't happy with how he represented you and
13 if he didn't investigate your case like you wanted him to,
14 then why did you tell the Judge you were happy?

15 A Because how do you want me to -- How do you want me to
16 do, like answer, no, in front of all these people. I would
17 feel like everyone is against me. And I went to jail, and
18 I wasn't able to communicate with anyone.

19 Q I understand, but why wouldn't you fight for what you
20 felt was right?

21 A For the very same reason. I thought that the attorney
22 was the person who was in charge of doing all the
23 investigation and not me, that he was going to help me, so
24 we were going to fight, you know.

25 Q So you felt that the plea hearing didn't really

1 concern your answers at all? It was more about the
2 attorney?

3 A Not necessarily. At that point, I didn't know
4 anything about those things.

5 MS. MAY: I have no further questions. Thank you.

6 THE COURT: Redirect?

7 MR. GEOLY: Very briefly, Judge.

8 **REDIRECT EXAMINATION**

9 **BY MR. GEOLY:**

10 Q You said that you understood that you either sign for
11 10 or you would get 50?

12 A That's it.

13 Q Did he ever talk to you about the fact that you might
14 have a chance to win at a jury trial and go home?

15 A No.

16 Q He never talked to you about whether the chances were,
17 he thought, were 50/50 or, no, they would probably convict
18 you, or anything along those lines about going to trial?

19 A No.

20 Q Did he ever ask you if you were innocent?

21 A No.

22 Q Did he ever ask you if you were guilty?

23 A No.

24 Q Did you do this?

25 A No.

1 MR. GEOLY: No further questions.

2 THE COURT: Recross?

3 MS. MAY: No questions, Your Honor.

4 THE COURT: Thank you. You may step down. Court's in
5 recess until 2:30 for lunch.

6 (Whereupon there was a luncheon recess.)

7 THE COURT: Call your next witness.

8 MR. GEOLY: Your Honor, it was my intention to call
9 Mr. Duncan. I don't think he's returned yet, Judge. Oh,
10 there he is. Your Honor, we'd call Jack Duncan to the
11 stand.

12 JOHN E. DUNCAN,

13 HAVING BEEN DULY SWORN, TESTIFIED AS FOLLOWS:

14 DIRECT EXAMINATION

15 BY MR. GEOLY:

16 Q Mr. Duncan, do you recall Mr. Anzaldo?

17 A Yes.

18 Q And you were here to hear him testify earlier?

19 A For 90 percent, yes.

20 Q Did you ever ask him whether or not he was guilty to
21 your recollection?

22 A I asked him one time, and he wouldn't answer me. And
23 there are certain clients that you just don't -- They --
24 You can tell they don't want to answer you. And so what I
25 do with them is I say, this is the evidence, this is what's

1 going to be presented, this is the testimony, this is my
2 investigation, you have choices, we can go to trial and
3 these are the options, this is what can happen, this is the
4 possible sentence, or I don't know if I can work out some
5 sort of plea deal or not but I can see what I can do, come
6 back to you and tell you what's available if we do do some
7 sort of plea agreement. And his response was, I want the
8 deal, I don't want to go to trial.

9 Q Okay. So you don't push him then. You're saying you
10 did ask him and he just didn't respond to whether he had
11 done this or not?

12 A That's correct. He never denied it, and he made a
13 comment in a -- He would go off on these long tangential
14 narratives, soliloquies, and would -- And he said that the
15 closest he ever came to it was he said his wife was not
16 having sex with him. And I didn't push him to confess to
17 me.

18 Q Okay. Did you ever go out and visit the residence,
19 the place this allegedly occurred?

20 A No, I did not; but I did speak to the witnesses, his
21 daughters.

22 Q Did his wife ever witness any of this activity?

23 A No.

24 Q I mean, it's pretty small confines from your
25 understanding, isn't it?

1 A Yes.

2 Q I mean, with six people living there, you'd almost
3 feel like somebody would have to see something going on,
4 wouldn't you?

5 A Well, there were certainly opportunities that were
6 there when no one was there but him and the children or the
7 child.

8 Q Okay.

9 A So I -- You can't prove a negative, so that rarely
10 works.

11 Q Did you ever go down the path with him of talking
12 about preparing for trial and what defenses he may have
13 available to him?

14 A In the sense that I said, this is what the testimony
15 is going to be, I have spoken to your daughters, I've
16 spoken to your ex-wife or your wife. She was pretty much
17 of a neutral witness; she was very subservient in the sense
18 of very deferential to him. The daughters, I told him,
19 would have been just devastating witnesses. They were
20 articulate; they were attractive; they were -- I mean, they
21 would have been some of the most effective witnesses for
22 the prosecution I'd ever seen.

23 Q Did you ever talk to him about why they would be
24 making this up if they were?

25 A I asked him, and he had no explanation. He never,

1 never said that this was some sort of pay back. He did --
2 In one of his ramblings, he did talk about the oldest child
3 talking on a cell phone and being rebellious; but I said,
4 she's 14, I mean, that's her job at that age. So it was
5 never anything --

6 Q And, now, actually, at the time that this came to
7 light -- The allegations are this happened when she was 14.
8 But, as this was coming to light, she is actually 16 or 17.
9 Right?

10 A And the -- Yeah. And, of course, it was alleged to
11 have happened over a 4-year period and --

12 Q So, if you're going from the -- You know, for a
13 second, if we entertain the idea that what he said a few
14 moments ago was true, that he didn't do this and she makes
15 this is up and gets her sibling to go along with her, we're
16 talking about a 16 or 17-year-old girl who's talking on
17 this phone to a boy, I mean, it starts to become a little
18 more feasible or understandable, doesn't it?

19 A To me, no.

20 Q Okay. Don't you think it would have been appropriate
21 to request a forensic exam in terms of had the younger
22 child ever been violated, did she have an intact hymen and
23 that type of thing?

24 A My understanding was that she had -- that she didn't
25 allege any sort of forceful penetration and that -- My

1 understanding of the science is that, after so many months
2 unless there is a severe tear, that there's no physical
3 evidence. And I didn't -- And you always run into the
4 circumstance that, any time you have a CSC case, the
5 prosecution is always going to have a witness who says that
6 there is evidence of sexual abuse, physical evidence, and,
7 therefore, it must have happened; or, if there's no
8 evidence, they say that's perfectly consistent with sexual
9 abuse also. I mean, they have it both ways.

10 Q Right. I understand what you're saying. But isn't
11 there a base kind of level test of hymen's intact or
12 hymen's not intact that can be performed?

13 A My understanding of the medicine is that only a severe
14 tear is going to show up 6 months to a year after the fact
15 and --

16 Q Now, a vagina tear is different though than a hymen.
17 being intact, isn't it? And not that you're a doctor
18 but --

19 A And I don't claim to be one, but that was my
20 understanding of the medicine at the time.

21 Q Okay. If you were going to gear this for trial,
22 wouldn't you think that would be something you would want
23 to know and have somebody from your side going, this is
24 intact or not intact, or obviously --

25 A Well -- And I -- You like to have all the evidence you

1 can, but I don't know how many judges would order an
2 11-year-old to be examined by a defense doctor in such a
3 personal way.

4 Q But isn't it strange to you that, not only is there
5 not a defense doctor, there's no prosecution doctor either,
6 is there?

7 A I did not find that unusual considering the
8 allegations.

9 Q You didn't consider it unusual that a criminal sexual
10 conduct, two different cases so you've got two subjects
11 that are alleging criminal sexual conduct as children, that
12 there's no examination done on either one? You didn't find
13 that curious?

14 A Well, no, because I represented him over like a
15 4-month period. I gave him his options. And preparing him
16 for trial, of course, is very different from preparing for
17 a plea. And he never said, I want a trial, never.

18 Q Do you feel like y'all had clear communication when
19 you would talk with him?

20 A No doubt.

21 Q Okay. So the idea that he told you he was not guilty
22 and that he didn't do this, that was news to you today?

23 A That's the first time I've ever heard him say that.

24 Q Okay. Do you -- How many times did you visit him at
25 the jail?

1 A I don't know. Ordinarily, you could check a jail
2 visitors roster; but Saluda's a little different in that
3 I -- The Sheriff's Department, for instance, if you want to
4 see somebody during a week of court and you're sitting in
5 the court, sitting in the attorney's room with everybody,
6 they'll bring him over. And so I recall talking to him
7 on the bench in the courtroom. I recall seeing him. I
8 would -- I had 5 or 6 clients in the Saluda Detention
9 Center at the time, and so I didn't have the run of the
10 place, but it was pretty close. They let me go back to the
11 cells. I would stand there at the door and speak to
12 clients.

13 Q Well, let me ask you about on the bench.

14 A Okay.

15 Q Was that the day of the plea you talked to him on the
16 bench?

17 A No, no, this was --

18 Q Oh, a different occasion.

19 A Yeah, this was --

20 Q Right?

21 A Right, exactly.

22 Q Okay. Do you remember -- He indicated you talked to
23 him two times at the jail. Is that possible?

24 A I think it was more, but I don't know.

25 Q Okay. He indicated it was probably just 5 minutes

1 each time.

2 A No.

3 Q Does that sound right?

4 A No, no, because it -- Just to explain the process to
5 him would take obviously much longer and giving him his
6 options as far as a trial or a plea, do you want me to work
7 something out. And he was very emphatic; he wanted me to
8 work something out because he did not want a trial.

9 Q Okay. How many times do you think the situation like
10 the courthouse bench -- Do you think it was just one other
11 time other than the plea or multiple times?

12 A I remember at least once. I don't -- That was two --

13 Q So, including the day of the plea, you have at least
14 two times at the jail and at least two times at the
15 courthouse?

16 A That's correct, yeah; and that was two and a half
17 years ago, so I --

18 Q He indicated that you said, sign up to 10 years, and
19 that, when you said that, he said, no, I didn't do it, why
20 would I do that, and you said, do you want to do 50 in a
21 raised voice. Do you recall anything like that?

22 A No, no, he never -- Today was the first time I've ever
23 heard him say, I did not do it.

24 Q Okay.

25 A It just didn't happen.

1 Q Do you remember mentioning 50 years to him that day?

2 A I probably did just --

3 Q Was that because he was balking at the ten?

4 A No, no. I -- Under the circumstances, I thought 10
5 was just an outstanding result; and I told him that, and he
6 seemed pleased that he wasn't going to be looking at
7 50 years. I told him, if he went to trial and his
8 daughters testified, that -- and he was found guilty which
9 I felt that he would be found guilty -- that 99 percent of
10 the judges would max him out.

11 Q Where did you talk to his daughters?

12 A It was at the magistrate's. They were at Judge Horn's
13 for some reason, and I don't --

14 Q At the preliminary hearing or something?

15 A It could have been. But I talked to them upstairs at
16 the judge's office, the magistrate judge's office at the
17 building next door.

18 Q Were you alone with them or was the solicitor there or
19 do you recall?

20 A No, the solicitor was not there, no.

21 Q Law enforcement or just you and them?

22 A No, just me and them.

23 Q And they indicated, yes, he did do this?

24 A No doubt, and they -- I just found them -- I found
25 them to be just very articulate and just --

1 Q And was their mother with them?

2 A She was there to begin with, and then she moved off to
3 the side.

4 Q And what was her take on it?

5 A She was upset that the father of these children and
6 her husband would have done such a thing and that she -- I
7 think it was guilt on her part that she didn't discover it
8 or stop it.

