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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Writ of Certiorari to the Greenville County Court of Common Pleas
The Honorable J. Mark Hayes, II, Circuit Court Judge

STORM RILEY BRIAN McCARTHY,

Respondent,

v.

STATE OF SOUTH CAROLINA,

Petitioner.

Appellate Case No. 2023-001157

PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

QUESTION PRESENTED

Can the PCR court extend the requirements of Padilla v. Kentucky[1] to the judiciary and grant relief to respondent on the basis that the plea court did not advise respondent, a foreign national here on a tourist visa who informed the plea court he had no intention of immigrating to this country, of potential immigration consequences to respondent of his pleas should he at some time in the future change his mind about immigrating to this country?

[1] 559 U.S. 356 (2010).

STATEMENT OF THE CASE

This is a State's appeal from the grant of post-conviction relief (PCR) to respondent Storm Riley Brian McCarthy (hereinafter "McCarthy"). It is undisputed that in 2018 McCarthy was a citizen of South Africa who entered the United States on a tourist visa. On September 1, 2018, the Greenville County Sheriff's Office arrested McCarthy for driving under the influence (DUI) and simple possession of marijuana. On October 9, 2018, McCarthy appeared *pro se* before the Honorable Jonathan Horne, Greenville County Magistrate, and expressed his desire to plead guilty to both charges. Judge Horne inquired into McCarthy's reason for being in the country, and McCarthy admitted he was not an immigrant, whether legal or illegal, had no intent to immigrate to the United States, and was here as a tourist and intended to return to South Africa where he lived and worked after visiting the United States and Canada. After a full plea colloquy with Judge Horne regarding his constitutional rights, McCarthy waived his constitutional rights and pled guilty to both charges [DUI and simple possession of marijuana]. Judge Horne imposed fines of $420 and $1017 respectively. McCarthy subsequently retained an attorney, Matt Kappell, and filed a motion to reconsider which was heard November 20, 2018, and denied by Judge Horne.[2] Applicant did not appeal his guilty plea convictions or the denial of the motion to reconsider.

By his own admission, a month to several months after his guilty pleas, around January of 2019, McCarthy changed his mind about immigrating to the United States. (App. 25, ll. 9-19). On May 7, 2019, through counsel Matt Kappel, McCarthy filed a post-conviction relief (PCR) application alleging his guilty pleas were involuntary because *the plea judge* [Judge Horne] erred in failing to advise him that his "immigration status" may be affected by pleading guilty. (App.

[2] This motion and the transcript from the hearing on that motion was not introduced at the PCR hearing, but the motion and some of what occurred at that hearing were discussed in some of the testimony at the PCR hearing.

19). The State filed a Return on January 2, 2020, arguing the PCR court should deny relief. A PCR hearing was conducted on January 22, 2020, before Circuit Court Judge J. Mark Hayes ("the PCR court"). McCarthy was present and represented by Matthew J. Kappel, Esq., and the State was represented by Taylor Z. Smith, Assistant Attorney General. McCarthy testified at the hearing as did Judge Horne who accepted McCarthy's guilty pleas and sentenced him. Also testifying at the hearing was Jessica Wallace, an immigration attorney, and Joseph Loveless, the arresting officer who was present at McCarthy's guilty pleas. On February 28, 2023, Judge Hayes issued an "Order Granting Post-Conviction Relief" finding McCarthy's guilty pleas were involuntary because the plea court did not advise him of the possible adverse consequences to his immigration status and vacated the 2 convictions. (App. 60-65). The Order was filed March 2, 2023. The State filed a timely Rule 59, SCRCP Motion to Alter or Amend. (App. 66-74). Judge Hayes then denied that motion by a "Modified Order Granting Post-Conviction Relief with Consideration of SCRCP Rule 59(e) Motion" issued on May 31, 2023, and filed June 20, 2023. (App. 79-84). This Petition for Writ of Certiorari follows asking this Court to grant certiorari from Judge Hayes' decision and reverse the grant of post-conviction relief (PCR) for multiple reasons, including errors of law and erroneous factual findings.

