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S.C. SUPREME COURT

**STATE OF SOUTH CAROLINA
IN THE SUPREME COURT**

**ON WRIT OF CERTIORARI TO GREENVILLE COUNTY
Court of Common Pleas
Honorable J. Mark Hayes, II, Circuit Court Judge**

Appellate Case No. 2023-001157

STORM RILEY BRIAN MCCARTHY,..... RESPONDENT,

v.

STATE OF SOUTH CAROLINA,..... PETITIONER.

APPENDIX

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STATE OF SOUTH CAROLINA)
)
 COUNTY OF GREENVILLE)
)
 Storm Riley Brian McCarthy)
 Full name and prison number (if any) of Applicant.)
)
 v.)
)
 State of South Carolina)
)

IN THE COURT OF COMMON PLEAS

APPLICATION FOR
POST-CONVICTION RELIEF

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 Not Applicable
2. Name and location of Court which imposed sentence Greenville County Magistrate's Court, 301 University Ridge, Suite 5100, Greenville, SC 29601
3. Name(s) of co-defendant(s) (if any) _____
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) 20181100029748
 - (b) 20181100029749
 - (c) _____
5. The date upon which sentence was imposed and the terms of the sentence:
 - (a) October 9, 2019

- (b) _____
- (c) _____
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty X
- (b) after a plea of not guilty _____
- (c) after a plea of nolo contendere _____
7. Did you appeal from the judgment of conviction or the imposition of sentence?
No
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
- i. _____
- ii. _____
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. _____
- ii. _____
- iii. _____
- (c) the date of each such result:
- i. _____
- ii. _____
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. _____
- ii. _____
- iii. _____
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) Applicant was unaware of the error made by the Court until after 10 days expired.
- (b) _____
- (c) _____
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

- (a) Applicant appeared in Court without counsel and pleaded guilty to Simple Possession of Marijuana and Driving Under the Influence.
- (b) The Applicant is a citizen of South Africa not a citizen of the United States.
- (c) The Court did not advise the Applicant of the immigration consequences of pleading guilty to Simple Possession of Marijuana or Driving Under the Influence. Specifically, the Court did not utilize SCCA Form 685 which requires the Magistrate's Court to advise the accused of the following: "You understand by pleading guilty, there may be collateral consequences of a conviction or plea that you are not aware of, including . . . your immigration status may be affected.

If Applicant had known of the possible immigration consequences he would have requested his court date be postponed so that he could seek legal counsel from a criminal defense lawyer or immigration lawyer. Moreover, Applicant would have been advised by counsel that pleading guilty to Simple Possession of Marijuana and Driving Under the Influence would have substantial negative immigration consequences and Applicant would have pleaded Not Guilty and demanded a jury

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

(a) Applicant appeared in the Magistrate's Court on October 9, 2018 which was his initial court date. The Applicant appeared before the Court and indicated that he wished to plead guilty.

(b) The Court accepted Applicant's guilty plea but did not utilize SC Form 685 which requires the Court to advise the accused of certain rights they have before pleading guilty. One such part requires the Court to advise the accused that their immigration status may be affected.

(c) Applicant is a citizen of South Africa and not a citizen of the United States. If Applicant had known of the possible immigration consequences he would have requested his court date be postponed so that he could seek legal counsel from a criminal defense lawyer or immigration lawyer. Applicant would have been advised by counsel that pleading guilty to Simple Possession of Marijuana and Driving Under the Influence would have substantial negative immigration consequences and Applicant would have pleaded Not Guilty and demanded a jury trial.

12. Prior to this application have you filed with respect to this conviction:
- (a) any petition in a State Court under South Carolina Law? No
 - (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? No
 - (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? No
 - (d) any other petitions, motions or applications in this or any other Court? No
13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:
- (a) the specific nature thereof:
 - i. _____
 - ii. _____
 - iii. _____
 - iv. _____
 - (b) the name and location of the Court in which each was filed:
 - i. _____
 - ii. _____
 - iii. _____
 - iv. _____
 - (c) the disposition thereof:
 - i. _____
 - ii. _____
 - iii. _____
 - iv. _____
 - (d) the date of each such disposition:
 - i. _____
 - ii. _____
 - iii. _____
 - iv. _____
 - (e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

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

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

The Court did address this issue in a Motion To Reconsider that was held after the expiration of Applicant's time to appeal on November 20, 2018 and denied Applicant's request to vacate the convictions.

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

(a) which grounds have been presented:

i. Court erred in not advising the Applicant of the immigration consequences of his guilty plea to Simple Possession of Marijuana and Driving Under the Influence.

ii. _____

iii. _____

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

i. Motion to Reconsider that was held after Applicant's time to Appeal expired on November 20, 2018.

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:

(a) your arraignment and plea? No

(b) your trial, if any? No

(c) your sentencing? No

(d) your appeal, if any, from the judgment of conviction or the imposition of

sentence? No

(e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? yes

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. Matthew J. Kappel, 114 Whitsett Street, Greenville, SC 29601

ii. _____

iii. _____

(b) the proceedings at which each such attorney represented you:

i. Motion To Reconsider

ii. The Application for Post Conviction Relief

iii. _____

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

Vacate the convictions of the Simple Possession of Marijuana and Driving Under the Influence.

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

No

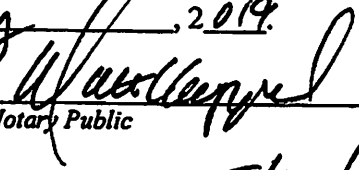
STATE OF SOUTH CAROLINA)
)
County of Greenville)

VERIFICATION

I, Storm Riley Brian McCarthy, 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.



SWORN to and subscribed before me this 3
day of May, 2019.

 (L.S.)
Notary Public

My Commission Expires: 5/19/19

**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.

Applicant

SWORN or affirmed to and subscribed before me this
_____ day of _____, 2____.

Notary Public

My Commission Expires: _____

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

STORM KILEY McArthur
Plaintiff(s)

vs.

STATE OF SOUTH CAROLINA
Defendant(s)

IN THE COURT OF COMMON PLEAS

CIVIL ACTION COVERSHEET

-CP -

2019-CP-23-02588

Submitted By: MATT KAPPEL
Address: 114 Whitsett St
Greenville SC 29601

SC Bar #: 15390
Telephone #: 864 467 9593
Fax #: 864 467 1945
Other: _____
E-mail: Matt.Kappellaw.com

19 MAR 7 PM 3:15
FILED IN E-FILED CASE

NOTE: The coversheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing cases that are NOT E-Filed. It must be filled out completely, signed, and dated. A copy of this coversheet must be served on the defendant(s) along with the Summons and Complaint. This form is NOT required to be filed in E-Filed Cases.