9 Q She didn't say she believed it though, did she?

10 A She -- Well, see, the reason why we got the 10 years
11 was we went to her and asked, you know, you realize what
12 would happen if we had a trial, that your daughters would
13 have to testify and the trauma that they might suffer from
14 that and that Jose was, you know, your husband was the
15 father of these children; and we said, 10 years as a
16 sentence would mean he would serve eight and a half, and do
17 you think that's sufficient punishment -- we were hoping,
18 of course, she would say, yes -- and then we said, as a
19 practical matter, he could be put in prison for what could
20 amount to a life sentence. And she said she did not want
21 that under any circumstance. And so I actually had her
22 write a letter in Spanish to the solicitor asking for the
23 10-year sentence.

24 Q Do you know if that letter indicated whether she
25 believed he was guilty or not?

1 A I don't remember that. She was reluctant to do
2 anything, saying that she did not want to not be supportive
3 of her daughters, that she believed her daughters, she
4 didn't know what to believe from Jose and she didn't want
5 to be seen as betraying her daughters.

6 Q She never came out and said that she believed he did
7 this at any point, did she?

8 A No.

9 Q And she was living in the household where this
10 allegedly occurred in these short quarters. Right?

11 A She did not know. She just said, I don't know.

12 Q Do you recall, on the day of the plea, any discontent
13 by Mr. Anzaldo about taking the deal?

14 A No. Now, Mr. Anzaldo had a habit of, if I made a
15 declarative statement such as, you drove your truck to this
16 location and at that location you did this, this and this
17 and then you followed up with this, he would shake his head
18 very negatively and say no, no, no, that's not what
19 happened. And I would say, what happened. And he'd say,
20 well, it was a car, not a truck. So he had little
21 nitpicking distinctions that he would make. And that's
22 when I figured out that he's just not going to admit it, he
23 doesn't -- he's embarrassed or he doesn't want to or -- You
24 know, I mean, that was my analysis of it. So I said, well,
25 what I have to do here is just tell him the evidence, tell

1 him what I think is going to be testified to and this is
2 what I think is going to happen, this is my -- and then you
3 make a decision as to whether or not you want to go to
4 trial or plead straight up or have me work out some kind
5 of -- the best possible deal. And, with 10 years and when
6 Frank Young indicated that was fine with him as long --
7 Since it was fine with the victim, I told him, you know,
8 this is just something we can't pass up under the
9 circumstances. And, he said, fine.

10 Q So it is your testimony then though that the first
11 time he said he did it to your knowledge to you was
12 standing in front of the Judge?

13 A True.

14 Q He'd never said it before that?

15 A No. He never denied it, but he never admitted it
16 either.

17 Q Okay. And do you recall the Court actually asking
18 you, on page 5 of the transcript, the Court asked, how does
19 Mr. Anzaldo indicate to you he wishes to plead, guilty or
20 not guilty. Do you remember how you answered?

21 A No, I mean I haven't --

22 Q I mean, typically, how would you answer that?

23 A Well, I'd say, yes, you know, he says so or that --

24 Q Or guilty. Right?

25 A Yeah.

1 Q And I just found it interesting that your response was
2 not guilty or not guilty of -- You say, I agree with his
3 decision to plead guilty, not that he had actually
4 indicated to you that he wished to plead guilty but just
5 that you agreed with his decision.

6 A I think that's a distinction without a difference, but
7 that's just my opinion.

8 Q Okay. Toward the end of the transcript then, I guess
9 as y'all were wrapping it up in front of Judge Manning,
10 when he asked the fundamental question, do you understand
11 all these things -- this is the Court -- and do you agree
12 with what the solicitor just told me, Mr. Anzaldo. He
13 says, may I speak with my attorney for a second. The Court
14 says, sure. Do you remember what happens then because then
15 there's a pause?

16 A I don't recall. I don't remember. Probably any --
17 Out of any 10 pleas I do, 2 or 3 people will have something
18 that they balk at for just, you know, just very
19 momentarily. And I don't remember --

20 Q You heard him testify earlier that, at that point, he
21 told you, I don't want to do this.

22 A No, that did not happen.

23 Q And then the Court asked, is there a problem that we
24 need to address. And then, no, you can continue, please.
25 Is that what you recall?

1 A I don't recall. I mean, if the transcript says it,
2 then it's true.

3 Q So it's your position you always had geared this for a
4 plea and never really prepared it for trial?

5 A That's true. There's a lot -- There's a lot more I
6 would have done.

7 Q That was going to be my next question. If you were
8 preparing it for trial, there's a lot of things you would
9 have done differently. Right?

10 A Certainly, and --

11 Q You would have visited the scene?

12 A Yeah. And, quite frankly, the choice of judges was a
13 factor also.

14 Q Yes, sir, I understand. But help me go down this
15 rather hole, if you will, of, if you had been preparing it
16 for trial, you would have gone to the scene.

17 A Sure.

18 Q You would have probably pushed him for an answer on,
19 did you do this or didn't you?

20 A I don't know that. I mean a lot of people just won't
21 admit it.

22 Q Okay. You would have probably -- Even though the
23 science maybe is iffy, wouldn't you have wanted some
24 medical report from their side or yours?

25 A Oh, certainly.

1 Q Okay. Did you talk to him about these things and
2 that, if there was going to be a chance of not going to
3 prison, these are things you needed to do and you needed
4 his help with?

5 A I told them that this is what would be presented as
6 far as the testimony against him; and I said; we can -- you
7 know, there are certain things I can do, cross-examination
8 of your daughters is probably the strongest tool that we
9 would have, but then there were other things, you know, we
10 could do some investigation into, you know -- Well, I
11 didn't really know what to say. His wife was not being
12 accusatory, and so I didn't want to do anything that would
13 push her into deciding that she needed to testify against
14 him and --

15 Q Did you ever get into the finding her on the phone
16 with him? You indicated there was some talk between y'all
17 at some point -- I'm not sure when -- about the fact she
18 was on the cellphone. Was that similar to the story he
19 related in court today about being on the phone late when
20 he came in or was that a different scenario?

21 A I don't remember exactly when it was, but he
22 complained about her being on the phone. And I said, she's
23 14, I mean, what's abnormal, what's wrong with that.

24 Q Okay.

25 A And he never -- He never answered me.

1 Q Well, if it was in the context of like he was
2 explaining earlier, that she had essentially kicked her
3 younger sister out of the bedroom to the living room and
4 was, you know, kind of deviously talking to him on the
5 telephone late at night -- He indicated his only
6 understanding for her to get out of the room was, that I
7 understood him to basically be putting forth, is that maybe
8 somebody was sneaking in to see her.

9 A I don't think that was a defense. That's not a
10 defense to what he was alleged to have done.

11 Q Well, but if he's being strict and not allowing that
12 type behavior and she's kind of --

13 A Well --

14 Q -- acting out in vengeance against that discipline, I
15 mean, that would have been motive for her to kind of get
16 her out of his -- get him out of her life for now, wouldn't
17 it?

18 A Well, the mother was not -- You know, she was not
19 someone that just left these kids home alone all the time
20 without any discipline. So, I mean, I found her to be, you
21 know, a caring, concerned parent. So I just didn't think
22 that was -- You know, she would have had just as much, I
23 think just as much motivation to say something about her
24 mother if all she wanted to do was sneak out with a boy.

25 Q Hearing him today, if he'd have told you these

1 things -- Apparently, he took the position earlier that you
2 never asked him and he kept expecting you to ask him. But,
3 if he would have told you these things and said, I'm not
4 guilty, would you have prepared this case for trial?

5 A Certainly.

6 Q Okay. And it's your position he just never said one
7 way or another, never admitted guilt?

8 A He never admitted it, but he never denied it either.

9 Q Okay. Bear with me one second, please.

10 MR. GEOLY: Beg the Court's indulgence.

11 THE COURT: Yes, sir.

12 (Pause.)

13 MR. GEOLY: Your Honor, no further questions at this
14 time. Thank you, Mr. Duncan.

15 THE COURT: Any questions of the witness?

16 MS. MAY: May it please the Court, Your Honor.

17 **CROSS-EXAMINATION**

18 **BY MS. MAY:**

19 Q Mr. Duncan, during the plea, during the break that I
20 was referring to earlier I believe on page 13 when
21 Mr. Anzaldo asked if he could speak with you, if he had
22 indicated to you at that time that he didn't want to go
23 forward, would you have alerted the Court?

24 A Well, the first thing I would have said is, Judge,
25 we've got a problem, or I would have said -- No, I take

1 that back. I would have said something to the assistant
2 solicitor and then told the Judge, we can't go forward.

3 Q And Mr. Anzaldo, he did indicate to you that he did
4 not want to go to trial. Is that correct?

5 A That's correct.

6 Q And I believe you already said this, but you were
7 retained by Mr. Anzaldo in this case?

8 A Yes.

9 Q Just to go back generally, how long have you been
10 practicing?

11 A Thirty years.

12 Q And have you dealt with CSC cases before?

13 A Yes.

14 Q So you've had experience with legal issues surrounding
15 these types of --

16 A Yes --

17 Q Okay.

18 A -- hired experts.

19 Q And, when you met with Mr. Anzaldo, did you discuss
20 the charges against him and the facts alleged in each
21 charge?

22 A Certainly.

23 Q And he understood those discussions and that
24 conversation?

25 A He seemed to.

1 Q Did you file a discovery motion or was it the --

2 A Yes.

3 Q Okay. Do you recall what items you received in the
4 discovery materials?

5 A Incident reports, statements of -- statements of the
6 girls, his record or lack of a record. I think he might
7 have had a DUI 20 years ago in California or something;
8 but, I mean, it wasn't -- It wasn't any significant record.

9 Q And did you review all the discovery with Mr. Anzaldo?

10 A I sent him a copy, reviewed it. And I already knew
11 the allegations, so the written statement was just
12 repetition.

13 Q Did he provide you with the names of any witnesses,
14 maybe other family members who lived in the trailer that
15 would have testified or been beneficial to his case?

16 A No.

17 Q And did you discuss any possible defenses, or did he
18 provide you with enough information for you to --

19 A Well, the defenses would be, you didn't do it, and so
20 that's the defense.

21 Q And he never said that he didn't do it until today --

22 A. No.

23 Q -- I believe?

24 A No, he never denied it.

25 Q And you said that you entered into plea negotiations

1 on his behalf?

2 A Yes, with the victim and then the police and then the
3 solicitor. So, by the time I went to the solicitor, I
4 already had the law enforcement signed off, the victim
5 assistance person signed off and the victim signed off on
6 what the proposal was.

7 Q And you discussed all of the plea negotiations and all
8 of what you just explained with Mr. Anzaldo?

9 A Yes.

10 Q And, at that time, did he indicate that he still
11 possibly wanted to proceed to trial or was he ready, that
12 he wanted to plea?