PETITIONER'S STATEMENT OF FACTS

On September 1, 2018, McCarthy, a resident of South Africa here on a tourist visa, was stopped for speeding by the Greenville County Sheriff's Office. (App. 19; 21; 49-50). Deputy Sheriff Joseph Loveless conducted a DUI investigation and arrested McCarthy for DUI and simple possession of marijuana. (App. 49; 50). On October 9, 2018, McCarthy appeared before the Honorable Jonathan Horne, Greenville County Magistrate Judge, without counsel and indicated to the court he wished to plead guilty to both of his charges. (App. 19; 21; 50-52). Deputy Loveless was there as well. (App. 50-52). It is undisputed that Judge Horne reviewed with McCarthy his constitutional rights including his right to a jury trial, the right to confront witnesses, and the right to counsel. (App. 19; 21-22; 24-25). McCarthy does not challenge the constitutionality of his guilty plea convictions based on the failure of the plea court to go over any of his constitutional rights. (App. 19). Judge Horne specifically went into detail two (2) different times with McCarthy about the right to counsel and that counsel may be able to assist him and advise McCarthy about the court system in this country and the consequences of his pleas that McCarthy might not be aware off because of his being from South Africa. (App. 24-25; 27-28, 35, ln. 10 – p. 36, ln. 5; 38, ll. 8-16). However, McCarthy informed Judge Horne repeatedly that he did not want an attorney and just wanted to plead guilty and get this over with and get on with his life. (App. 35, ln. 10 - 36, ln 5; 25, ll. 1-8). Judge Horne also specifically asked McCarthy his country of origin and his "immigration status." [i.e. whether he was an immigrant or not]. (App. 34, ln. 14 – 35, ln. 9). It is undisputed by **all three (3) witnesses at the guilty plea hearing** that McCarthy told Judge Horne that he was not an immigrant to the United States; he was here on **a tourist Visa**, and he intended to travel, go to Canada and see Niagara Falls, and then return to his home in South Africa. (App. 29, ll. 1-24; 34, ln. 14 – 35, ln. 9; 51, ln. 12 – 52, ln. 5; 21, ln. 16 – 23, ln. 6; 25, ll. 9-11).

McCarthy told Judge Horne that *he both lived and worked in South Africa, and he had no intention of remaining here or immigrating here, and he intended to return to South Africa to live.* (App. 25, ll. 9-24; 22, ln. 17 – 23, ln. 6; 29, 34, ln. 14 - 35 ln. 15). Judge Horne did not inform McCarthy that his guilty pleas might affect his "immigration status." After reviewing all of his constitutional rights with McCarthy, and making sure McCarthy was not under the influence of any drugs or alcohol and had not been threatened or promised anything to get him to plead guilty, and his guilty pleas were freely, knowingly, and voluntarily entered, Judge Horne accepted McCarthy's guilty pleas and sentenced him only to a fine on each charge and no jail time. (App. 19; 22; 27-28; 49-52).

Subsequently, McCarthy retained attorney Matthew Kappel to represent him, and he filed a motion for reconsideration before the Magistrate Court.[3] A hearing on the motion was held on November 18, 2018, before Judge Horne. (App. 27; 37-38). At that hearing, McCarthy showed the court a form from the Magistrate's Bench book containing a checklist recommending that in addition to informing a pleading defendant of his constitutional rights, the court also review some potential *collateral consequences* of a guilty plea with the pleading defendant including possible changes in his immigration status. (App. 27; 37-38; 88-89; Ex. P. 1 & 2).[4] The hearing on the motion for reconsideration was recorded but the State does not have access to the same. (App. 27). After the conclusion of the hearing on the motion for reconsideration, Judge Horne denied the motion for reconsideration. (App. 27). Neither McCarthy nor his attorney Mr. Kappel filed a

[3] It is unclear what the basis of the motion to reconsider was but based on the testimony at the PCR hearing about what occurred at the reconsideration hearing, it appears to involve the same issue raised at PCR. (App. 27; 37-38).

[4] This document is actually a plea checklist for defendants to review and sign. (See App. 87-88). It is unclear which exhibit was shown to the plea court at the motion for reconsideration, but it would have been either Exhibit P. 1 or P. 2, which are substantially the same. One checklist is simply more recent than the other. (See App. 88-89).

direct appeal to the Court of Common Please or to the Court of Appeals or this Court from the guilty plea convictions and sentences or from the denial of the motion for reconsideration.