DOCKETING INFORMATION (Check all that apply)

*If Action is Judgment/Settlement do not complete

- JURY TRIAL demanded in complaint. NON-JURY TRIAL demanded in complaint.
- This case is subject to ARBITRATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
- This case is subject to MEDIATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
- This case is exempt from ADR. (Proof of ADR/Exemption Attached)

NATURE OF ACTION (Check One Box Below)

- | | | | |
|---|--|--|--|
| <p>Contracts</p> <ul style="list-style-type: none"> <input type="checkbox"/> Constructions (100) <input type="checkbox"/> Debt Collection (110) <input type="checkbox"/> General (130) <input type="checkbox"/> Breach of Contract (140) <input type="checkbox"/> Fraud/Bad Faith (150) <input type="checkbox"/> Failure to Deliver/Warranty (160) <input type="checkbox"/> Employment Discrim (170) <input type="checkbox"/> Employment (180) <input type="checkbox"/> Other (199) _____ | <p>Torts - Professional Malpractice</p> <ul style="list-style-type: none"> <input type="checkbox"/> Dental Malpractice (200) <input type="checkbox"/> Legal Malpractice (210) <input type="checkbox"/> Medical Malpractice (220) Previous Notice of Intent Case #
20__-NI-____- <input type="checkbox"/> Notice/ File Med Mal (230) <input type="checkbox"/> Other (299) _____ | <p>Torts - Personal Injury</p> <ul style="list-style-type: none"> <input type="checkbox"/> Conversion (310) <input type="checkbox"/> Motor Vehicle Accident (320) <input type="checkbox"/> Premises Liability (330) <input type="checkbox"/> Products Liability (340) <input type="checkbox"/> Personal Injury (350) <input type="checkbox"/> Wrongful Death (360) <input type="checkbox"/> Assault/Battery (370) <input type="checkbox"/> Slander/Label (380) <input type="checkbox"/> Other (399) _____ | <p>Real Property</p> <ul style="list-style-type: none"> <input type="checkbox"/> Claim & Delivery (400) <input type="checkbox"/> Condemnation (410) <input type="checkbox"/> Foreclosure (420) <input type="checkbox"/> Mechanic's Lien (430) <input type="checkbox"/> Partition (440) <input type="checkbox"/> Possession (450) <input type="checkbox"/> Building Code Violation (460) <input type="checkbox"/> Other (499) _____ |
| <p>Inmate Petitions</p> <ul style="list-style-type: none"> <input checked="" type="checkbox"/> PCR (500) <input type="checkbox"/> Mandamus (520) <input type="checkbox"/> Habeas Corpus (530) <input type="checkbox"/> Other (599) _____ | <p>Administrative Law/Relief</p> <ul style="list-style-type: none"> <input type="checkbox"/> Reinstate Drv. License (800) <input type="checkbox"/> Judicial Review (810) <input type="checkbox"/> Relief (820) <input type="checkbox"/> Permanent Injunction (830) <input type="checkbox"/> Forfeiture-Petition (840) <input type="checkbox"/> Forfeiture-Consent Order (850) <input type="checkbox"/> Other (899) _____ | <p>Judgments/Settlements</p> <ul style="list-style-type: none"> <input type="checkbox"/> Death Settlement (700) <input type="checkbox"/> Foreign Judgment (710) <input type="checkbox"/> Magistrate's Judgment (720) <input type="checkbox"/> Minor Settlement (730) <input type="checkbox"/> Transcript Judgment (740) <input type="checkbox"/> Lis Pendens (750) <input type="checkbox"/> Transfer of Structured Settlement Payment Rights Application (760) <input type="checkbox"/> Confession of Judgment (770) <input type="checkbox"/> Petition for Workers Compensation Settlement Approval (780) <input type="checkbox"/> Incapacitated Adult Settlement (790) <input type="checkbox"/> Other (799) _____ | <p>Appeals</p> <ul style="list-style-type: none"> <input type="checkbox"/> Arbitration (900) <input type="checkbox"/> Magistrate-Civil (910) <input type="checkbox"/> Magistrate-Criminal (920) <input type="checkbox"/> Municipal (930) <input type="checkbox"/> Probate Court (940) <input type="checkbox"/> SCDOT (950) <input type="checkbox"/> Worker's Comp (960) <input type="checkbox"/> Zoning Board (970) <input type="checkbox"/> Public Service Comm. (990) <input type="checkbox"/> Employment Security Comm (991) <input type="checkbox"/> Other (999) _____ |
| <p>Special/Complex /Other</p> <ul style="list-style-type: none"> <input type="checkbox"/> Environmental (600) <input type="checkbox"/> Automobile Arb. (610) <input type="checkbox"/> Medical (620) <input type="checkbox"/> Other (699) _____ <input type="checkbox"/> Sexual Predator (510) <input type="checkbox"/> Permanent Restraining Order (680) <input type="checkbox"/> Interpleader (690) <input type="checkbox"/> Pharmaceuticals (630) <input type="checkbox"/> Unfair Trade Practices (640) <input type="checkbox"/> Out-of State Depositions (650) <input type="checkbox"/> Motion to Quash Subpoena in an Out-of-County Action (660) <input type="checkbox"/> Pre-Suit Discovery (670) | | | |

Submitting Party Signature: Matt Kappel

Date: 5/7/19

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRPC, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.

STATE OF SOUTH CAROLINA)
 COUNTY OF GREENVILLE)
 Storm Riley Brian McCarthy,)
 Applicant,)
 v.)
 State of South Carolina,)
 Respondent.)

IN THE COURT OF COMMON PLEAS
 FOR THE THIRTEENTH JUDICIAL CIRCUIT

Case No.: 2019-CP-23-02586

RETURN

Respondent, making its return to the application for post-conviction relief filed by Storm Riley Brian McCarthy (Applicant) on May 7, 2019, would respectfully show this Court:

I. Procedural History

On September 1, 2018, Applicant was cited for driving under the influence, 08 but less than .16, (20181100029749) and the simple possession of marijuana (20181100029748). On October 9, 2018, Applicant appeared before the Honorable Jonathan A. Horne (plea court) and pleaded guilty to both offenses as a pro se defendant. Thereafter, Applicant retained Matthew J. Kappell, Esquire, who moved for reconsideration before the Court on November 20, 2018. Judge Horne denied Applicant's motion. For each, offense, the plea court fined Applicant. Applicant did not appeal his plea or sentence.

II. Current Application

Respondent interprets the allegations raised by Applicant in his application for post-conviction relief as an allegation that he did not knowingly and voluntarily enter into guilty pleas because, though he was a pro se defendant at the time of his pleas, and the plea court did not advise Applicant that his immigration status could be affected by his pleading guilty. Applicant prays that the Court would grant him post-conviction relief by vacating his convictions.

Attached to this return and incorporated by reference are the records of the Greenville County Magistrate's Court regarding the subject convictions and the application for post-conviction relief. Respondent reserves the right to amend this return upon its receipt of any relevant materials.