13 A He never said he wanted a trial, never.

14 Q And whose decision ultimately was it to plead guilty?

15 A Oh, it was his.

16 MS. MAY: Beg the Court's indulgence Your Honor.

17 THE COURT: Yes, ma'am.

18 (Pause.)

19 BY MS. MAY:

20 Q Prior to Mr. Anzaldo stating that he just wanted you
21 to take a good deal, did you discuss with him in the event
22 that y'all did go to trial -- I know he never said that he
23 wanted one -- but just, I guess as a hypothetical, what
24 that would entail and the strength of that versus pleading
25 I guess?

1 A I told him my evaluation of the -- of his daughters,
2 and I told him what my evaluation was of a possible
3 sentence if he was convicted. You know, I did not tell him
4 that I thought he would make a terrible witness with his
5 roundabout rambling sort of manner of speaking, and I
6 said -- I did not tell him, you know, you would make a
7 terrible witness, but that was my evaluation.

8 Q So is it fair to say that Mr. Anzaldo, he -- You
9 didn't put any force or coercion on him to get him to plead
10 guilty?

11 A No.

12 Q But you did make him aware of the maximum potential
13 sentence that he could face going to trial?

14 A Yes.

15 Q And did you also -- Did you advise him that he could
16 be found not guilty, that that could happen?

17 A I don't specifically recall. I mean, it's possible, I
18 mean, probable that I --

19 Q You just kind of explained his right to a jury trial
20 and whatnot?

21 A I told him what my evaluation of a jury trial would be
22 and that I did not see that he had much chance of winning a
23 jury trial.

24 Q So, in your opinion and based on your experience
25 especially with defending CSC cases and working with those

1 types of cases, do you think this was a good decision for
2 him to plead and not go to trial?

3 A I thought the 10 years was outstanding.

4 MS. MAY: I have no further questions. Thank you.

5 THE COURT: Redirect?

6 MR. GEOLY: Just a couple Your Honor.

7 REDIRECT EXAMINATION

8 BY MR. GEOLY:

9 Q When he came to court that day, had he already been
10 advised, hey, you're coming to plea, or did he think he was
11 coming to court for a trial or did he just not know?

12 A I don't know.

13 Q Okay. Is it possible that you just finally got that
14 deal worked and -- Or let me back up and ask this. And
15 sometimes, in what we do, isn't it that it's a perfect
16 world when you can get the police and the solicitor and
17 your client and the victim on the same page?

18 A True.

19 Q And then the last hurdle is getting that judge to go
20 with it?

21 A Exactly.

22 Q And, sometimes in a case like this, if this had been
23 the accusations, there's some judges that might not have
24 gone along with 10 years?

25 A Exactly.

1 Q Is there a chance, with all that weighing in, that, if
2 he balked about the 10 years, that maybe without realizing
3 it, you know, kind of positionally (phonetic) and
4 circumstantially relative, that in his -- from his
5 perspective, you raised your voice and said, do you want
6 50. Could that have happened?

7 A I don't think so. I mean, it's a possibility, but I
8 don't think so. He --

9 Q I mean, you would have been wanting -- You mentioned
10 earlier the judge came into it, and I think this was Judge
11 Manning. Right?

12 A Right.

13 Q And this was probably a good judge, from what we do,
14 to get it in front of if you had this deal kind of set up
15 with everybody from the solicitor to law enforcement to the
16 victim. Right?

17 A With the solicitor, the specific law enforcement
18 officers, the victim assistance person, the victim all
19 agreeing, Judge Manning is going to trust, you know, the
20 collective judgment, so to speak, most of the time.

21 Q Now, could it be -- You've indicated earlier that the
22 first time he said he was guilty was when he was in front
23 of the Judge. He'd never before admitted it to you?

24 A That's correct.

25 Q He testified, he said today that he was like, wait,

1 why would I do this, I'm not guilty. And I realize you
2 testified a little differently. But it does appear in the
3 record that, after the recitation of the facts, he stops
4 things for a second. He's indicated today that's because
5 he, again, was -- you know, had qualms about the whole
6 thing and was essentially trusting your advice at that
7 point. He indicated that he was answering these questions
8 kind of in a robotic fashion, so to speak, like he had an
9 invisible gun to his head, that he needed to get through
10 this plea or else he was going to get 50 years. If you
11 could put yourself in the position of him kind of, English
12 not being his mother tongue, so to speak, his native
13 language, could it have been -- And you do speak some
14 Spanish. Right?

15 A That's correct.

16 Q But not fluent, or do you?

17 A That's correct.

18 Q Could it have been that, between him speaking some
19 English but not fluent and you speaking some Spanish but
20 not fluent, that there was a misfire there where he
21 believes he had expressed to you that he wasn't guilty
22 and you're thinking he's reserving and really indicative
23 of guilt but not wanting to acknowledge it? Is there
24 room for that possibility, Mr. Duncan, that he could have
25 denied and then felt pressured in that he truly didn't do

1 this?

2 A I don't know. I mean, I'm not a psychiatrist, but it
3 was very clear that culpable, guilty, was what he knew he
4 was pleading to. It was not ever any -- There was never
5 any mention of, you know, no culpable, that I'm not guilty,
6 never. And I don't think there's any room for any
7 misinterpretation there. As I recall -- Well, my usual
8 practice with the interpreter that is going to be used by
9 the Court that day is to go over the questions that the
10 Judge is going to ask; and virtually every time I sit there
11 and listen to the interpreter rehearse those questions.
12 And, in addition, I recall that my part-time interpreter, a
13 contract interpreter that worked with me, he was there also
14 and he spoke to Mr. Anzaldo that day. So there was never
15 any question that he understood what he was doing that day,
16 or at least there was never any question that he indicated
17 he understood everything.

18 Q Do you know Mr. Hunt that's in the courtroom today?

19 A Yes.

20 Q He was the interpreter that day. Right?

21 A Yes.

22 Q Did y'all -- You just indicated you rehearsed
23 questions. Did you rehearse the questions that day? Do
24 you recall?

25 A I don't specifically recall, but that's what I do with

1 him is we sit there and make certain that--- You know, the
2 majority of the time in Saluda, I have clients that are
3 from Guatemala or Mexico, and Spanish is not their first
4 language. And so we always have to be certain that a Mayan
5 language is not their first language and that they
6 understand Spanish. And so, you know, I'm listening to,
7 typically listening to Mr. Hunt go over the questions.
8 He's a very experienced interpreter; and he sits there and,
9 if there's a problem with the person not understanding
10 Spanish, he'll say so.

11 Q Okay. To be clear then, the questions we're talking
12 about are essentially, I'm guessing, the standard ones from
13 the bench about, do you understand your constitutional
14 right to a jury trial, do you understand you have the right
15 to remain silent. Are these the type questions y'all go
16 over?

17 A Yes, yes, exactly.

18 Q And y'all essentially go through a rehearsal so then
19 he knows that his expected answer to these is kind of to
20 recite, yes, yes, yes. Y'all practice that before you go
21 in front of the Judge. Right?

22 A Well, we don't practice in the sense that --

23 Q Well, I'm not trying to insinuate that you, in any
24 way, tell him how to answer a particular question. But my
25 point is --

1 A I don't want him to be surprised.

2 Q Right. But, when he's in front of the Judge, you
3 know, the Attorney General asked him questions about, well,
4 why did you answer this way. The fact of the matter is
5 5 minutes before this transcript was done or 10 minutes or
6 however -- you know, before that day, before that happened,
7 y'all have actually done a practice run where the defendant
8 essentially knows what's expected of him, and it's to
9 answer these questions in the affirmative. Is that fair to
10 say?

11 A Well, to answer the questions and -- Yeah, if he
12 balks -- If he says, whenever we ask the question -- You
13 know, I always, always ask, you know, say, the judge will
14 ask, are you, in fact, guilty. And if there was -- If
15 there had been a response, no, I am not guilty, then
16 everything comes to a complete halt.

17 Q And y'all would deal with that in the practice round
18 before it ever gets in front of the judge. Right?

19 A Certainly.

20 Q Okay.

21 MS. MAY: I don't have any further questions, Judge.
22 Thank you.

23 THE COURT: Any other questions of the witness?

24 MS. MAY: Just one question.

25

RECROSS-EXAMINATION

BY MS. MAY:

Q During your representation and before the guilty plea, before the guilty plea and during the guilty plea, did Mr. Anzaldo ever say to you, no, you're not understanding what I'm telling you --

A No.

Q -- or indicate that y'all were having a disconnect?

A No.

MS. MAY: No further questions.

THE COURT: Anything else from the witness?

MR. GEOLY: No, sir, Your Honor.

THE COURT: Thank you, sir. You may step down.

MR. GEOLY: Judge, in the interest of time, at the request of my client, I had Mr. Hunt come today. He was the interpreter. But, in my conversations with him, Judge, he does not recall any of the specifics of this either that would be considered to back Mr. Duncan's version or to back my client's. He just has no recollection of anything. I'd stipulate, if the Attorney General will, that he just doesn't recall any of the details of this. Being 2 years ago, he doesn't have any recollection. So I would offer that and stipulate to that. If Madame Attorney General thinks that's fit, we can save some time.

MS. MAY: I would just ask -- He can't state an

1 opinion either way if he doesn't remember anything.

2 MR. GEOLY: That's fine if you'll accept that, Judge.

3 THE COURT: I don't know. Do you have any other
4 witnesses?

5 MR. GEOLY: Judge, that will be it.

6 THE COURT: Does the State have any witnesses?

7 MS. MAY: No, Your Honor.

8 THE COURT: Do you all wish to argue?

9 MR. GEOLY: Judge, I guess I would.

10 THE COURT: Go ahead.

11 MR. GEOLY: Your Honor, this is a man who comes from a
12 different culture who, refreshingly enough these days, did
13 the right thing and obtained his citizenship over a decade
14 ago, 14 years ago, went through the proper channels and
15 became a citizen of this country. He has a home with his
16 wife of 24 years. He's got 4 children, a stable family
17 home environment. By his own admission, he's kind of
18 strict on them. You've heard testimony where, you know,
19 she would want to skip school or go stay with a friend and
20 he wouldn't allow it and say, in the future, they would be
21 allowed to do so, that he retains an attorney, Judge, who
22 he says came to meet with him 2 times at the jail with
23 about 5 minutes each visit. He says that he never was
24 asked, are you guilty or not. He admits that he never told
25 him that at the jail himself because he was never asked it.