Instead, McCarthy through Mr. Kappell filed a PCR application alleging his guilty plea convictions were involuntary because the plea court failed to advise him at his guilty plea of possible negative consequences to his immigration status. At the PCR hearing, McCarthy admitted under oath that it was sometime later, after his guilty pleas, that he changed his mind about immigrating to the United States. (App. 25, ll. 12-18). According to McCarthy's own sworn testimony, this change in mindset was "...a month, two months, three months later" *after entering his guilty pleas* before Judge Horne. (App. 25, ll. 12-18). In reference to the PCR hearing held January 22, 2020, McCarthy stated he changed his mind about wanting to remain in the United States probably "...a year ago[.]" which would have been January of 2019, *2 to 3 months after his guilty pleas*. (App. 25, ll. 12-15). McCarthy also admitted at the PCR hearing that he told Judge Horne at the time of his plea that he was here on a tourist visa and after traveling the United States and seeing Niagara Falls, he intended to return to South Africa where he lived and worked. (App. 25; 7-8). Based on the totality of his testimony, McCarthy admitted under oath that he never told Judge Horne at the time of his plea that he was an immigrant or that he intended or wanted to immigrate to the United States and in fact admitted he told Judge Horne the opposite, and in fact admitted he did not *change his mind* about immigrating to the United States until several months later, around January of 2019. Finally, McCarthy testified at the PCR hearing that at the time of the PCR hearing he was not subject to deportation. (App. 24, ll. 23-24).

Standard of Review

Appellate courts "review questions of law de novo, with no deference to trial courts." Smalls v. State, 422 S.C. 174, 180-81, 810 S.E.2d 836, 839 (2018). In general, appellate courts will "defer to a PCR court's findings of fact and will uphold them if there is evidence in the record to support them." Id. at 180, 810 S.E.2d at 839. However, this Court will not uphold the findings of a PCR court if no probative evidence supports those findings." Rutland v. State, 415 S.C. 570, 576, 758 S.E.2d 350, 353 (2016)(citing Holland v. State, 322 S.C. 111, 113, 470 S.E.2d 378, 379 (1996)). Likewise, "[t]his Court will reverse the PCR [court]'s decision when it is controlled by an error of law." Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013)(citing Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012); Suber v. State, 371 S.C. 554, 558-59, 640 S.E.2d 884, 886 (2007).

The PCR court should not have addressed this claim because it was waived and abandoned

The PCR court first committed legal error by addressing a claim that was waived and abandoned at the guilty plea and on direct appeal from the guilty plea. Below, applicant alleged his guilty plea was involuntary not because of ineffective assistance of counsel (IAC) but because of court error, a direct appeal claim. This claim should have been raised to the plea court and then on direct appeal. In fact, it may have been raised at the motion to reconsider hearing in November of 2018, but there is no question it was not raised on direct appeal. Neither McCarthy nor his attorney Mr. Kappell filed a direct appeal from his guilty plea convictions and sentences or the denial of the motion to reconsider filed by counsel approximately 1 month after the guilty plea. As a result, the PCR court should not even have addressed this involuntary guilty plea claim based on court error. S.C. Code Ann. Section 17-27-20(B); Drayton v. Evatt, 312 S.C. 4, 9, 430 S.E.2d 517, 520 (1993)("Issues that could have been raised at trial or on direct appeal cannot be asserted

in an application for post-conviction relief absent a claim of ineffective assistance of counsel"); Commonwealth v. Rachak, 62 A.3d 389, 391 (Pa. Super. Ct. 2012)(concluding PCR applicant waived any challenge to the voluntariness of his *pro se* guilty plea from the court's failure to colloquy him on potential immigration consequences of his plea by not raising that challenge on direct appeal instead of post-conviction relief). *Compare* Fortune v. State, 428 S.C 545, 837 S.E.2d 37 (2019)(*citing* S.C. Code Ann. Section 17-27-20(B) (2014) and AlShabazz v. State, 338 S.C. 354, 527 S.E.2d 742 (2000)). This is not a case like Fortune, but a simple claim that the plea court failed to advise the defendant of possible immigration consequences. This issue should have been raised on direct appeal. It was not. This issue was waived and abandoned.

ARGUMENT

The PCR court committed legal error when it extend the requirements of Padilla v. Kentucky to the judiciary and granted relief to McCarthy on the basis that the plea court did not advise McCarthy, a foreign national here on a tourist visa who informed the plea court he had no intention of immigrating to this country, of potential immigration consequences to McCarthy of his pleas should he at some time in the future change his mind about immigrating to this country.

The PCR court erred in granting relief where Judge Horne not informing McCarthy at the time of his plea of possible immigration consequences did not render McCarthy's pleas constitutionally involuntary. First, Padilla's requirements have not been extended to the judiciary. Second, where McCarthy admits he told Judge Horne at the time of his plea that he was not an immigrant and had no intention of immigrating to the United States and admits at the time of his plea he in fact had no intention to immigrate to the United States and only changed his mind months later; his guilty pleas could not have been rendered involuntary by Judge Horne not advising him of possible immigration consequences should he change his mind in the future.