III. Involuntary Guilty Pleas

In Argersinger v. Hamlin, 407 U.S. 25, 37 (1972), the United States Supreme Court held that a defendant may not be imprisoned for any offense, whether a petty, misdemeanor, or felony offense, unless he was represented by legal counsel or knowingly and intelligently waived his right to counsel. The Court explained that a court proceeding regarding a misdemeanor would be affected by Argersinger only if the proceeding resulted in the "actual deprivation" of a defendant's liberty from imprisonment. Id. at 40. If the sentencing court may impose a sentence of imprisonment but does not actually so sentence a pro se defendant, the defendant's right to counsel is not violated. Glaze v. State, 366 S.C. 271, 274, 621 S.E.2d 655, 656-57 (2005) ("In other words, actual imprisonment is the event that triggers the right to counsel.") (citing Scott v. Illinois, 440 U.S. 367 (1979)). Applicant pleaded guilty to the simple possession of marijuana, which is a misdemeanor. S.C. Code Ann. § 44-53-370(c). Applicant also pleaded guilty to operating a motor vehicle while under the influence of alcohol or drugs, which is a misdemeanor. S.C. Code Ann. § 56-5-2930(A)(1); see State v. Parker, 271 S.C. 159, 161, 245 S.E.2d 904, 905 ("[A]ppellant's arrest [for a second-offense DUI] was based upon probable cause to believe that he had committed a misdemeanor."). As Applicant was fined and not subjected to imprisonment, he did not have the constitutional right to counsel; therefore, Applicant's guilty pleas should not be invalidated based upon a claim that the plea court inadequately advised him of the dangers of self-representation.

Even if some aspect of Applicant's sentence caused the constitutional right to counsel attached, Applicant likely cannot show that the plea court's colloquy did not adequately inform him of the dangers of self-representation and the consequences of pleading guilty. "A guilty plea is a solemn, judicial admission of the truth of the charges against an individual; thus, a criminal inmate's right to contest the validity of such a plea is usually, but not invariably, foreclosed." Dalton v. State, 376 S.C. 130, 137, 654 S.E.2d 870, 874 (Ct. App. 2007) (citing Blackledge v. Allison, 431 U.S. 63, 74 (1977)). "Indeed, where a thorough colloquy is conducted, courts must exercise caution in setting aside the guilty plea." Garren v. State, 423 S.C. 1, 12, 813 S.E.2d 704, 712 (2018); see Jamison v. State, 410 S.C. 456, 469-71, 765 S.E.2d 123, 129-30 (2014) (observing that "guilty plea[s] must be treated as final in the vast majority of cases" and instructing that caution must be exercised so as not to "undermine the solemn nature of a guilty plea and the finality that generally attaches to a guilty plea"). The Due Process Clause of the United States Constitution requires that a defendant enter a guilty plea voluntarily, knowingly, and intelligently. Pittman v. State, 337 S.C. 597, 599, 524 S.E.2d 623, 624 (1999) (citing Boykin v. Alabama, 395 U.S. 238 (1969)). The defendant must be aware of the right to confront his accusers, the privilege against his self-incrimination, the right to be tried by a jury, 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. Id. (citations omitted). It is not required that a court direct a defendant's attention to "each and every constitutional right and obtain a separate waiver for each." State v. Lambert, 266 S.C. 574, 578-79, 225 S.E.2d 340, 342 (1976) (citing Wade v. Coiner, 468 F.2d 1059 (4th Cir. 1972)). Respondent submits that Applicant cannot likely cannot show that he is entitled to relief on this ground; however, Respondent requests an evidentiary hearing in order to address the

questions of fact raised that the record may not conclusively refute. Accordingly, Respondent requests an evidentiary hearing to fully resolve the matter. See Sharper v. State, 279 S.C. 264, 265, 305 S.E.2d 247, 248 (1983) (holding that an evidentiary hearing is required when an application for post-conviction relief alleges specific instances of ineffectiveness that are not conclusively refuted by the record) (citing Norman v. State, 276 S.C. 278, 277 S.E.2d 707 (1981)).

IV. Denial of All Other Allegations

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

V. Future Amendments and the Discovery Process

Applicant must specify any claims he intends to raise at the post-conviction relief evidentiary hearing. All claims should be made well in advance of the evidentiary hearing. Because Applicant is represented by private counsel, that attorney and not the Applicant is the only individual authorized to file amendments to this application for post-conviction relief. See Rule 11, SCRPC. Pro se filings will not be considered at the evidentiary hearing. Respondent reserves the right to request that any amendments withheld until the last minute be stricken because of undue prejudice to Respondent pursuant to Love v. State, Op. No. 27921 (S.C. Sup. Ct. filed October 2, 2019) (Shearouse Adv. Sh. No. 39 at 14), or, alternatively, Respondent will move for a continuance in the matter. See Love, at 24 (Kittredge, J., dissent) (“If, however, the proposed amendment . . . would truly prejudice the State, the better course of action would be to continue the matter and thus remove any possibility of prejudice resulting from the belated amendments.”).

VI. Conclusion

WHEREFORE, Respondent requests that the Court convene an evidentiary hearing into the allegations.

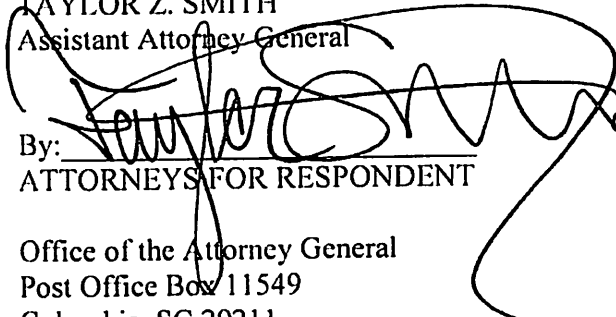
Respectfully submitted,

ALAN WILSON
Attorney General

W. JEFFREY YOUNG
Chief Deputy Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General

TAYLOR Z. SMITH
Assistant Attorney General

By: 
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
Telephone: (803) 734-3737

December 11, 2019

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)
)
)
)
STORM RILEY BRIAN MCCARTHY,)
)
)
Applicant,)
)
)
vs)
)
STATE OF SOUTH CAROLINA,)
)
)
Respondent.)
_____)

IN THE COURT OF COMMON PLEAS


2019-CP-23-02586

AFFIDAVIT OF SERVICE BY MAIL

1. I am an employce 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** in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Matthew J. Kappel, Esquire
Law Office of Matthew J. Kappel, PC
114 Whitsett Street
Greenville, SC 29601

DATED this 11th day of December, 2019.



Anne A. Mueller
Legal Assistant For Respondent

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

IN THE COURT OF COMMON PLEAS

STORM McCARTHY,)
)
APPLICANT,)
)
-VS-)
)
STATE OF SOUTH CAROLINA,)
)
RESPONDENT.)
_____)

2019-CP-23-02586

TRANSCRIPT OF RECORD

JANUARY 22, 2020
GREENVILLE, SOUTH CAROLINA

BEFORE:

THE HONORABLE J. MARK HAYES, II

APPEARANCES:

ATTORNEY FOR APPLICANT:

MATTHEW J. KAPPEL, ESQ.

ATTORNEY FOR RESPONDENT:

TAYLOR Z. SMITH
ASSISTANT ATTORNEY GENERAL

SUSAN W. HUDGINS
CIRCUIT COURT REPORTER

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<u>NO</u>	<u>DESCRIPTION</u>	<u>ID</u>	<u>EVIDENCE</u>
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1 **THE COURT:** All right. I've got that the first matter is
2 the State versus Storm McCarthy. All right. Yes, sir.