1 He says that, when he's brought to the courthouse to plead,
2 he's given a sheet and told, sign up for 10 years; and he
3 asks, why, I didn't do this. He indicates, you know,
4 contrary to what Mr. Duncan is saying, that he indicated he
5 didn't do it and that Mr. Duncan raised his voice, he felt
6 intimidated, and he said, well, you're going to get 50 then
7 if you don't take this. You know, Your Honor, it comes
8 down to the classic tale my grandma taught me when I was
9 little, that there was three sides to every story, mine, my
10 sister's and the truth. But, with the additional factors
11 of you've got a language barrier, you've got a situation
12 where my client apparently, though not remembered, it's
13 obvious that he stops the colloquy with the Court and
14 there's a pause where he's indicated that he was saying, I
15 don't want to do this; he's saying that earlier he had said
16 he didn't want to do it. And he was facing 50 years. Your
17 Honor, it's a heck of a thing that he's asking for here
18 because, to hear Mr. Duncan tell it -- And I've advised him
19 and cautioned him, in fact, that you actually are asking
20 Judge Keesley to let you be facing the 50 years in prison.
21 He's asking the Court to do that. He's not wanting to
22 accept the benefit of the bargain he got which was a
23 10-year sentence. Your Honor, today this, in fact,
24 would -- And I may have actually confused him at one point,
25 and I went back and corrected it. But today this is such a

1 serious crime that what he would be facing, if charged
2 today for events that happened yesterday, he'd be facing
3 life in prison. What he was charged with was CSC with a
4 minor under 11 years old. That carries 25 to life for a
5 first offense. At the time, it carried up to 30; the other
6 charge carried up to 20. So he would be facing 50 years.
7 It's my fault that -- You know, another old adage that I
8 got from grandma was, be careful what you ask for, you just
9 might get it. This man is claiming it was a
10 misunderstanding and almost a feeling of intimidation that
11 led him to enter into the plea that he did. I think
12 there's some support for that in the record. I understand
13 it's maybe a semantics issue. And Mr. Duncan, you know,
14 appropriately said, well, that's kind of saying the same
15 thing. But it does just read funny when you read the
16 transcript. Beg the Court's indulgence.

17 (Pause.)

18 MR. GEOLY: I think it was on page 5. You know,
19 typically -- I've been in court many times, and you hear
20 the response be guilty or not guilty, how does Mr. Anzaldo
21 indicate he wishes to plead, guilty or not guilty. Almost
22 the automatic -- I can hear it in my head - guilty, Your
23 Honor. He doesn't say that; he says, I agree with his
24 decision to plead guilty. And, Your Honor, if you believe
25 the testimony of Mr. Duncan, to this point, he's never even

1 heard Mr. Anzaldo say he's guilty because he says the first
2 time he says it is at the plea. At this point, he hasn't
3 even said it yet; all he's done is signed the paper
4 indicating -- And, according to my client, when faced with
5 that paper, he said, why are we doing this. Judge, I feel
6 like we live, as much as you see stuff in the papers these
7 days, we live in the greatest country of the world because
8 of juries and gentlemen like yourself that -- We don't live
9 in a situation like Mexico where the justice is what you
10 pay for. It's open to all levels whether, you know, you're
11 an heir to the Kennedy or a Rockefeller kingdom or you're a
12 penniless pauper on the street. We all get a fair shake.
13 And here's a gentleman who doesn't feel like he understood.
14 The feeling he did have was one of, in his mind,
15 intimidation. And, Judge, I almost feel like what he's
16 asking for is so severe because I know the solicitors down
17 there -- I know it's your home circuit -- that they'll try
18 to give him 50 years, Judge, if this gets overturned and
19 he'll be facing these girls. And I've talked to him at
20 length about that; and he has indicated to me without
21 reservation, Mr. Geoly, that's I want because I didn't do
22 this, I did not do what my daughter said I did, the
23 attorney never helped me to prove that, he never worked
24 with me, when I would ask him about my case, he would say,
25 we'll talk about that later. He's been consistent with

1 that in my conversations with him. And it's a heck of a
2 paddle ride he's getting himself into to ask for this
3 relief knowing the trial he's going to get if you grant it.
4 And I'd ask, in this situation, that you err on the side of
5 caution and justice and, you know, be empathetic with, it's
6 my side, my sister's and the truth and give Mr. Anzaldo
7 just what he's asking for. And it goes back to, be careful
8 what you ask for, you just might get it. Your Honor, I'm
9 sure that, if you grant his relief, he'll be facing a trial
10 in the near future and he would get the opportunity to see
11 justice in the form of a trial where I think he certainly
12 would be facing more time than this if convicted or he
13 would have the benefit of an attorney to try to
14 cross-examine and get to the truth of the matter where, you
15 know, he says that he's innocent, and maybe that would come
16 out at trial. So I would ask that you grant his relief,
17 Your Honor.

18 THE COURT: Thank you. Does the State wish to make an
19 argument?

20 MS. MAY: May it please the Court, Your Honor,
21 Mr. Anzaldo, like his attorney said, obtained his
22 citizenship 14 years ago. He's been in this country for
23 numerous years; he's not new to this country. You know,
24 what he said, part of justice -- part of justice is having
25 various choices, multiple choices and not just one road.

1 He did -- He was aware of that. He made a choice, albeit
2 he might not -- either choice he might not have liked. He
3 had to make a decision, and he did. With regards to the
4 failure to investigate, the applicant provided nothing, no
5 evidence, as to what Mr. Duncan failed to investigate.
6 Nothing was submitted to the Court, no reports, no
7 evaluations, no testimony from any witnesses. And I would
8 heavily rely on the transcript. Judge Manning did an
9 outstanding job making sure, after almost every 2 or 3
10 questions, do you understand, do you understand what's
11 going on. Mr. Anzaldo never said, I don't believe during
12 his testimony, that there was any disconnect based on the
13 language barrier between him and Mr. Duncan. I don't think
14 that was ever an issue or even brought up. But the State
15 would heavily rely on the transcript in that Mr. Anzaldo
16 had an interpreter, there was an abundance of caution taken
17 by the Judge to ensure that he understood what he was
18 pleading to, the Judge read through the indictments, the
19 specific facts in the indictments; and he was given
20 multiple chances by the Judge, do you still wish to go
21 forward. And he indicated, yes. The State would submit
22 that the applicant has failed to prove that he was
23 insufficient or that there was any resulting prejudice that
24 he suffered.

25 THE COURT: Anything else?

1 MR. GEOLY: No, sir, Your Honor.

2 THE COURT: I've read the record; I've read the
3 transcript twice; I've reviewed everything in the file;
4 I've observed the witnesses as they testified; and I find
5 that the application for post-conviction relief is to be
6 denied. The Court does not find the testimony of the
7 applicant to be credible. The Court finds the testimony of
8 Mr. Duncan to be very credible. With regard to the
9 specifications in the post-conviction relief application,
10 there is an allegation that counsel failed to adequately
11 investigate the case. No evidence has been presented about
12 anything that could have been discovered that would be, in
13 any way, likely or even possible to change this outcome at
14 trial. The only thing that's been hinted is about the size
15 of the mobile home, but there's no indication put before
16 this Court as to when these things are alleged to have
17 occurred and who was present. There's been an utter
18 failure to prove anything about a failure to investigate
19 the case. The second allegation is that counsel failed to,
20 quote, motion for a pretrial conference. I don't know what
21 that means. I don't know what a pretrial conference would
22 have done to change this. The third specific allegation is
23 subject matter jurisdiction on indictments, failure to put
24 him on notice. There's been no evidence about failure to
25 put the defendant on -- the applicant on notice or any

1 deficiency with the indictment or any subject matter
2 jurisdiction issue. There's a lot of discussion in the
3 petition and in the attachment to it about a chain of
4 custody. I don't know what he's talking about there. I
5 don't know what evidence he claims to have been in a chain
6 of custody. It looks to me like he may have had somebody
7 help him prepare this at the prison and they just sort of
8 put everything down for the same -- everything down and
9 really don't do a whole lot of modifications. I don't know
10 if that's true or not. But he states he didn't know the
11 essential elements of the crime, but he admitted to Judge
12 Manning to the specific elements of the crime. There is a
13 mention earlier about a failure to let him know he could
14 appeal. I don't think that's been raised, but there's been
15 no evidence that would allow the Court to determine that
16 he's entitled to a belated appeal. I've read through this
17 attachment to his PCR application, and I don't find any
18 evidence to support these arguments. He's got failure to
19 investigate, failure to review discovery, failed to motion
20 for a pretrial conference, failure to challenge the chain
21 of custody, failure to inform him of the essential elements
22 of the crime. I think I've covered all of those, but
23 there's no evidence about any of that. Now, he went before
24 Judge Manning, and Judge Manning did do an excellent job of
25 conducting the plea; and very specifically, on page 11 of

1 the transcript, he asked the applicant if he was pleading
2 guilty of his own free will and accord, and he asked, you
3 are pleading because you actually did this, is that
4 correct. And then, on page, 12 he asked, you are pleading
5 guilty to both of these charges because you're guilty of
6 both of these charges. All of those questions were
7 answered by the applicant in the affirmative. The facts
8 that were recited were not long or convoluted; they were
9 short and to the point. The allegations in the indictments
10 were digital penetration of two minor children, females
11 whom he knows well. The solicitor's recitation was very
12 brief and asserted the same thing, that he assaulted these
13 two children over a course of years using his fingers to
14 actually penetrate the girl; one child indicated it started
15 when she was 9 or 10 years old, that being the older child.
16 So the motion is denied, I mean, the application is denied.
17 The Attorney General is directed to submit a proposed order
18 within 30 days. After the order is entered, if the
19 applicant wishes to file an appeal, he has a very limited
20 time in which to do so. It must be in writing, so he must
21 instruct his attorney, if he desires to appeal, to file the
22 appeal. Does he understand what I just said? Ask him if
23 he understands everything I just went over.

24 (APPLICANT RESPONDS TO COURT'S QUESTIONS BY WAY OF THE
25 INTERPRETER.)

1 MR. ANZALDO: Yes, I understand kind of.

2 THE COURT: Kind of?

3 MR. ANZALDO: I understand everything you said but --

4 THE COURT: Tell him I'm denying his motion, his
5 application for post-conviction relief, I'm ruling against
6 him, I don't believe him and, if he wants to appeal, he has
7 to do so in writing and he needs to tell his attorney to do
8 so promptly. Does he understand that?

9 MR. ANZALDO: Yes.

10 THE COURT: Thank you.

11 **WHEREUPON, HEARING CONCLUDED.**

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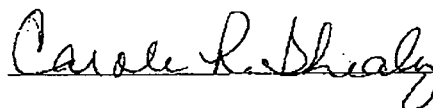
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C E R T I F I C A T E

I, the undersigned CAROLE R. SHEALY, Official Court Reporter for the Eleventh Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete transcript of record of all the proceedings had and evidence introduced in the trial of the captioned cause, relative to appeal, in the Court of Common Pleas for Saluda County, South Carolina, heard in Lexington, South Carolina, on the 31st day of August, 2011.

I do further certify that I am neither of kin, counsel or interest to any party.

December 31, 2012.



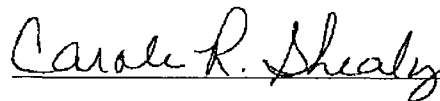
CAROLE R. SHEALY

C E R T I F I C A T E

I, the undersigned CAROLE R. SHEALY, Official Court Reporter for the Eleventh Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete transcript of record of all the proceedings had and evidence introduced in the trial of the captioned cause, relative to appeal, in the Court of Common Pleas for Saluda County, South Carolina, heard in Lexington, South Carolina, on the 31st day of August, 2011.

I do further certify that I am neither of kin, counsel or interest to any party.

January 16, 2013.