The basis for the PCR court's grant of relief to appellee

The PCR court identified Padilla v. Kentucky, 559 U.S. 356 (2010) as the seminal case concerning a criminal defense attorneys' obligation to notify his or her client of the consequences that a criminal conviction could have on the client's immigration status. The PCR court then committed an error law in finding that Padilla's requirement "applies to pro-se defendants as well" and extends to the judiciary.[5] The PCR court then cited the test used to determine if a guilty plea was valid; that test is "whether the plea represent[ed] a voluntary and intelligent choice among the alternative courses of action open to the defendant. The PCR court also cited to Form SCCA 685, which is a magistrate court form published by the South Carolina Judicial Department, for the proposition that magistrate judges are required to advise every criminal defendant that his or her immigration status may be affected as a collateral consequence of a conviction. In applying the law identified in the order, the PCR court made a series of legal errors and erroneous findings of fact. This Court should grant certiorari to reverse these blatant errors of law and erroneous factual findings.

First, the PCR court found that the plea court did not advise McCarthy that his "immigration status" could be affected by the entry of his guilty pleas and this rendered applicant's guilty pleas constitutionally involuntary. This was an error of law. Second, the court found that there are "significant immigration consequences" that will "dramatically impact" McCarthy; in doing so, apparently relying upon McCarthy's testimony that he would have talked to an immigration lawyer had he known that there would be potential immigration consequences

[5] *See also* Lucero v. State, 414 S.C. 238, 777 S.E.2d 409 (Ct. App. 2015)(discussing the holding in Padilla and it is not applied retroactive and is not a watershed rule of criminal procedure but one of ineffective assistance of counsel).

associated with his pleas. This was contrary to McCarthy's testimony, the plea court's testimony, and the arresting officer's testimony that at the time of the plea hearing he, McCarthy, had no intention to immigrate to the United States. Third, the PCR court committed legal error in finding that federal law's mandate that applicant's conviction for simple possession of marijuana rendered him "inadmissible" under federal law was not a collateral consequence of his conviction but was instead a "direct penal consequence." Because of these errors of law, certiorari should be granted and the grant of post-conviction relief reversed.

Errors of Law

The PCR court's cited authorities do not support the grant of relief. In Padilla, the United States Supreme Court found that a criminal defense attorney was constitutionally ineffective for failing to advise his client of the immigration and deportation consequences of his pleading guilty and held as follows, as has been summarized by this Court:

> Advice regarding deportation is not categorically removed from the ambit of the Sixth Amendment right to counsel. If the deportation consequences of a particular plea are clear or uncertain, a criminal defense attorney need do no more than advise a non-citizen client that pending criminal charges may carry a risk of adverse immigration consequences. However, when the terms of the relevant immigration statute are succinct, clear, and explicit in defining the removal consequence, counsel has an equally clear duty to give correct advice.

Taylor v. State, 422 S.C. 222, 225, 810 S.E.2d 862, 863 (2018)(quoting Padilla). The United States Supreme Court decided that the two-part test for constitutional ineffective assistance of counsel (IAC) articulated in Strickland v. Washington, 466 U.S. 668 (1984), applied to Padilla's claim of ineffective assistance of counsel. Padilla, 559 U.S. at 366. The Court so held to satisfy its "responsibility under the Constitution ...that no criminal defendant—whether a citizen or not—is left to the mercies of incompetent counsel." Id., 559 U.S. at 374 (quotation omitted). Padilla contains no holding-or dicta, for that matter—that requires **a court** to render similar advice on