3 **MR. SMITH:** Okay. Your Honor, just by way of background,
4 in September of 2018 Mr. McCarthy was cited for DUI and simple
5 possession of marijuana. On October 9th, 2018 he appeared
6 before the Honorable Jonathan Horne, who is here today, and
7 pleaded guilty to both offenses as a pro se defendant.

8 Thereafter, he hired Mr. Kappel, who's here today to move
9 forward with reconsideration. And he did so in a hearing on
10 November 20th, 2018. Judge Horne denied the motion for
11 reconsideration. And for both offenses Mr. McCarthy was
12 fined. He did not appeal.

13 And it's my understanding that we just have one single
14 issue today that Mr. McCarthy alleges that his guilty plea was
15 not knowing and -- knowing, intelligent or voluntary because
16 the plea court did not inform him of immigration consequences
17 from pleading guilty. And the State's ready, Your Honor.

18 **THE COURT:** Yes, sir.

19 **MR. KAPPEL:** Judge, the defense is ready as well. I
20 think it's an accurate reflection of the issues before the
21 Court today.

22 **THE COURT:** All right. You want to call your first
23 witness? Are you going to call a witness?

24 (Pause)

25 **MR. SMITH:** Well, it's -- Mr. McCarthy, I think, has the

1 burden here.

2 **MR. KAPPEL:** Yeah, I wasn't sure if you were addressing
3 me or the State, Judge.

4 **THE COURT:** Yes.

5 **MR. KAPPEL:** We'll call Storm McCarthy.

6 **THE COURT:** Sir, just come right around and let the clerk
7 of court swear you in. Just come right up here and stand up
8 here and raise your -- left hand on the Bible and raise your
9 right hand and she'll swear you in.

10 **Storm McCarthy,** being duly
11 sworn testified as follows;

12 **MADAM CLERK:** Thank you. You may be seated. Please
13 state your full name for the record.

14 **MR. McCARTHY:** Storm Riley Brian McCarthy.

15 **Direct Examination by Mr. Kappel:**

16 Q. Mr. McCarthy, good afternoon, or excuse me, good morning.
17 Tell me where you're from.

18 A. South Africa.

19 Q. And are you a citizen of the country of South Africa?

20 A. I am indeed.

21 Q. Okay. You came to this country on a visa?

22 A. I did.

23 Q. All right. You were ultimately charged -- do you have
24 family -- excuse me. Let me back up. Do you have family here

25 ---

- 1 A. Yes.
- 2 Q. --- in South Carolina?
- 3 A. Yes, I do.
- 4 Q. Who do you have here living here?
- 5 A. I have an aunt and uncle as well as my cousins.
- 6 Q. Say it a little bit slower so everybody can understand.
- 7 A. My aunt ---
- 8 Q. And speak up if you ---
- 9 A. My aunt, and uncle and my two cousins.
- 10 Q. And are they permanent residents of the United States?
- 11 A. They are.
- 12 Q. Are some of them citizens?
- 13 A. Yes, they're all citizens.
- 14 Q. Okay. Do you enjoy being in the United States?
- 15 A. I do.
- 16 Q. Okay. You were ultimately arrested for driving under the
17 influence and simple possession of marijuana. Does that sound
18 correct?
- 19 A. That is correct.
- 20 Q. And you appeared at the magistrate's court on your first
21 court date?
- 22 A. I did.
- 23 Q. And that was -- you appeared sometime in October of 2018?
- 24 A. That's correct.
- 25 Q. Is that right? All right. Do you recall having an

STORM McCARTHY - DIRECT EXAMINATION BY MR. KAPPEL

7

1 encounter with the court prior to pleading guilty?

2 A. Encounter?

3 Q. Did you recall speaking with a judge prior ---

4 A. Yes.

5 Q. --- to pleading guilty?

6 A. Yes, I did.

7 Q. Okay. And did the judge discuss with you various rights
8 that you have?

9 A. He did.

10 Q. And he took the time to go over your right to a trial?

11 A. He did.

12 Q. And to present evidence on your behalf?

13 A. He did.

14 Q. And that you'd be waiving those rights by pleading
15 guilty?

16 A. Yes.

17 Q. Okay. Did he get into a conversation with you about
18 where you were from?

19 A. He did.

20 Q. And did he talk to you about your plans here in the
21 United States?

22 A. He did.

23 Q. Did he ask you if you intended to stay in the United
24 States or not?

25 A. He did ask me this. And I told him I was going to

1 travel.

2 Q. Okay. Did you indicate to him that you were planning on
3 returning to South Africa?

4 A. I did.

5 Q. Okay. And were those your plans at that time?

6 A. It was indeed.

7 Q. Okay. Did he ever discuss with you that by pleading
8 guilty to the DUI and to the marijuana charge that it could
9 affect your immigration rights, or possibilities, or ability
10 to remain in the United States?

11 A. He did not.

12 Q. Okay. Had he discussed with you -- had he said to you,
13 Mr. McCarthy, you're a resident of South Africa, if you choose
14 to stay here or if you choose to live here, if you choose to
15 obtain any relief from the immigration courts that these
16 charges could affect your ability to do that? Did he ever say
17 that?

18 A. No, he did not.

19 Q. Okay. If you had known that by pleading guilty to the
20 DUI and by pleading guilty to the marijuana charge what would
21 you have done?

22 A. I would have postponed and consulted an attorney,
23 immigration attorney.

24 Q. Okay. To find out exactly ...

25 A. Pardon?

1 Q. To find out exactly ---

2 A. Yes.

3 Q. --- what those consequences ---

4 A. Yes.

5 Q. --- might ---

6 A. Yes.

7 Q. --- or could be?

8 A. Yes. Correct.

9 Q. All right. Now understanding -- have you talked to an
10 immigration lawyer now?

11 A. I have.

12 Q. Okay. And understanding those consequences by speaking
13 with an immigration lawyer you would now request a jury trial,
14 is that ---

15 A. Yes.

16 Q. --- correct?

17 A. Correct.

18 Q. Okay. All right.

19 **MR. KAPPEL:** That's all I have, Your Honor.

20 **Cross-examination by Mr. Smith:**

21 Q. Good morning, Mr. McCarthy.

22 A. Good morning.

23 Q. Are you subject to deportation now?

24 A. I am not.

25 Q. Okay. You told us that the court -- Judge Horne did

1 suggest to you to get a lawyer. Did he -- what questions did
2 he ask you about that?

3 A. I can't exactly recall what questions -- he did say I had
4 a right to an attorney and ---

5 Q. Okay.

6 A. Which I did not obviously agree, and he said no to.

7 Q. Okay. And at the time you didn't think you needed one?

8 A. No, I did not.

9 Q. Okay. And you mentioned earlier that you told him your
10 plans were return to South Africa after doing some traveling?