CAROLE R. SHEALY

WITNESSES

BYRD

SCSO

ARREST WARRANT NUMBER

J141354

ACTION OF GRAND JURY

William B. Rikard

Foreperson of Grand Jury

Date:

SEP 24 2008

VERDICT

TRUE BILL

Foreperson of Petit Jury

Date:

DOCKET NO. 2008-GS-41- 507

The State of South Carolina

County of SALUDA

COURT OF GENERAL SESSIONS

OCTOBER TERM 2008

THE STATE

vs.

JOSE ANTONIO ANZALDO

CDR# 0385

Indictment for

CRIMINAL SEXUAL CONDUCT WITH A
MINOR - 2ND DEGREE

DONALD V. MYERS, SOLICITOR

STATE OF SOUTH CAROLINA)

COUNTY OF SALUDA)

INDICTMENT FOR

CRIMINAL SEXUAL CONDUCT WITH A MINOR
- 2ND DEGREE

At a Court of General Sessions, convened on September 24, 2008 the Grand Jurors of Saluda County present upon their oath:

That Jose Antonio Anzaldo, DOB August 29, 1967 did in Saluda County between the dates of January 1, 2004 and March 7, 2005, unlawfully engage in sexual battery with a minor, to wit: the Defendant, Jose Antonio Anzaldo, DOB [redacted], penetrated the vagina, and/or rectum area of the victim, Minor [redacted], DOB [redacted], by insertion of his finger(a) and/or penis into vagina and/or rectum, the victim then being fourteen years of age or less but who was at least eleven years of age, and the defendant was older than the victim, in violation of Section 16-3-655(2) of the Code of Laws of South Carolina, 1976, as amended.

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


ASSISTANT SOLICITOR

103

WITNESSES

BYRD

SCSO

ARREST WARRANT NUMBER

J141355

ACTION OF GRAND JURY

Melvin B. Richard
Foreperson of Grand Jury

Date:

SEP 24 2008

VERDICT

TRUE BILL

Foreperson of Petit Jury

Date:

DOCKET NO. 2008-GS-41- 508

The State of South Carolina

County of SALUDA

COURT OF GENERAL SESSIONS

OCTOBER TERM 2008

THE STATE

vs.

JOSE ANTONIO ANZALDO

CDR# 0385

Indictment for

CRIMINAL SEXUAL CONDUCT WITH A
MINOR - 1ST DEGREE

DONALD V. MYERS, SOLICITOR

STATE OF SOUTH CAROLINA)
COUNTY OF SALUDA)

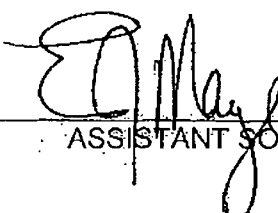
INDICTMENT FOR

CRIMINAL SEXUAL CONDUCT WITH A MINOR -
1ST DEGREE

At a Court of General Sessions, convened on September 24, 2008 the Grand Jurors of Saluda County present upon their oath:

That Jose Antonio Anzaldo, DOB [redacted] did in Saluda County between the dates of November 24, 2004 and November 24 2005 unlawfully engaged in a sexual battery, with a minor to wit: the defendant penetrated the vagina and/or rectum of the victim **Minor 2**, DOB [redacted] by insertion of his finger(s) into her vagina and/or rectum the victim then being less than eleven years of age, and the defendant being older than the victim, in violation of Section 16-3-655(1) of the 1976 South Carolina Code of Laws, as amended.

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


ASSISTANT SOLICITOR

STATE OF SOUTH CAROLINA)
COUNTY OF SALUDA)

IN THE COURT OF COMMON PLEAS
ELEVENTH JUDICIAL CIRCUIT

2010-CP-41-0033

Jose Antonio Anzaldo, #334118,
Applicant,

v.

State of South Carolina,
Respondent.

ORDER OF DISMISSAL

2012 JAN -3 PM 12:22
CLERK OF COURT
SALUDA CO. S.C.

FILED

WPC #1
This matter comes before the Court pursuant to an application for post-conviction relief (PCR) filed February 17, 2010. Respondent made its Return on May 3, 2010. An evidentiary hearing into the matter was convened on August 31, 2011, at the Lexington County Courthouse. The Applicant was present at the hearing and was represented by Stephen D. Geoly, Esquire. The Respondent was represented by Kaelon E. May of the South Carolina Attorney General's Office.

At the hearing, the Applicant testified on his own behalf. The State offered the testimony of John Duncan, Esquire (Mr. Duncan) Applicant's plea counsel. This Court also had before it the records of the Saluda County Clerk of Court, the transcript of the proceedings against the Applicant, and the Applicant's records from the South Carolina Department of Corrections.

I. PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Saluda County Clerk of Court. The Applicant was indicted at the October 2008 term of the Saluda County Grand Jury for Criminal Sexual Conduct with a Minor—2nd Degree (2008-GS-41-0507) and Criminal Sexual Conduct with a Minor—1st Degree

(2008-GS-41-0508). He was represented by John Duncan, Esquire. On or about April 7, 2009, the Applicant pled guilty as charged. He was sentenced by the Honorable L. Casey Manning to confinement for a period of ten (10) years. The Applicant did not appeal his guilty plea or sentence.

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

1. Ineffective assistance of counsel;
 - a. "Attorney fail to let me know I could appeal."
 - b. "Counsel failed to adequately investigate my case."
 - c. "Counsel failed to motion for a pre-trial conference."
 - d. "Had counsel investigated to prepare for a defense and challenge the sufficiency of the chain of custody and evidence against me and informed me of the essential elements of the crime of 1st and 2nd criminal sexual conduct with a minor I would not have pled guilty, but insisted on going to trial."
 - e. "No ~~and~~ counsel ever show/go over the Brady discovery documents of any and all of the alleged evidence that was against me."
2. Involuntary Guilty Plea
 - a. "Furthermore Counsel's failure to inform me of any of the applicable laws/rules of the state of south Carolina as well as any chances I had at trial made me and my guilty plea unknowingly and unintelligently entered."
3. Subject matter jurisdiction: indictments failed to put Applicant on notice.

WAL
#2

II. SUMMARY OF TESTIMONY AND EVIDENCE PRESENTED AT THE PCR EVIDENTIARY HEARING

Applicant's Testimony

At the PCR hearing Applicant testified that he became a US citizen fourteen (14) years ago, that he has been married for twenty-four (24) years, and that Applicant has four (4) children with his wife. Applicant testified that he retained Mr. Duncan when Applicant was already incarcerated, that counsel visited Applicant twice, that Applicant was counsel's client for about two (2) to three (3) months, and that the visits with counsel lasted five (5) minutes. Applicant testified that counsel did not investigate, that counsel never asked Applicant if he was guilty, and that counsel never asked Applicant why Applicant's daughters (victims) would have accused Applicant of the crimes. Applicant testified that counsel did not discuss the Applicant's family living situation, that counsel did not review discovery with the Applicant, and that Applicant did not have the opportunity to ask counsel about an exam on the victims. Applicant testified that he never told counsel about his living situation or the problems with the oldest victim. Applicant testified that he was able to plead guilty and receive a ten (10) year sentence, and that counsel only told Applicant to sign the sentencing sheet for the ten (10) year plea deal. Applicant testified that when he signed the sentencing sheet Applicant stated, "I didn't do it." Applicant testified that he believed that he had to take the ten (10) year deal or else Applicant would receive a fifty (50) year sentence.

Applicant testified that he thought counsel would have investigated Applicant's case and form some conclusions. Applicant testified that he did not discuss with counsel Applicant's actual innocence until the day of the plea hearing, but then told the plea judge Applicant did commit the crimes because Applicant did not want to get a fifty (50) year sentence. Applicant testified that

counsel never discussed a jury trial, the possibility of Applicant being innocent, and that counsel did not ask Applicant if the older victim was sexually active. Applicant testified that at the time of the alleged incidents, Applicant and his wife were having problems with the oldest victim because she would not go to school and that Applicant would not let her sleep over at a friend's house. Applicant testified that the oldest victim slept in a bedroom and that the younger victim was sleeping in the living room. Applicant testified that he never saw anyone that was coming over to his house to visit the oldest victim. Applicant testified that when counsel met with Applicant, Applicant asked how his case was going and that counsel said they would talk about that later. Applicant testified that he asked counsel if counsel had spoken with the solicitor and that counsel said they would talk about that later.

Mr. Duncan's Testimony

WAL
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At the PCR hearing, counsel testified that he asked the Applicant at least one (1) time if the Applicant was guilty and that the Applicant did not answer the question. Counsel testified that he discussed the evidence with Applicant, the testimony of the victims, and that if they proceeded to trial the range of possible sentences the Applicant faced. Counsel testified that he filed a discovery motion and that the discovery materials included an incident report, statements made by the victims, and Applicant's prior record. Counsel testified that Applicant never denied his guilt, that counsel did not visit the Applicant's residence, that counsel did speak with the two victims, that counsel reviewed the discovery with the Applicant, and that counsel was not able to speak with the Applicant's wife. Counsel testified that Applicant was alone with the two victims at times even though six people were living together in the trailer. Counsel testified that he explained to Applicant what the victims' and the Applicant's wife's testimony would be at trial, that the wife was a neutral

witness but that the victims' testimony would have been devastating and very effective. Counsel testified that he and Applicant did discuss some of the older victim's family troubles.

Counsel testified that it would have been appropriate to request a forensic exam for the younger victim, however the youngest victim did not allege forceful penetration and that after so many months there would be no physical evidence. Counsel testified that his understanding of the ~~medicne~~ ^{MEDICAL EVIDENCE} involved with criminal sexual conduct cases was that only a severe tear would show up or still be present months after the incident. Counsel testified that not many judges would order an 11-^{year-old} year-old to be examined by a defense doctor in such a personal way. Counsel testified that it was not unusual for the state not to have a doctor that would testify. Counsel testified that he discussed the options available to the Applicant and that preparing for a trial is different from preparing for a plea. Counsel testified that he had no difficulty communicating with the Applicant, that counsel recalled speaking with Applicant in the courtroom, and that counsel was allowed to visit the Applicant's cell at the Saluda County jail. Counsel testified that he met with the Applicant more than two times and that their meetings lasted more than five minutes.

Counsel testified that Applicant was emphatic about the fact Applicant did not want a trial, that the first time counsel heard Applicant claim he was innocent was during the PCR hearing, and that under the circumstances of the Applicant's case counsel believed ten (10) years was a good deal. Counsel testified that he informed Applicant that if Applicant proceeded to trial the victims would both testify and that if Applicant was found guilty ninety-nine percent of judges in the state would max out sentence the Applicant's sentence. Counsel testified that he met with the victims at a magistrate judge's office and that the victims affirmatively stated the Applicant committed the crimes.

Counsel testified that on the day of the Applicant's plea the Applicant did not indicate any discontent about taking the plea offer. Counsel testified that he did not recall what occurred during the break indicated in the plea hearing transcript, however counsel knew that during the break the Applicant did not inform counsel Applicant did not want to proceed with the plea hearing. Counsel testified that if the Applicant wanted to proceed to trial counsel would have prepared the case for trial by going to the scene and requesting a medical expert. Counsel testified that if Applicant went to trial, counsel's strongest tool would have been cross-examination of the victims. Counsel testified that he would have alerted the plea court and the solicitor if Applicant did not want to plead guilty. Counsel testified that he explained the charges against the Applicant and that the Applicant understood the charges. Counsel testified that it was the Applicant decision to plead guilty and that Applicant never indicated to counsel that there was language barrier problem. Finally, counsel testified that if the Applicant told counsel at any time Applicant was not guilty, counsel would have prepared for trial.