immigration consequences to a *pro se* defendant. *See* United States v. Akinsade, 686 F.3d 248 (4th Cir. 2012)(while finding the district court's admonishment that touched upon the topic of deportation did not cure the incorrect advice that plea counsel gave to the defendant, the Cout noted that the opinion did not impose any new obligations on the district court); *see also* Figuerro v. Sanchez v. United States, 678 F.3d 1203, 1209 (11th Cir. 2012)(finding Padilla has not "altered our understanding of bedrock procedural elements ...given that the United States Supreme Court merely defined the contours of deficient and effective representation under Strickland"); People v. Cowart, 28 N.E.3d 862, 868 (Ill. App. Ct. 2015)("Padilla concerns an ineffective representation of counsel under the Sixth Amendment."); Commonwealth v. Rachak, 62 A.3d 389, 391-92, 395 (Pa. Super. Ct. 2012)(affirming denial of post-conviction relief, agreeing with the court below that Padilla did not apply because applicant chose to proceed *pro se* when he pled guilty and because Padilla places the onus on defense attorneys to advise of immigration consequences not the courts); Smith v. State, 697 S.E.2d 177, 184-85 (Ga. 2010)(trial court's failure to advise a defendant regarding the potential impact of guilty plea on immigration status does not require setting aside plea as a matter of constitutional law but defendant's possible remedy under statutory law requires a showing of manifest injustice requiring 3 elements which defendant could not show here), *overruled on other grounds by* Collins v. State, 834 S.E.2d 769 (Ga. 2019); *Compare* State v. Lopez, 794 N.W.2d 379 (Minn. Ct. App. 2011)(reversing and remanding because Lopez established a fair and just reason he should have been entitled to withdraw his guilty plea which he entered pro se because the plea court did not advise Lopez a guilty plea could result in adverse immigration consequences, which advice was required by Minnesota statute); *but see* Sasic v. State, 2012 WL 4856143 (Minn. Ct. App. 2012)(Unpublished)(reversing grant of post-conviction relief because district court erred in relying on Paddilla in finding due process was violated when

defendant's guilty plea was entered without his being aware of deportation consequences).[6] At no time before, during, or after the January 22, 2020, hearing in this case did McCarthy provide any case authority for an application of Padilla's requirements *to a court* accepting the entry of a guilty plea from a *pro se* defendant, and the PCR court did not cite any case authority requiring the same in its original Order of Dismissal or Amended Order.[7] The PCR court simply erroneously imposed the requirement on the plea court. *See* State v. Slocumb, 426 S.C. 297, 306, 827 S.E.2d 148, 153 (2019)("First, a long line of Supreme Court precedent prohibits us from extending federal constitutional protections beyond the boundaries the Supreme Court itself has set." *referencing as e.g.*, Arkansas v. Sullivan, 532 U.S. 769, 772 (2001) (per curiam) ("The Arkansas Supreme Court's alternative holding, that it may interpret the United States Constitution to provide greater protection than this Court's own federal constitutional precedents provide, is foreclosed by Oregon v. Hass, 420 U.S. 714, 95 S.Ct. 1215, 43 L.Ed.2d 57 (1975).").

In Rachak, 62 A.3d 389, the facts are strikingly similar to the present case. The applicant pled guilty without counsel and was advised of his right to counsel and even offered a continuance to obtain counsel and refused the same. The applicant claimed on post-conviction relief that his plea was involuntary because the plea court did not advise him of the possible consequences to his immigration status. First, the court found that the voluntariness of his guilty plea should have been raised on direct appeal and was not; therefore, the issue was waived. Second, the Court found the PCR court properly denied relief because Padilla v. Kentucky was inapplicable to this case because

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[6] Several courts have held that Padilla's Sixth Amendment holding "sheds no light" on the due process obligations of a court accepting a plea from a noncitizen. United States v. Delgado-Ramos, 635 F.3d 1237, 1240-41 (9th Cir. 2011); State v. Ortiz, 44 A.3d 425, 430-31 (N.H. 2012); Smith v. State, 697 S.E.2d at 183.

[7] McCarthy, in his response to the State's Rule 59 motion only cited to a few states who had adopted rules of court or criminal rules of procedure requiring a court to colloquy a *pro se* defendant on immigration consequences of their plea. (App. 76-77).

it is not the responsibility of the trial court to advise the applicant of consequences to his immigration status by pleading guilty. That responsibility is counsel's alone. Based on the entire colloquy of the plea court with the defendant, the Court found his guilty plea was not involuntary but was knowingly and voluntarily entered. Rachak, 62 A.3d at 395.