11 A. Yes, that is correct.

12 Q. Okay. At what point did you decide that you did not want
13 to return to South Africa?

14 A. It's been more recently. Probably -- probably about a
15 year and a half ago. No, say a year ago.

16 Q. Okay. Do you remember how long after you pled guilty
17 that was that you changed your mind?

18 A. Say a month, two months, three months later.

19 Q. Okay.

20 A. Sorry, can't recall exactly when I made my decision.

21 Q. Okay. And I can understand that. Do you recall saying
22 to Judge Horne before pleading guilty that you, you know,
23 planned on returning home to South Africa?

24 A. I did. I did tell him.

25 Q. Okay. Okay. Thank you. No more questions.

1 A. Um-hum (affirmative).

2 Q. --- is that correct?

3 A. Yes.

4 Q. And -- but do you recall this particular case?

5 A. Yes, sir, I do.

6 Q. And I suspect you recall it for a number of reasons.

7 One, it's an unusual case, correct?

8 A. Yes, sir.

9 Q. And, further, we had a fairly interesting hearing of
10 sorts in your office about 30 days after it concluded as well,
11 isn't that correct?

12 A. That's correct.

13 Q. Okay. And I assume those are the type of events that
14 created the bytes of memory in your mind that allow you to
15 remember what happened?

16 A. That's correct.

17 Q. Okay. So there's no question that on the 30 days after
18 the guilty plea that we recorded the proceeding? There's no
19 question in your mind at that time you could recall all the
20 important facts and questions and things that were asked of my
21 client, Mr. McCarthy, isn't that correct?

22 A. Yes, that's correct.

23 Q. Okay. When you did Storm's guilty plea you asked a bunch
24 of questions of him. Isn't that also right?

25 A. Yes, that's correct.

1 Q. And you did that in furtherance of your duty to ensure
2 that his guilty plea was what we call freely and voluntary?

3 A. Yes.

4 Q. Waiver of rights to trial? Correct?

5 A. That's correct.

6 Q. Confront and cross-examine witnesses?

7 A. That's correct.

8 Q. That he's not under -- was not under the influence of
9 alcohol or drugs?

10 A. Yes, sir.

11 Q. He wasn't forced, coerced or threatened in any way to
12 plead guilty?

13 A. Yes, sir.

14 Q. Wasn't promised anything? Correct?

15 A. Yes, sir.

16 Q. And you also advised him that he was proceeding pro se,
17 which is to say that he was proceeding without an attorney?

18 A. Yes, sir, that's correct.

19 Q. All right. And that you obtained a waiver to all these
20 particular rights, isn't that right?

21 A. Yes, verbally. Yes, sir.

22 Q. That's right. And in addition you have a discussion with
23 him about, you know, as most judges do, how old are you? How
24 far did you go in school? Where are you from?

25 A. Yes, sir.

1 Q. And he disclosed to you that he was from South Africa?

2 A. Yes, sir.

3 Q. And you asked him about his plans in the United States,
4 isn't that right?

5 A. Yes, sir, specifically asked what his immigration status
6 was, ---

7 Q. Okay.

8 A. --- being a resident from South Africa.

9 Q. That's right.

10 A. Yes, sir.

11 Q. And he said he was going to go to Niagra Falls and do
12 some driving, ---

13 A. Yes, ---

14 Q. --- isn't that right?

15 A. --- that's correct.

16 Q. And that he had family here as well, too? Did ---

17 A. Yes, sir.

18 Q. --- he say that? And then he had disclosed to you that
19 his plans were to return to South Africa, isn't that right?

20 A. That's correct.

21 Q. Okay. And that was essentially the conclusion of your
22 conversation with him regarding his immigration status, isn't
23 that right?

24 A. Yes, sir. As far as I recall that was the extent of it.

25 Q. Okay. In other words, that you have no specific

1 recollection of ever discussing with him the immigration
2 consequences, possible immigration consequences of pleading
3 guilty to a DUI or a possession of marijuana, isn't that
4 correct?

5 A. That's correct.

6 Q. Okay. Now you're familiar with form -- you're familiar
7 with the forms that the judicial administration gives the
8 magistrates to work with, isn't that correct?

9 A. Most of them, yes, sir.

10 Q. Yeah, I know there's probably a hundred of them. But it
11 typically comes in a bench book or it comes in a notebook or
12 something. And they're available to you when you need them?

13 A. Yes. Most of them are online, yes.

14 Q. Okay.

15 **MR. KAPPEL:** Can I have this marked as Plaintiff's 1?

16 (Whereupon Plaintiff's exhibit 1 was marked for
17 identification)

18 **MR. SMITH:** No objection.

19 **MR. KAPPEL:** All right. So I'm ---

20 **THE COURT:** Without objection.

21 Q. I'm just going to go ahead and have you identify this
22 document for me. Most of those documents have document
23 numbers on them, do they not?

24 A. Yes, sir, down at the bottom on the left.

25 Q. And this is what they call SCCA685?

1 A. That's what it says. Yes, sir.

2 Q. Okay. And it's titled guilty plea information at the
3 top?

4 A. Yes, sir.

5 Q. Okay. And you recognize this to be one of the forms that
6 is online with Court Administration?

7 A. Yes. I do now, yes.

8 Q. Okay.

9 A. Correct.

10 **MR. KAPPEL:** At this time I'd move Plaintiff's number 1
11 into evidence.

12 **THE COURT:** Without objection.

13 **MR. KAPPEL:** Okay.

14 (Whereupon Plaintiff's exhibit 1 was admitted into
15 evidence)

16 Q. Okay. This is a document that's essentially a guide
17 that's given to magistrates that are to ensure that guilty
18 pleas are voluntarily given and -- freely and voluntarily
19 given, isn't that correct?

20 A. Yes, sir.

21 Q. Okay. And there are a number of bullet points about
22 rights that defendants must waive to make their guilty plea
23 freely and voluntary, isn't that right?

24 A. Yes, sir.

25 Q. You're not under the influence of alcohol or drugs. You

1 have sound mental capabilities. You're pleading guilty
2 because you're guilty. You have the right to appeal, et
3 cetera, et cetera. Does that sound about correct?

4 A. Yes, sir.

5 Q. Okay. Down toward the bottom of the page, you would
6 agree that this form also includes the fact that there may be
7 collateral consequences of pleading guilty?

8 A. Yes, sir, I see that. Yes.

9 Q. And what's in that paragraph is that immigration status
10 may be affected?

11 A. That's correct.

12 Q. Okay. And the reason for that -- would you agree that
13 the reason for that is is that people that are here that are
14 not U.S. citizens need to be aware based upon the current
15 status of the law in this country that non-U.S. citizens need
16 to be aware of the fact that there could be immigration
17 consequences to pleading guilty, isn't that correct?

18 A. Yes, sir.

19 Q. And that when people that are here that are not U.S.
20 citizens are unaware of immigration consequences that it
21 potentially could affect the voluntariness of a guilty plea?