WPA
#6

III. APPLICABLE LAW

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

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered

adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. 668. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of plea counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland. Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. With respect to guilty plea counsel, the Applicant must show there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985).

WPK
#7

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, this Court reviewed the Clerk of Court records regarding the subject convictions, the Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, the transcripts and documents from the prior proceedings, the exhibits introduced into evidence at the hearing, and legal arguments of counsel. Pursuant to S.C. Code Ann. §17-27-80 (2003), this Court makes the following findings of fact based upon all of the probative evidence presented.

1. Ineffective Assistance of Counsel

a. Failure to Inform of Right to Appeal

This Court finds Applicant's allegation that counsel failed to inform Applicant that he could appeal is without merit. There is no constitutional requirement that necessitates that trial counsel inform a criminal defendant of his right to appeal, following a guilty plea. Weathers v. State, 319 S.C. 59, 459 S.E.2d 838 (1995); Carey v. Leverette, 605 F.2d 745 (4th Cir. 1979). Therefore, absent extraordinary circumstances, the failure to be advised of his right to an appeal from the guilty plea does not result in a denial of the Applicant's due process rights. Younger v. Cox, 323 F.Supp. 412 (D.C. Va. 1971). This Court finds that the Applicant did not present any evidence or testimony that would entitle Applicant to a belated appeal. Therefore, this Court finds that this allegation is denied and dismissed.

WAC
#8

b. Failure to Investigate

This Court finds that Applicant's allegation that counsel was ineffective for failing to investigate is without merit. Applicant asserts that counsel was ineffective for failing to obtain a medical expert, visit the scene of the crime, and ask Applicant certain questions about Applicant's guilt. This Court finds that the Applicant's testimony is not credible. This Court does find counsel's testimony to be credible. Counsel testified that he filed a discovery motion, reviewed the discovery materials with the Applicant, and was able to speak with the two victims and ascertain what their testimony would be at a trial. Counsel testified that the Applicant never indicated that he wanted to go to trial throughout counsel's representation and that had Applicant informed counsel he wanted to proceed to trial counsel would have prepared Applicant's case for trial. Counsel testified that

obtaining a forensic expert would not have been helpful because the youngest victim did not allege forceful penetration and that after so many months there would be no physical evidence.

To establish counsel was inadequately prepared, an Applicant must present evidence of what counsel could have discovered or what other defenses could have been pursued had counsel been more fully prepared. Jackson v. State, 329 S.C. 345, 495 S.E.2d 768 (1998). The "brevity of time spent in consultation, without more, does not establish that counsel was ineffective." Easter v. Estelle, 609 F.2d 756, 759 (5th Cir. 1980). When claims of ineffective assistance of counsel are based on lack of preparation time, an Applicant challenging his conviction must show specific prejudice resulting from counsel's alleged lack of time to prepare. United States v. Cronin, 466 U.S. 648 (1984); U. S. v. LaRouche, 896 F.2d 815 (4th Cir. 1990). Here, the Applicant could not point to any specific matters counsel failed to discover which would have caused him to proceed with a jury trial instead of pleading guilty. This Court finds the Applicant offered no evidence at the PCR hearing that counsel could have found that would have been likely to have any outcome more favorable to the Applicant. The Applicant did not produce any witnesses or offer any other evidence from which this Court could conclude that the outcome of the case would likely have been different, had that evidence been developed. Therefore, this Court finds that this allegation is denied and dismissed.

c. Failure to Motion for a Pre-Trial Conference

This Court finds that Applicant's allegation that counsel was ineffective for failing to make a motion for a pre-trial conference is without merit. The Applicant did not present any testimony or evidence at the PCR hearing concerning this allegation. This Court finds that the Applicant

abandoned this claim and that Applicant has failed to meet his burden of proof; therefore, this allegation is denied and dismissed.

d. Failure to Prepare Potential Defenses, Challenge the Chain of Custody, Inform Applicant of Evidence against him, and Failure to Inform of Elements of Charges

Applicant asserts that counsel was ineffective for failing to prepare and ^{INVESTIGATE} ~~investigating~~ potential defenses, failing to challenge the chain of custody, failing to inform Applicant of the evidence against him, and failing to inform Applicant of the elements of the charges. This Court finds that the Applicant has failed to meet his burden of proof as to these allegations. This Court finds Applicant's testimony is not credible. This Court does find counsel's testimony to be credible. Counsel testified that he explained the charges against the Applicant to the Applicant and that the Applicant understood the elements of the charges he faced. Counsel testified that Applicant never denied he was not guilty which made it very difficult to prepare a defense. Counsel testified that he explained to Applicant what would be presented at trial and what counsel could do in terms of a defense at trial. Counsel testified that he discussed the state's evidence with the Applicant and the options available to the Applicant. With regard to Applicant's claim that counsel failed to challenge the chain of custody, this Court finds that Applicant did not present evidence or testimony as to what counsel should have challenged concerning the chain of custody.

This Court finds and the record reflects that Applicant admitted to the plea judge that he was guilty of the specific elements of the crimes. (Tr. p.6-8). This Court further finds that the facts of the case recited by the solicitor at the plea hearing were not long or convoluted. The Applicant clearly indicated to the plea judge that he understood the charges against him and that Applicant wanted to plead guilty because he was guilty. (Tr. p.6-8; 11). To establish counsel was inadequately prepared,

an Applicant must present evidence of what counsel could have discovered or what other defenses could have been pursued had counsel been more fully prepared. Jackson v. State, 329 S.C. 345, 495 S.E.2d 768 (1998). The "brevity of time spent in consultation, without more, does not establish that counsel was ineffective." Easter v. Estelle, 609 F.2d 756, 759 (5th Cir. 1980). When claims of ineffective assistance of counsel are based on lack of preparation time, an Applicant challenging his conviction must show specific prejudice resulting from counsel's alleged lack of time to prepare. United States v. Cronin, 466 U.S. 648 (1984); U. S. v. LaRouche, 896 F.2d 815 (4th Cir. 1990). Here, the Applicant could not point to any specific matters counsel failed to discover which would have caused him to proceed with a jury trial instead of pleading guilty. This Court finds the Applicant offered no evidence at the PCR hearing that counsel could have found that would have been likely to have any outcome more favorable to the Applicant. Therefore, this Court finds that these allegations are denied and dismissed.

e. Failure to Review Discovery with Applicant and the Evidence against Applicant

This Court finds that Applicant's allegations that trial counsel was ineffective for failing to review the discovery materials with the Applicant and for failing to review the evidence against the Applicant with him are without merit. This Court has already found that counsel discussed the state's evidence with the Applicant. Additionally, counsel testified that he filed a discovery motion and reviewed the discovery materials with the Applicant. Moreover, counsel testified that he explained to Applicant what the victims' and the Applicant's wife's testimony would be at trial, that the wife was a neutral witness but that the victims' testimony would have been devastating and very effective. This Court finds that Applicant has failed to show that counsel's performance was deficient in any way and that Applicant was prejudiced; therefore, this Court finds that these allegations are denied

and dismissed.

2. Involuntary Guilty Plea

Applicant asserts that counsel's failure to inform Applicant of any of the applicable laws/rules of the State of South Carolina as well as any chance Applicant had at trial made Applicant's guilty plea unknowing and unintelligent. Applicant has also asserted that counsel coerced Applicant into pleading guilty. This Court finds that Applicant has failed to meet his burden of proof in showing that his guilty plea was involuntary. At the plea hearing the Applicant indicated to the plea judge that counsel explained to the Applicant the charges, the possible punishments, and Applicant's constitutional rights, and the Applicant indicated that he understood the explanation provided by counsel. (Tr. p.5-6). The plea judge asked Applicant if Applicant understood and knew about his right to a jury trial, and Applicant indicated that he did not want a jury trial. (Tr. p.9). The Applicant told the plea judge that he had not been threatened by anyone into pleading guilty. (Tr. p.9). Additionally, the Applicant indicated to the plea judge that he was satisfied with counsel's representation and that counsel had done everything he could to help the Applicant. (Tr. p.10). The Applicant told the plea judge that he was pleading guilty of his own free will and accord. (Tr. p.11). The Applicant told the plea judge that he was pleading guilty to both charges because Applicant was guilty of both charges. (Tr. p.12). This Court finds the overwhelming evidence in the record and presented through the testimony of the witnesses at the hearing reflects that the plea was knowingly and voluntarily entered. Boykin v. Alabama, 395 U.S. 238 (1969); Vickery v. State, 258 S.C. 33, 186 S.E.2d 827 (1972). Therefore, this Court finds that this allegation is denied and dismissed.

3. Lack of Subject Matter Jurisdiction

This Court finds that Applicant's allegation that the plea court lacked subject matter

jurisdiction because the indictments failed to put the Applicant on notice of the charges against him is without merit. Defects in the indictment do not affect subject matter jurisdiction. See State v. Gentry, 363, S.C. 93, 610 S.E.2d 494 (2005). However, an Applicant may challenge the subject matter jurisdiction of the trial court, and such a claim is one that may be raised at any time. See Brown v. State, 343, S.C. 342, 540 S.E.2d 846 (2001, *overruled in part by State v. Gentry*, 363 S.C. 93, 610 S.E.2d 494 (2005)). However, “[c]ircuit courts obviously have subject matter jurisdiction to try criminal matters.” Gentry, *supra*, 610 S.E.2d at 499; *See also* S.C. Const. Art. V, § 7. Thus, the Applicant must present evidence that his case is of some class over which the Circuit Court does not have the authority to preside. The Applicant’s conviction involved a criminal charge in General Sessions Court. Thus, the Circuit Court had subject matter jurisdiction. This Court finds that the Applicant did not address this allegation at the PCR hearing, thereby abandoning this claim and failing to meet his burden of proof. Therefore, this Court finds that this allegation is denied and dismissed.

WAL
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V. CONCLUSION

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

This Court notes that Applicant must file and serve a notice of intent to appeal within thirty (30) days from receipt of this Order to secure the appropriate appellate review. *See* Rule 203, SCACR. Rule 71.1(g), SCRCP; Bray v. State, 336 S.C. 137, 620 S.E.2d 743 (2005), for the obligation of Applicant’s counsel to file and serve notice of appeal. The Applicant’s attention is also

directed to South Carolina Appellate Court Rule 243 for appropriate procedures after notice has been timely filed.

IT IS THEREFORE ORDERED:

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

AND IT IS SO ORDERED this 30TH day of Nov., 2011.

COPY


William P. Keesley
Presiding Judge
Eleventh Judicial Circuit

LEXINGTON, South Carolina

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

JOSE ANTONIO ANZALDO, #334118,

Applicant,

v.