Following Rachak, 62 A.3d 389, the Pennsylvania appellate courts have repeatedly affirmed that the court owes no duty to an immigrant, whether represented by counsel or *pro se*, to advise him of potential consequences to his immigration status by pleading guilty. Commonwealth v. Gonzalez, 304 A.2d 743, p. 3 (Table) (2023)(Unpublished)("the court was under no obligation to ensure that he was aware of the immigration consequences of his guilty plea."). In Gonzolez, the PCR applicant alleged that the plea court failed to conduct an adequate plea colloquy regarding his potential immigration consequences from his guilty pleas rendering his guilty pleas involuntary. The Court, citing and quoting Rachak, held the "Court was under no obligation to ensure that Gonzalez was aware of the immigration consequences of his guilty plea. His argument lacks merit." Gonzalez, *supra* at ** 11-12 & n. 14 (quoting Rachak, 62 A.3d at 395). In Commonwealth v. Nelson, 2013 WL 11248463 (Sup. Ct. Penn. 2013)(Not Reported in A.3d), Sylvia Nelson pled guilty *pro se* to a summary court offense and was not entitled to appointment of counsel and did not retain counsel. She was also required to file any appeal from summary court within 30 days. Nelson claimed, citing Padilla, the trial court was required to colloquy her about the possible adverse immigration consequences of her guilty plea since she was *pro se*. The Court disagreed relying on Rachak, 62 A.3d 389, appeal denied, 67 A.3d 796, that held Padilla was not extended to the plea court but applied to defense counsel. The Nelson court also found that Nelson failed to timely appeal her guilty plea. In Commonwealth v. Morales, 2019 WL 39922469 (Sup. Ct. Penn. Aug. 23, 2019) (Not Reported in Atl. Rptr.), Morales made a similar

argument, that his plea was involuntary because the plea court did not adequately advise him during the plea colloquy that he would be deported as a result of the guilty plea. Again, the Court found he waived the issue by not raising it on direct appeal as in Rachak, but even still Rachak, 62 A.3d 389, was controlling because Padilla did not extend its requirements to plea courts only to counsel. Therefore, the plea court had "no obligation to inquire into his awareness of the immigration consequences of his plea under any circumstances." Morales, *supra* at pp. 4-5, *citing* Rachak.

Similarly, Kolle v. State, 386 S.C. 578, 589, 690 S.E.2d 73, 79 (2010), which the PCR court cited does not support its' findings and grant of relief. In Kolle, the PCR court considered and then affirmed a court's grant of post-conviction relief, citing Kolle for "the longstanding test for determining the validity of a guilty plea is 'whether the plea represent[ed] a voluntary and intelligent choice among the alternative courses of action open to a defendant.'" Id. at 589, 690 S.E.2d at 79 (quoting Hill v. Lockhart, 474 U.S. 52 (1985)). The United States Supreme Court has already identified the rights that a defendant needs to waive for his decision to plead guilty to be one that is voluntary, knowing, and intelligent: (1) the right against compulsory self-incrimination, (2) the right to a jury trial, and (3) the right to confront one's accusers. Boykin v. Alabama, 395 U.S. 238, 243 (1969). Additionally, a defendant must be aware of the nature and crucial elements of the offense for which he is being accused, the maximum and minimum possible penalties, and the nature of any constitutional rights being waived by the entry of a guilty plea. Pitman v. State, 337 S.C. 597, 599, 524 S.E.2d 623, 624 (1999). Kolle does not support the PCR Court's application of Padilla's requirements to plea courts.

The PCR court also cited to Form 685 and stated that the form required the plea court to advise applicant that his immigration status could have been affected by pleading guilty. Even if

the form contains information of which magistrate judges are required to inform defendants pleading guilty before it as a matter of Judicial Department policy, a hypothetical that applicant has not proven to be true, a plea court's failure to abide by that policy would not affect the validity of a defendant's guilty pleas in a constitutional sense, i.e. it would not render the pleas involuntary in a constitutional sense. Boykin and Pittman identify the constitutional rights that McCarthy had to know before pleading guilty as a *pro se* defendant for the pleas to be valid constitutionally; the magistrate's court form adds nothing new here. Further, Respondent submits the form is a plea check list to be reviewed and signed by the defendant. Furthermore, even if the plea court had read to applicant the relevant section from the form, as the PCR court indicated was necessary, it is not altogether clear that the form's language itself is sufficient to satisfy the advisory requirements that Padilla laid on defense attorneys. *See* Taylor, at 225, 810 S.E.2d at 863 (explaining what advice a defense attorney must give his client, depending on the circumstances). Padilla appears to require more than the defendant plea checklist, depending on the criminal offense. (App. 87 & 88). Padilla, 559 U.S. at **360, 368-69**. The PCR court's reliance on the form/plea checklist is misplaced.