22 A. I don't know if I agree with that.

23 Q. Okay. So if someone is pleading guilty to something
24 where it's just a fine, and they're not going to jail, and
25 they don't know about the immigration consequences, they might

1 think, well, I'm just going to pay a fine and I'm out the
2 door. However, if that person is actually advised, hey, look,
3 this may affect your ability to live and stay in the United
4 States, they might say, wait a minute, this is now not just a
5 fine, this means my whole life. Isn't that right?

6 A. It could, yes.

7 Q. Okay. And then I'd like to close -- and I need to say
8 this. And I'm sorry. And I'm sorry, Judge. I'm not fussing
9 at you or anything. I deeply respect the work that y'all do
10 and the number of people that y'all have in the courtroom. So
11 I hope you -- you take that with a grain of salt, I suppose.

12 **MR. KAPPEL:** That's all I have, Your Honor.

13 **THE COURT:** All right.

14 **MR. SMITH:** May I approach, Your Honor?

15 **THE COURT:** Yes, sir.

16 **MR. SMITH:** Okay.

17 **Cross-examination by Mr. Smith:**

18 Q. Mr. Horne, ---

19 A. Yes, sir.

20 Q. --- you have -- you have there -- you have Plaintiff's
21 exhibit 1?

22 A. Yes, sir.

23 Q. Would you look down at the bottom of that form. If you
24 see -- I'm looking at the bottom left hand corner. The form
25 is noted SCCA685. Do you ---

1 A. Yes, sir.

2 Q. --- see that?

3 A. I do.

4 Q. What -- that notation immediately after that, what is
5 that?

6 A. It looks like it's probably the date that the form was
7 updated or edited and put back on the Court Administration
8 website June 2019.

9 Q. Okay. Do you have any idea what this form would have
10 said before that date or if it would have existed before that
11 date?

12 A. I'm not sure what it would have said before the date, no,
13 sir.

14 Q. Okay. Can you tell us what, you know, you mentioned
15 earlier that Mr. McCarthy talked about his plans at the time
16 before he pled guilty. What did he say about his plans?

17 A. I asked him what his current status was in the United
18 States because he had told me that he was from South Africa.
19 I asked him if he had any intention of trying to stay in the
20 United States or what his intentions were. And he stated, no,
21 I live and work in South Africa. And I'm going to return and
22 I'm not -- I don't have any intentions of staying in the
23 United States.

24 And he told me that he wanted to travel, he wanted to go
25 to Canada specifically. He stated he wanted to go visit the

1 Niagara Falls and that he was here on a visa and that he
2 wanted to do these things before he returned to his home
3 country.

4 Q. Okay. Did he express any desire to remain in the United
5 States permanently?

6 A. No, he did not.

7 Q. Okay. Did he refer to the United States as home or South
8 Africa as home?

9 A. South Africa as home.

10 Q. Okay. What sort of questions did you ask him about
11 whether he had consulted an attorney about his case?

12 A. When he -- when we started speaking about what his rights
13 were and the charges that he was facing and the potential
14 consequences of those, he was making statements that he just
15 wanted to plead guilty and put all this behind him.

16 And I took some extra time to explain to him, since he
17 was not from here, that he might should get an attorney, there
18 might be things about our court system he does not understand,
19 he had never been to our court system before, and that it'd be
20 -- could be very -- it would be very beneficial to him to
21 obtain an attorney mainly because he's not a citizen, he's not
22 from the United States. And I spent some extra time trying to
23 explain that to him and the benefits of that, to retain
24 counsel. And he said, no, I want to put all this behind me.
25 I just want to plead guilty.

1 I kind of brought it up again, hey, you're not from here,
2 you know, trying to be fair to you, you might need to get an
3 attorney. And he kept saying, no, I just want to plead guilty
4 to these offenses, I'm guilty, and get this behind me. Those
5 were -- that was the conversation we had.

6 Q. Okay. On the Court Administration form, again, and Mr.
7 Kappel has highlighted the portion I'd like you to look at,
8 the bullet point that mentions immigration consequences. Does
9 it refer to any sort of case law or right in regards to
10 immigration status?

11 A. It doesn't appear to, no, sir.

12 Q. Okay. Just a moment, please.

13 (Pause)

14 Q. No more questions. Thank you.

15 **MR. KAPPEL:** Judge, I have some ---

16 **THE COURT:** Yes, sir.

17 (Whereupon Plaintiff's exhibit 2 was marked for
18 identification)

19 **Redirect Examination by Mr. Kappel:**

20 Q. Judge Horne, if you will take a look at what's been
21 marked ID number 2.

22 A. Okay.

23 Q. Does that also look like a guilty plea information form?

24 A. Yes, sir.

25 Q. And if you'll look at the bulletous [sic] paragraph that

1 references the immigration status. I mean, let me first start
2 off, is that -- you're familiar with this form we've already
3 discussed, 685?

4 A. Yes, sir.

5 Q. And do you see an effective date for what's been marked
6 as number 2?

7 A. February 2014.

8 Q. Okay. So that would have been the document in effect at
9 the time of this particular case, correct?

10 A. Yes. One of them, yes.

11 Q. Okay.

12 **MR. KAPPEL:** At this time I'd move Plaintiff's number 2
13 into evidence.

14 **MR. SMITH:** No objection.

15 **THE COURT:** Without objection, Plaintiff's 2.

16 **MR. KAPPEL:** Okay.

17 (Whereupon Plaintiff's exhibit 2 was admitted into
18 evidence)

19 Q. And if you look at what's been marked number 2, or not
20 marked, what's in evidence as number 2 and what's in evidence,
21 number 1, if you look at the paragraph regarding the
22 immigration consequences, aren't they essentially the same?

23 A. They look -- they look to be the same.

24 Q. Okay. And you recall that this form was the subject of
25 much of our conversation at our gathering in your office in

1 November of 2018 as well, isn't that correct?

2 A. Yes, sir.

3 Q. All right. Was this form used for this particular case?

4 A. No, sir.

5 Q. Okay. Was it in your hands when you were discussing
6 things with him?

7 A. No, sir.

8 Q. Okay. Now you talked about just a moment ago that you
9 took some extra time because he was not from here.

10 A. Um-hum (affirmative).

11 Q. And it sounds to me that it was more in line with
12 explaining the system and trials and things of that sort to
13 make sure that he understood, correct?

14 A. Yes, sir. It was mainly that I did everything but tell
15 him to go get an attorney, tried to very strongly recommend
16 that he get that, and he did not want to.

17 Q. And on behalf of the South Carolina Bar, we appreciate
18 you doing that. That's all I have. Thank you.

19 **MR. SMITH:** Just one more question, Your Honor.

20 **Recross-examination by Mr. Smith:**

21 Q. Referring to Plaintiff's exhibit 2, Judge Horne, can you
22 tell us why you did not complete one of these forms at the
23 time of Mr. McCarthy's guilty pleas?

24 A. No, sir. I can honestly say I don't know that I had seen
25 this exact form. We had other forms in our office that we'd

1 sometimes use mainly for jury trial cases, but I don't -- I
2 don't have a specific reason why I didn't take the time to do
3 this with this form.