STATE OF SOUTH CAROLINA,

Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Order has been served upon the applicant by mailing one (1) copy in the United States mail, postage prepaid, addressed to:

Stephen Geoly, Esquire
1225 S. Main St.
Greenwood, SC 29646

This 6th Day of January, 2012.

Lena Pelishenko

Lena Pelishenko
Legal Assistant for Respondent

SWORN to before me this 6th Day of January, 2012.

Laura Maria

Notary Public for South Carolina.

My Commission Expires: 9/25/2019

STATE OF SOUTH CAROLINA)
)
 COUNTY OF SALUDA)
)
)
 Jose Antonio Anzaldo, # 334118)
 Applicant.)
)
 VS.)
)
)
 State of South Carolina,)
 Respondent.)
 _____)

IN THE COURT OF COMMON PLEAS
 ELEVENTH JUDICIAL CIRCUIT

Case No. 2010-CP-41-0033

Applicant's Rule 59 (e), SCRCP Motion
 to Alter or Amend the Judgment

FILED
 2012 JAN 17 PM 3:01
 CLERK OF COURT
 SALUDA CO. S.C.

Pursuant to Rule 59 (e), SCRCP, Applicant, Jose Antonio Anzaldo, moves the Court for an order altering or amending the judgment and granting him post conviction relief (PCR) based on Issue 1, Ineffective assistance of counsel, and Issue 2, Involuntary guilty plea of the Applicant's PCR application.

PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Saluda County Clerk of Court. The Applicant was indicted at the October 2008 term of the Saluda County Grand Jury for Criminal Sexual Conduct with a Minor – 2nd. Degree (2008-GS-41-0507) and Criminal Sexual Conduct with a Minor – 1st. Degree (2008-GS-41-0508). The Applicant retained John Duncan, Esquire, to represent him. On or about April 7, 2009, the Applicant pled guilty as charged. He was sentenced by the Honorable L. Casey Manning to confinement for a period of ten (10) years, sentence to run concurrent.

On February 17, 2010, Applicant filed his application for PCR. The PCR application requested relief based on the following grounds:

1. Ineffective Assistance of Counsel;
 - a. "Attorney fail to let me know I could appeal."
 - b. "Counsel failed to adequately investigate my case."
 - c. "Counsel failed to motion for a pre-trial conference."
 - d. Had counsel investigated to prepare for a defense and challenge the sufficiency of the chain of custody and evidence against me and informed me of the essential elements of the crime of 1st. and 2nd. Criminal sexual conduct with a minor I would not have pled guilty, but insisted on going to trial."
 - e. "Nor did counsel ever show/go over the Brady discovery documents of any and all of the alleged evidence that was against me."
2. Involuntary Guilty Plea
 - a. "Furthermore Counsel's failure to inform me of any of the applicable laws/rules of the state of south Carolina as well as any chances I had at trial made me and my guilty plea unknowingly and unintelligently entered."
3. Subject matter jurisdiction: indictments failed to put Applicant on notice.

The Honorable William P. Keesley conducted a hearing on the PCR application on August 31, 2011 at the Lexington County Court House. The Court signed the Order of Dismissal on November 30, 2011, and it was filed with the Saluda County Clerk of Court on January 3, 2012. Counsel received written notice of entry of the Order on January 5, 2012.

This Motion to Alter or Amend the Judgment follows.

ARGUMENT

- I. Counsel has a duty to investigate regardless of any admissions of guilt by the client. Counsel asked Applicant one time if he was guilty and stated that Applicant did not respond. Counsel took this lack of response as Counsel not denying his guilt rather than an indication he was not aware of what was being asked by Counsel. This was a communication issue, not an acknowledgment of guilt by silence. The transcript (page 13, line 5) of the plea hearing indicates that the Applicant had questions as to the proceedings and accusations. After being asked by the Court if he understood what the Solicitor had just stated for the

facts of the case, the Applicant asked to speak with his Attorney. The transcript shows a lapse of time that indicates confusion on the part of the Applicant. Applicant was more concerned with the threat of receiving 50 years versus 10 years which created tremendous pressure to plead guilty.

- II. Counsel failed to review the state's evidence with the Applicant. If the evidence had been reviewed with the Applicant, the Applicant would have had the opportunity to advise Counsel why the victims may have made these accusations and would have given Counsel additional evidence to investigate and potentially exonerate the Applicant. Applicant was never given an opportunity to confront the witnesses against him. The victims were also apparently interviewed by DSS in Saluda, but no notes of the interview were provided in any discovery nor were any notes and/or reports requested by or provided to Counsel.
- III. Counsel received discovery consisting of an incident report, statements made by the victims, and Applicant's criminal record which indicated no prior record. Counsel testified that Applicant was alone with the two victims at times even though there were six people living together in the trailer. Counsel apparently never attempted to speak with the additional two people living in the trailer to determine what their testimony would be. It is unclear as to the extent of any conversation with the mother of the victims who was also the wife of the Applicant, but Counsel described the Applicant's wife as a neutral witness. In the Mother's statement, she states that when she asked her daughter if her father had been touching her, the daughter would never answer. Further, the Mother stated she asked the victim if she wanted to move to Virginia and the victim replied no since she has already made plans to move to Mexico with her Dad. Counsel apparently failed to follow up on this information with the victim. Counsel failed to visit the trailer to determine the layout of the living quarters and to further determine the reliability of the victim's testimony. If Counsel had looked into this matter, mitigating circumstances may have been revealed and the Applicant would not have pled guilty.
- IV. Counsel never requested nor received the results of any forensic exams to establish the criminal sexual conduct of which the Applicant was accused. There is nothing to indicate that in the course of Counsel's interview with the victims that they were ever asked about any family related issues that could give rise to these accusations. Counsel never sought any medical or counseling records that may have been used to establish the Applicant's innocence.

SUMMARY:

Counsel should have, at a minimum, properly investigated by interviewing critical witnesses to determine defenses for the Applicant. Counsel should have presented evidence of mitigating circumstances that would have allowed for a knowledgeable and informed basis for proceeding to trial or for any voluntary plea or plea negotiations on the Applicant's behalf.

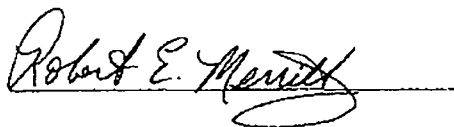
CONCLUSION:

For the foregoing reasons, this Court should reconsider its written Order of November 30, 2011, and grant the Applicant post conviction relief and order a new trial on these additional grounds.

IT IS SO MOVED.

Geoly Law Firm

By:



Robert E. Merritt
1225 South Main Street
Greenwood, SC 29646
864-223-3352 (O)
864-223-3400 (fax)
Attorneys for the Applicant

Greenwood, South Carolina

January 17, 2012

2012 JAN 17 PM 3:01
CLERK OF COURT
SALUDA CO. S.C.

FILED

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS
ELEVENTH JUDICIAL CIRCUIT

COUNTY OF SALUDA)

CASE NO.: 2010-CP-41-0033

Jose Antonio Anzaldo, #334118)**MOTION AND ORDER INFORMATION
FORM AND COVERSHEET**

Plaintiff,)

vs.)

State of South Carolina)

Defendant.)

Plaintiff's Attorney:Robert E. Merritt, Geoly Law Firm, Bar No.
3952**Address:**1225 South Main Street, Greenwood, SC
29646

Phone: 864-223-3352 Fax 864-223-3400

E-mail: merrittlaw@nctv.com Other: _____

Defendant's Attorney:

Kaleon E. May,, Bar No. 80469

Address:

P. O. Box 11549, Columbia, SC 29211-1549

Phone: 803-734-3747 Fax 803-734-4113

E-mail: _____ Other: _____

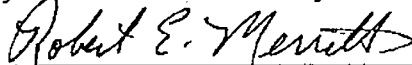
☒ **MOTION HEARING REQUESTED** (attach written motion and complete **SECTIONS I and III**)☐ **FORM MOTION, NO HEARING REQUESTED** (complete **SECTIONS II and III**)☐ **PROPOSED ORDER/CONSENT ORDER** (complete **SECTIONS II and III**)**SECTION I: Hearing Information**

Nature of Motion: Rule 59 (e) motion to Alter or amend the Order

Estimated Time Needed: 30 minutes

Court Reporter Needed: ☒ **YES** / ☐ **NO****SECTION II: Motion/Order Type**☒ Written motion attached☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for ☒ Plaintiff / ☐ Defendant

January 17, 2012

Date submitted

SECTION III: Motion Fee☐ **PAID - AMOUNT: \$** _____☒ **EXEMPT:**

(check reason)

☐ Rule to Show Cause in Child or Spousal Support☐ Domestic Abuse or Abuse and Neglect☐ Indigent Status ☐ State Agency v. Indigent Party☐ Sexually Violent Predator Act ☒ Post-Conviction Relief☐ Motion for Stay in Bankruptcy☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRPC)☐ Proposed order submitted at request of the court; or,

reduced to writing from motion made in open court per judge's instruction

Name of Court Reporter: _____

☐ Other: _____**JUDGE'S SECTION**☐ Motion Fee to be paid upon filing of the attached order.☐ Other: _____

JUDGE CODE _____

Date: _____

CLERK'S VERIFICATION

Collected by: _____ Date Filed: _____

☐ **MOTION FEE COLLECTED: \$** _____☐ **CONTESTED - AMOUNT DUE: \$** _____

2012 JAN 17 PM 3:01
 CLERK OF COURT
 SALUDA CO. S.C.
 FILED

STATE OF SOUTH CAROLINA)
COUNTY OF SALUDA)

Jose Antonio Anzaldo, # 334118)
Applicant.)

VS.)

State of South Carolina,)
Respondent.)

FILED
IN THE COURT OF COMMON PLEAS
ELEVENTH JUDICIAL CIRCUIT
2012 JAN 17 PM 3:02

CLERK OF COURT Case No. 2010-CP-41-0033
SALUDA CO. S.C.

Applicant's Rule 59 (e), SCRCP Motion
to Alter or Amend the Judgment

I certify that I served a copy of this motion on the date reflected below on opposing counsel by United States mail, postage pre-paid, addressed as follows:

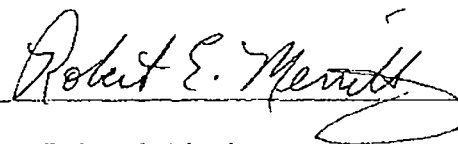
Kaelon E. May, Assistant Attorney General
SC Attorney General's Office
P. O. Box 11549
Columbia, SC 29211-1549

In compliance with Rule 59(g), SCRCP, I certify that I provided the Court on the date reflected below with a copy of this motion by mailing a copy, postage pre-paid, addressed as follows:

The Honorable William P. Keesley
P. O. Box 10
Edgefield, SC 29824

Respectfully Submitted,
Geoly Law Firm

By



Robert E. Merritt
1225 South Main Street
Greenwood, SC 29646
864-223-3352
Attorneys for the Applicant

January 17, 2012
Greenwood, SC

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF SALUDA	)	Case No.: 2010-CP-41-0033
	)	
Jose Antonio Anzaldo, #334118,	)	
	)	
Applicant,	)	RETURN TO APPLICANT'S MOTION
	)	TO ALTER OR AMEND
v.	)	
	)	
State of South Carolina,	)	
	)	
Respondent.	)	
	)	

This matter comes before this Court by way of the Applicant's Motion pursuant to Rule 59(e), SCRCP, in which Applicant asks this Court to alter or amend its Order denying and dismissing Applicant's application for post-conviction relief (PCR). The Respondent would submit the following:

I.