Respondent submits neither applicant nor the PCR court identified case authority requiring such advice to a defendant from the court before a plea is voluntarily and knowingly made. The PCR court's reliance on Padilla, Kolle, and Form 685 is misplaced, and the authorities do not give the PCR court a basis to grant relief to applicant who was here **on a tourist visa**, admitted he informed the plea court he was not an immigrant, either legal or illegal but a tourist, and admitted he did not change his mind about immigrating to the United States until around January of 2019, long after his guilty pleas and sentencing. (App. 22, ll. 17-23, ln. 6; 25, ll. 7-8; 12-18).

The PCR court's factual findings are not supported by the record

The PCR court found that there are "significant immigration consequences" that will "dramatically impact" McCarthy because of his pleas. An immigration lawyer McCarthy offered as a witness testified one convicted of simple possession of marijuana is subject to deportation and that the conviction would prevent him from returning to the United States in the future or adjustment to status if he is already here, unless granted a waiver to the statutory bar due to a hardship on his family's part; she also testified the federal government could apply a discretionary bar in the future to prevent one convicted of DUI who had left the country from returning or adjusting his status if he is already in this country. First, the attorney witness is wrong legally about deportation. The immigration statute at issue in Padilla and also here, provides as follows:

> Any alien who at any time after admission has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States or a foreign country relating to a controlled substance ... other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable.

8 U.S.C. Section 1227(a)(2)(B)(i). *See also* Paddilla, 559 U.S. at 368; Morales, *supra*, at 3. McCarthy pled guilty in magistrate court to simple possession of marijuana less than 28 grams. (App. 19, 21-23; 27; 49-50). The fact McCarthy was exempted from this provision was not mentioned at the PCR hearing and is nowhere reflected in either of the PCR court's orders. The PCR court treated the simple possession of marijuana conviction as if it was automatically deportable. That is a legally incorrect premise.[8]

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[8] There are numerous other provisions in the federal immigration statutes covering *admission, detention, removal, deportation, cancellation of removal,* and *inadmissibility* into this country. One or more of these statutes appear to be what McCarthy's immigration attorney is referencing in her PCR testimony, though she did not specify, and the PCR court in its orders; however, the complexity of these various statutory provisions evidences why counsel and not the judiciary is required to advise a defendant regarding possible immigration consequences. *See* State v. Jimenez, 853 S.E.2d 265 (N.C. App. 2020)(setting forth some of the immigration statutes).

If the simple possession offense had a "significant immigration consequence" for McCarthy, such as a bar to re-entry or an adjustment of status, unless there was some waiver by the government through a plea of hardship by a spouse, that would be contingent on McCarthy's personal choice to leave the country and try to return or to change his status, which at the time of his plea, he admittedly had no intent of doing. The State submits that the DUI conviction did not subject applicant to deportation either, but only would make his re-entry or adjustment of status subject to discretionary review by federal authorities. Again, something he had no intent on doing at the time of his plea. McCarthy also testified at the PCR hearing under oath that **he was not subject to deportation at the time of the PCR hearing,** even though the PCR hearing took place long after he pled guilty to both charges. (App. 24, ll. 24-25). The PCR court's order fails to draw any distinction between the two (2) possible immigration outcomes and does not give any consideration to McCarthy's sworn testimony that he was not subject to deportation at the time of the PCR hearing or of what McCarthy's intent was at the time of the plea. (App. 24, ll. 24-25; 25). Again, the complexity of these various statutory provisions evidences why counsel and not the judiciary is required to advise a defendant regarding possible immigration consequences. *See* State v. Jimenez, 853 S.E.2d 265 (N.C. App. 2020); *Padilla.*

If the Padilla requirements apply in this case even though applicant was a *pro se* defendant, then surely prejudice must be shown. A PCR applicant asserting that counsel was constitutionally ineffective under Padilla is not relieved of his burden of satisfying Strickland's prejudice prong. *See* Padilla, 559 U.S. at 369 (finding Padilla had sufficiently proven that his lawyer's performance was deficient under Strickland, but stating Padilla still had to satisfy the prejudice prong). Even if the plea court had advised McCarthy of the potential immigration consequences to pleading guilty, he would have had no reason at the time of the pleas to not go forward and enter his pleas because