4 Q. Okay. But you did discuss with him a large part of the
5 information contained on the form?

6 A. Yes, sir.

7 Q. Okay. Thank you. No more questions.

8 **MR. KAPPEL:** Judge, I have nothing further and ask if
9 Judge Horne can be excused.

10 **THE COURT:** Any reason why the witness cannot be excused?

11 **MR. SMITH:** None, Your Honor.

12 **THE COURT:** Sir, thank you for coming. You may be
13 excused.

14 **MR. KAPPEL:** Your Honor, my next witness and last witness
15 would be the immigration lawyer. Can I ask the Court for a
16 brief moment to step outside and see if she's on her way? Mr.
17 Smith and I've discussed going out of order to accommodate the
18 Court. But if I can just have a quick second?

19 **THE COURT:** Yes, sir.

20 **MR. KAPPEL:** Thank you.

21 (Pause)

22 **MR. KAPPEL:** Judge, unfortunately she's still staring at
23 her telephone. We'd like to -- Plaintiff would like to keep
24 our case open until she's available for ---

25 **THE COURT:** All right.

1 **MR. KAPPEL:** --- about five minutes of testimony from
2 her.

3 **THE COURT:** All right. Then we're going to step down for
4 a few minutes. If y'all want to get Robinson teed up, and
5 we'll come right back.

6 (Whereupon court was in recess at 10:13 am)

7 (Whereupon court reconvened at 11:40 am)

8 **THE COURT:** We'll go back on the record in the matter of
9 McCarthy versus the State. Is the Applicant ready to call
10 their next witness?

11 **MR. KAPPEL:** We are, Your Honor. Thank you. We'd call
12 Jessica Wallace.

13 **THE COURT:** Just come right over here and let the clerk
14 of court swear you in.

15 **MADAM CLERK:** Ms. Wallace, please place your left hand on
16 the Bible and raise your right hand.

17 **Jessica Wallace,** being duly
18 sworn testified as follows;

19 **MADAM CLERK:** Thank you. You may be seated. And please
20 state your full name for the record.

21 **MS. WALLACE:** Jessica Lynn Wallace.

22 **Direct Examination by Mr. Kappel:**

23 Q. All right. Well, good morning.

24 A. Good morning.

25 Q. I'm glad you're here. Thank you for coming.

- 1 A. Sure.
- 2 Q. Tell us about your education.
- 3 A. I am an attorney. I graduated from Mercer Law School.
- 4 And I have a JD.
- 5 Q. Okay. When did you obtain your JD?
- 6 A. 2012.
- 7 Q. And have you been in practice since 2012?
- 8 A. I have, yes.
- 9 Q. And have you worked for the same firm ---
- 10 A. Yes.
- 11 Q. --- for that period of time? What's the name of that law
- 12 firm?
- 13 A. Ibrahim & Rao.
- 14 Q. Will you spell that, please?
- 15 A. I-b-r-a-h-i-m & Rao, R-a-o.
- 16 Q. And is it an immigration law firm?
- 17 A. Yes.
- 18 Q. Do y'all do any other types of work?
- 19 A. No. We practice exclusively immigration law.
- 20 Q. Okay. So you've been an immigration attorney going on
- 21 eight years, is that correct?
- 22 A. Correct.
- 23 Q. And how long have your partners been in practice?
- 24 A. Since the late 1990s.
- 25 Q. So they've been practicing immigration law for give or

1 take 15, 20 years?

2 A. Yes.

3 Q. Or longer?

4 A. Um-hum (affirmative).

5 Q. And do you use them as a resource in part of your
6 practice? Y'all talk about issues, changes in the law, that

7 ---

8 A. Yes.

9 Q. --- kind of thing?

10 A. We do.

11 Q. And does the law change much?

12 A. With immigration law? It does, yes.

13 Q. Daily?

14 A. Yes.

15 Q. Okay. An'd you keep up with all the changes?

16 A. I do.

17 Q. And you work in coordination with your partners in
18 Atlanta, is that correct?

19 A. Correct.

20 Q. Okay. And do you have a full caseload of immigration
21 files?

22 A. Yes.

23 Q. And which immigration course do you typically practice
24 in?

25 A. I practice most often in Charlotte, Atlanta and Stewart

1 in Lumpkin, Georgia.

2 Q. Okay. Do you work with businesses or do you work with
3 people?

4 A. Primarily I work with individuals. I have a couple of
5 business clients as well.

6 Q. But the majority of your cases are with individuals and
7 people?

8 A. Correct.

9 Q. Okay. And do they come to you when they have -- when
10 they're here or they want to bring family members over or is
11 it just a wide variety of matters?

12 A. It's a wide variety. We do mostly family immigration and
13 removal defense.

14 Q. Okay. And when you say removal defense, that is
15 deportation defense?

16 A. Correct.

17 Q. In other words, trying to stop deportation?

18 A. Correct.

19 Q. And are you familiar with the criminal consequence --
20 consequences of criminal convictions with regards to removal
21 or deportation?

22 A. Yes.

23 Q. And do you keep up with that?

24 A. Yes.

25 Q. And that changes often, too, I suppose?

1 A. It does.

2 Q. Okay. Do you consider yourself a professional in this
3 area?

4 A. I do.

5 Q. And have you testified in these types of proceedings
6 before in terms of providing the court with not specific
7 immigration advice for the Applicant, but just general
8 immigration advice regarding criminal convictions?

9 A. I have, yes.

10 Q. And do you recall how many times? Has it been two or
11 three times prior?

12 A. Two or three times, yes.

13 Q. Okay.

14 **MR. KAPPEL:** At this time I'd offer Ms. Wallace as an
15 expert in offering opinions in immigration consequences of
16 criminal convictions.

17 **MR. SMITH:** Just maybe one or two questions, Your Honor.

18 **Voir Dire by Mr. Smith:**

19 Q. Ms. Wallace, have you ever been qualified as an expert
20 witness ---

21 A. I have, yes.

22 Q. --- in South Carolina?

23 A. Yes.

24 Q. Okay.

25 **MR. SMITH:** No questions, Your Honor. No objection to

1 the ---

2 **THE COURT:** So you're going to offer to a court a lawyer

3 ---

4 **MR. KAPPEL:** Well, I ---

5 **THE COURT:** --- as an expert witness in law?

6 **MR. KAPPEL:** Well, what I needed to say, Judge, -- and I
7 caught myself ---

8 **THE COURT:** Okay.

9 **MR. KAPPEL:** --- midstroke in that. I just want to offer
10 her as an immigration lawyer that can properly -- or can give
11 what advice she has on immigration consequences -- or of
12 criminal convictions. I misspoke ---

13 **THE COURT:** Okay.

14 **MR. KAPPEL:** I was kind of in the flow of it. Sorry
15 about that.

16 **THE COURT:** That's all right. Go ahead. The State's not
17 objecting.

18 **Direct Examination by Mr. Kappel Continued:**

19 Q. All right. So what I want to do is just present to you a
20 case study. You have an individual that is, we'll say, he's
21 from South Africa and he's here on a tourist visa. And he is
22 charged with driving under the influence and simple possession
23 of marijuana.