The Order of Dismissal issued by the Honorable William P. Keesley on November 20, 2011, contains the required findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80 (1976), and Rule 52(a) SCRCP. See McCray v. State, 305 S.C. 329, 408 S.E.2d 241 (1991). Respondent submits this Court did not err in granting the Order of Dismissal and the Order fully addresses all of the Applicant's claims.

The Court's Order properly found that Applicant was not coerced into pleading guilty by counsel and that Applicant's guilty plea was made knowingly and voluntarily. At the guilty plea hearing the Applicant told the plea judge that he had not been threatened by anyone into pleading guilty. (Tr. p.9). The Applicant told the plea judge that he was pleading guilty of his own free will and accord. (Tr. p.11). The Applicant told the plea judge that he was pleading guilty to both charges

because Applicant was guilty of both charges. (Tr. p.12).

The Court's Order properly found that counsel reviewed the state's evidence with the Applicant. This Court found Applicant's testimony was not credible and found counsel to be credible. Credibility determinations are factual determinations. As such, they "are presumed to be correct absent clear and convincing evidence to the contrary, and a decision adjudicated on the merits and based on a factual determination will not be overturned on factual grounds unless objectively unreasonable in light of the evidence presented in the state court proceeding." Miller-El v. Cockrell, 537 U.S. 322 (2003). Applicant's testimony that counsel did not review the discovery with Applicant is not credible. At the PCR hearing Applicant admitted that he never informed counsel about the family's living situation or the problems with the oldest victim. The Applicant complains in his motion that he was never given the opportunity to confront the witnesses against him. The Applicant waived his right to confront his accusers by pleading guilty.

This Court found that Applicant admitted to the plea judge that he was guilty of the specific elements of the crimes. This Court further found that the facts of the case recited by the solicitor at the plea hearing were not long or convoluted. The Applicant clearly indicated to the plea judge that he understood the charges against him and that Applicant wanted to plead guilty because he was guilty. A guilty plea is a solemn, judicial admission of the truth of the charges against the defendant. Statements made during the plea are conclusive unless the defendant presents reasons why they should be allowed to depart from the truth of those statements. Crawford v. U.S., 519 F.2d 347 (4th Cir. 1975); Edmonds v. Lewis, 546 F.2d 566 (4th Cir. 1976). Applicant presented no such reasons at the PCR hearing and fails to do so in his motion.

The Applicant complains that failed to interview various people who were allegedly living in

the trailer with Applicant's family. Prejudice from trial counsel's failure to interview or call witnesses cannot be shown where the witnesses do not testify at post conviction relief. Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Bassette v. Thompson, 915 F.2d 932 (4th Cir. 1990), cert. denied, 499 U.S. 982 (1991). An 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. Bannister v. State, 333 S.C. 298, 509 S.E.2d 807 (1998). This Court found that Applicant did not present any witnesses at the PCR hearing; therefore, Applicant cannot meet his burden.

Applicant complains that counsel never requested the results of any forensic exams and that counsel never sought any medical or counseling records. To establish counsel was inadequately prepared, an Applicant must present evidence of what counsel could have discovered or what other defenses could have been pursued had counsel been more fully prepared. Jackson v. State, 329 S.C. 345, 495 S.E.2d 768 (1998). The "brevity of time spent in consultation, without more, does not establish that counsel was ineffective." Easter v. Estelle, 609 F.2d 756, 759 (5th Cir. 1980). When claims of ineffective assistance of counsel are based on lack of preparation time, an Applicant challenging his conviction must show specific prejudice resulting from counsel's alleged lack of time to prepare. United States v. Cronin, 466 U.S. 648 (1984); U. S. v. LaRouche, 896 F.2d 815 (4th Cir. 1990). This Court properly found that Applicant failed to produce any such forensic exam results, medical records, or counseling records at the PCR hearing; therefore, Applicant cannot his burden.

II.

The State therefore requests that the relief requested by the Applicant be denied and that his Motion be dismissed.

WHEREFORE, having made its Return to the motion, the State requests that the relief requested in the Motion be denied and that said Motion be dismissed.

Respectfully submitted,

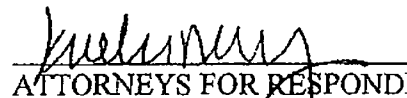
ALAN WILSON
Attorney General

JOHN W. MCINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Senior Assistant Deputy Attorney General

KAELOE E. MAY
Assistant Attorney General

BY:


ATTORNEYS FOR RESPONDENT

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

Columbia, South Carolina
April 13, 2012

STATE OF SOUTH CAROLINA)

COUNTY OF SALUDA)

IN THE COURT OF COMMON PLEAS

2010-CP-41-0033

JOSE ANTONIO ANZALDO, #334118,)

Applicant,)

vs)

AFFIDAVIT OF SERVICE BY MAIL

STATE OF SOUTH CAROLINA,)

Respondent.)

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

Stephen D. Geoly, Esquire
 Post Office Box 336
 Greenwood, SC 29648

DATED this 13th day of April, 2012.

Lena Pelishenko

Lena Pelishenko, Legal Assistant
 For Respondent

STATE OF SOUTH CAROLINA) FILED) IN THE COURT OF COMMON PLEAS
COUNTY OF SALUDA 2012 OCT 12 PM 12:45 No.: 2010-CP-41-00033

CLERK OF COURT
JOSE ANTONIO ANZALDO, SALUDA CO. S.C.

Applicant,

vs.

STATE OF SOUTH CAROLINA,

Respondent.

**ORDER DENYING MOTION
FOR RECONSIDERATION**

Following a ruling denying the Applicant's request for post-conviction relief (PCR), the Applicant filed a motion for reconsideration and to alter or amend under Rule 59, SCRCP. The motion is denied.

Pursuant to Rule 59(f), SCRCP, the court, in its discretion, notified the parties that it would decide the motion on briefs without oral argument. Deadlines were established. The State has submitted a brief. There is a lengthy motion of counsel, and a brief submitted by the Applicant. While South Carolina does not recognize hybrid representation, the court construed all the written submissions on behalf of the Applicant to have been adopted by his counsel.

Having reconsidered the matter and having reviewed the written submissions, it appears to the court that the issues raised by the Applicant in his PCR request have all been ruled upon and reasons stated as to why the court ruled as it did. The prior order appears to adequately state findings of fact and conclusions of law covering all the matters raised in the application.

RECEIVED
BY Mail 10/17

The Applicant's motion and supporting materials are primarily aimed at rearguing matters already ruled upon. Basically, there are assertions that the attorney who represented the Applicant in his guilty plea failed to conduct a proper investigation and that assertions that evidence would have been discovered that would have been likely to have made a material difference in the outcome of the case. However, the Applicant does not provide the evidence itself - merely the assertion and speculation of what evidence could have been obtained. He cannot rely upon his beliefs about what evidence may have been developed. He has to bring those witnesses or the evidence before the court so that it can be evaluated as to whether it establishes whether the failure to develop it constituted ineffective assistance; and, if so, whether Mr. Arzardo suffered any prejudice from the alleged failure to develop it.

Mr. Arzardo has supplied the court with no concrete proof that interviewing any other witnesses, conducting any further investigation, visiting the home where the prosecution allegedly occurred, obtaining expert medical testimony, challenging the chain of any evidence, or doing any other activity would have given him access to some substantial evidence that might have made any difference in the case.

The attorney testified that the Applicant was charged with criminal sexual conduct upon two members of his family. Mr. Arzardo was facing 10 years of imprisonment. A plea agreement was entered for incarceration of 10 years. Other than the testimony of Mr. Arzardo about his not understanding the plea, there is no proof that he did not fully understand. The claim is refuted by the record. The fact that there was a record in the guilty plea does not prove a lack of understanding when the plea colloquy

resumed or when the guilty plea was accepted. Mr. Anzaldo's testimony regarding his lack of understanding was not credible.

Attorney Duncan testified credibly that he would have prepared the case for trial, if his client had wanted a trial, and he acknowledged that such preparation would have involved further discovery. However, Mr. Duncan's advice about his assessment of the potential outcome of the case seems credible and proper, and the Applicant has failed to prove that further discovery would have uncovered anything that would have been likely to have changed the ultimate outcome.

One major contention related to the lack of time spent by counsel on the cases. The prior order repeatedly discussed the legal standard required to prove entitlement to PCR on this ground. Nothing has been provided to change the court's evaluation of that issue.

WA
#3

The assertion that Mr. Duncan performed ineffectively because he did not ask his client about guilt is simply not established. First, Mr. Duncan testified that he did ask Mr. Anzaldo about his guilt on one occasion, and Mr. Anzaldo did not answer. There is no proof that the client was prevented in any way from communicating his innocence to his attorney. Second, there is no proof of actual innocence here that would override the result.

Mr. Duncan interviewed the victims. He found their version of the events to be compelling and difficult to overcome. He determined that the Applicant's wife would be a neutral witness. Those appear to be the key witnesses, other than the Applicant himself.

The Applicant asserts ineffectiveness of counsel in failing to go the home where the events are alleged to have occurred; but, the Applicant lived in the home and he knew

that 6 people were living there. He knew that it was a small home and that there was an ability to raise a question of how sexual activity could have taken place undetected.

What he has failed to do is to provide proof of information beneficial to the Applicant that any of these other residents would have actually provided admissible evidence challenging the State's version of the events, other than speculation that the abuse could not have occurred without one of them seeing the alleged sexual activity.

WAC #4
The Applicant alleges ineffectiveness concerning the alleged failure to investigate the girls' motivation for lying. Yet, there has been no showing that the Applicant did not know about the alleged disciplinary problems with his girls and their alleged disrespect at the time he entered his plea. Aside from the blanket assertion that such things existed and that they influenced the girls to lie about sexual abuse, there is no evidence that further investigation into these issues would have yielded anything to change the outcome of the case.

There is no proof of any assumed legal deficiencies in the indictment. There does not appear to be any impropriety in the charging papers or the proceedings.

There are alleged deficiencies related to the attorney not obtaining a medical expert. No testimony was offered as to what information a medical expert would have provided that would assist the Applicant's defense. He is merely speculating about things that do not exist.

There are assertions related to the chain of custody of certain items. This claim is difficult to follow because the court has not been given evidence that appears that it might be subject to a challenge related to the chain of custody. In any event, the

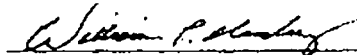
Applicant has failed to prove that any failure to investigate a potential challenge to any of the evidence on any ground would have been likely to be productive.

In short, the Applicant has failed to provide the court with any valid reason why the original order should be altered or amended. All issues raised appear to have been ruled upon. The motion is denied.

Should the Applicant desire to appeal the decision of this court, he must do so in writing as mentioned in the prior order.

AND IT IS SO ORDERED.

October 10, 2012


William P. Keesley, Judge

#5