he testified that he did not change his mind and want to immigrate to the United States until long after his pleas. (App. 21, ln. 16 – 23, ln. 6; 25, ll. 7-18). This corroborates the plea court's testimony that, when he asked McCarthy about his "immigration status" before McCarthy pled guilty, McCarthy disclosed only that he wanted to return to South Africa after traveling and seeing Niagara Falls and that he lived and worked in South Africa, which he referred to as "home." (App. 29, ll. 1-24; 34, ln. 14 – 35, ln. 9; 36-40; 44, ll. 18-20). Likewise, Deputy Sheriff Joseph Loveless, who attended McCarthy's plea hearing, testified that McCarthy told the plea court that he was in the United States as a tourist to sight see. (App. 49-52). McCarthy has failed to prove that he would have been prejudiced by the alleged failure on the part of the plea court to warn him about possible immigration consequences because, by his own admission, he had no intent to stay in the United States until months after his guilty pleas were entered. (App. 22, ll. 17-23; 25, ll. 7-8; 12-18). Just as McCarthy rebuffed Judge Horne's repeated advice that he retain an attorney before pleading, McCarthy would still have entered his pleas if advised of potential immigration consequences because at the time of the pleas *he had no intent to immigrate but was admittedly intent traveling and then returning to South Africa.* The PCR Court's reliance on McCarthy's testimony as credible that if he had been advised of potential immigration consequences he would have sought the advice of counsel, and now that he has been advised by counsel he would not have pled guilty, is not supported by the entire record ***including*** *his own sworn testimony* that at the time of the plea he had no intention of immigrating at all; he was here only on vacation as a tourist, and he did not change his mind about immigrating until long after his guilty pleas. (App. 22, ll. 17-23, ln. 6; 25, ll. 7-8; 12-18). *See* Lee v. United States, 582 U.S. 357, 369 (2017)("Courts should not upset a plea solely because of *post hoc* assertions from a defendant about how he would have pleaded but for his attorney's deficiencies. Judges should instead look to contemporaneous

evidence to substantiate a defendant's expressed preferences."); Stalk v. State, 383 S.C. 559, 563, 681 S.E.2d 592, 595 (2009)("Hill [v. Lockhart] makes clear that th[e] prejudice prong requires more *than simply a defendants assertion* that but for counsel's deficient performance he would not have pled but would have gone to trial."); *see also* Taylor v. State, 404 S.C. 350, 362, 745 S.E.2d 97, 103 (2013)("Despite Petitioner's assertions to the contrary, there is probative evidence in the Record before us that he would not have chosen to proceed to trial."). This testimony of McCarthy is supported by two (2) other witnesses' testimony at the PCR hearing, Judge Horne and Deputy Sheriff Loveless. As a result, this Court should find there was no prejudice based on the undisputed testimony of the plea court, **McCarthy**, and the deputy sheriff who witnessed the plea, because at the time of his plea, McCarthy was not an immigrant and did not intend to immigrate to this country but to return to his home in South Africa after visiting here as a tourist. By his own admission, he did not change his mind about immigrating here until January of 2019, approximately two and a half (2 ½) months after his pleas. Realistically, such warnings could not have had any effect on McCarthy's decision to plea on the day he entered his pleas of guilty. Boykin, *supra.*

Finally, the PCR court found that federal law's mandate that applicant's conviction for simple possession of marijuana makes him "inadmissible" under federal law was not a collateral consequence but was instead a "direct penal consequence." The PCR erred in this regard, and provides no authority for this conclusion, because there is no such authority. This is a clear error of law. The United States Supreme Court has declared that "[d]eportation as a consequence of a criminal conviction is ...uniquely difficult to classify as either a direct or a collateral consequence." *See* Padilla, 559 U.S. at 366. If the United States Supreme Court will not endeavor to classify this immigration consequence, then the PCR court should refrain from that conclusion as to *inadmissibility* also in order to extend Padilla further than its holding. And inadmissibility

would be contingent on McCarthy choosing on his own to leave the country and attempt to return or attempt to adjust his status, neither of which he had an intent to do at the time of his pleas according to his own sworn testimony. Further, the statute as cited above states that simple possession of marijuana is not an automatically deportable offense, which is different than the offense dealt with in Padilla.

CONCLUSION

Based on the above facts and law, the PCR court erred as a matter of law in granting relief to McCarthy on the basis his guilty plea was involuntary because the plea court did not advise him that in the future, if he changes his mind about immigrating to this country, his guilty pleas could affect that change of mind. Further, the PCR Court also made factual errors that are not supported by the record. As a result, this Court should grant the petition for writ of certiorari and reverse the grant of post-conviction relief by the PCR court and reinstate McCarthy's convictions because his guilty pleas were knowingly, voluntarily, and intelligently entered. Boykin, *supra.*

Respectfully submitted,

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