24 He comes to you and says I'm a tourist. What are the
25 immigration consequences of pleading guilty to DUI and simple

1 possession of marijuana? Are there consequences, I suppose,
2 would be the first part. And if there are, what are they?

3 A. Yes. So I would advise that individual that the simple
4 possession of marijuana would make him deportable from the
5 United States if he were convicted. I would also advise him
6 that the marijuana conviction would make him inadmissible to
7 the United States with his tourist visa in the future and with
8 any other type of visa that he sought in the future. That
9 would be my main advice. The DUI could also cause him
10 discretionary issues if he were applying for entry into the
11 United States again as well.

12 Q. So if you'll just take two seconds and explain the
13 difference between discretionary and what the consequence is
14 with marijuana.

15 A. Sure. So the marijuana conviction is actually a
16 statutory bar to admission into the United States. That bar
17 can be waived but only if the individual has a spouse or
18 parent who is a lawful permanent resident or U.S. citizen who
19 would suffer extreme hardship.

20 The DUI is not a statutory bar to admission to the United
21 States, however, every time someone applies for admission at
22 customs or at a consulate for a visa there is a discretionary
23 element and the officer can deny that visa in discretion based
24 on criminal history.

25 Q. Okay. So one's statutory. The marijuana is a statutory

1 bar. There's no discretion. There's no way around it except
2 for this waiver using a permanent resident spouse ---

3 A. Correct.

4 Q. --- or family member. And the DUI is just not statutory,
5 but discretionary?

6 A. Correct.

7 Q. Okay. And when you say admission, you're talking about
8 someone that's out of the country trying to apply for a visa
9 to come into the United States?

10 A. Correct. Or someone who's already in the United States
11 and seeks an adjustment of status. That's also considered
12 applying for admission as a permanent resident.

13 Q. And just so we're talking -- getting the immigration
14 language to what we can all understand. Adjustment of status
15 would be if -- say if in our case study he meets a person that
16 he wants to marry and spend time with and raise a family, he
17 would want to change his status from a tourist visa to a
18 lawful permanent resident, is that correct?

19 A. Correct.

20 Q. And the marijuana would be a statutory bar to that
21 happening?

22 A. Correct.

23 Q. Unless there is some sort of waiver to say that this
24 particular future spouse would -- spouse would suffer extreme
25 hardship?

1 A. Correct.

2 Q. Okay. So would you -- would you say then that there are
3 immigration consequences of significance with regard to
4 pleading to DUI?

5 A. Absolutely, yes.

6 Q. And are there greater significant consequences to the
7 marijuana?

8 A. Yes.

9 Q. And that's because the marijuana's statutory?

10 A. Correct.

11 Q. Okay. And that would be the advice you would provide our
12 person or hypothetical?

13 A. Yes.

14 Q. Okay. That's all I have. Thank you.

15 **MR. SMITH:** I have no questions, Your Honor. Thank you.

16 **THE COURT:** Thank you, ma'am. You may step down. Watch
17 your step as you're stepping down.

18 **MS. WALLACE:** Thank you, Your Honor.

19 **THE COURT:** Yes.

20 **MR. KAPPEL:** And I'm sure she's got other things she
21 wishes to do. If we can have her excused, that'd be great.

22 **THE COURT:** You may -- any objection?

23 **MR. SMITH:** None, Your Honor.

24 **THE COURT:** Thank you, ma'am. You may be excused as
25 well.

1 **MS. WALLACE:** Thank you, Your Honor.

2 **THE COURT:** Um-hum (affirmative).

3 **MR. KAPPEL:** Judge, that's our case.

4 **THE COURT:** State have any witnesses?

5 **MR. SMITH:** I do, Your Honor. I have one witness. I
6 would call to the stand Deputy Joseph Loveless.

7 **THE COURT:** Just come right over here.

8 **MADAM CLERK:** Mr. Loveless, please place your left hand
9 on the Bible and raise your right hand.

10 **Joseph Loveless,** being duly
11 sworn testified as follows;

12 **MADAM CLERK:** Thank you. You may be seated.

13 **MR. LOVELESS:** Thank you.

14 **MADAM CLERK:** And please state your full name for the
15 record.

16 **MR. LOVELESS:** My full name is Joseph Anthony Loveless.

17 **Direct Examination by Mr. Smith:**

18 Q. Okay. Deputy Loveless, will you please give us your rank
19 and explain to us what you do at the sheriff's office?

20 A. Currently I am a master deputy assigned to the Warrant's
21 Division at the Greenville County Sheriff's Office.

22 Q. Okay. And what was your role back at the time of Mr.
23 McCarthy's guilty pleas?

24 A. The time that I had contact with Mr. McCarthy, I was
25 actually a deputy assigned to the Traffic Enforcement Division

1 of the Greenville County Sheriff's Office.

2 Q. Okay. And what was your involvement in his case?

3 A. In this particular case I assisted another deputy after
4 he made the initial traffic stop for a speeding violation in
5 Greenville County. And I subsequently followed up with a DUI
6 investigation and arrested Mr. McCarthy for a DUI at that
7 time.

8 Q. Okay. Were you -- were you present the day that Mr.
9 McCarthy pleaded guilty to simple possession and DUI ---

10 A. Yes, sir, ---

11 Q. --- before Judge Horne?

12 A. --- I was.

13 Q. Okay. Who else was present at that time?

14 A. In the judge's chambers at the time, it was just myself,
15 Mr. McCarthy and Judge Jonathan Horne.

16 Q. Okay. Do you remember what sentence Judge Horne imposed?

17 A. I don't remember the exact specific sentence, but I know
18 that he actually took a plea from Mr. McCarthy for DUI, first
19 offense, and for marijuana, possession under 28 grams.

20 Q. Okay. And in line with that, you may not remember this,
21 do you remember if he imposed any kind of jail time?

22 A. There was -- there was no jail time. It was just a fine.

23 Q. Okay. During that plea hearing what did Judge Horne tell
24 Mr. McCarthy about his rights?

25 A. I have done hundreds of cases in front of Mr. -- in front

1 of Judge Horne.

2 **MR. KAPPEL:** Judge, I might object to this. I think
3 Judge Horne was here and testified as to the rights that he
4 gave [sic] over. So I would say this is a little bit
5 cumulative. And just speaking of context of historical,
6 generally what he says or whatnot would be inappropriate.

7 **THE COURT:** I tend to agree.

8 **MR. SMITH:** Okay.

9 **MR. KAPPEL:** Thank you, Your Honor.

10 **MR. SMITH:** I can ask a different question.

11 **Direct Examination by Mr. Smith Continued:**

12 Q. Deputy, what did -- what did Mr. McCarthy say about his
13 plans, future plans during the plea hearing?

14 A. During the plea hearing he specifically spoke to the fact
15 that he was here on a visa, a visitor's visa, if I'm not
16 mistaken, and he was here just with the assistance,
17 monetarily, of family members to travel around the United
18 States, particularly going to the Niagara Falls area with a
19 vehicle that he had purchased, which is the same vehicle that
20 I had dealings with him on the roadside, and which is an
21 Acura, and that he was going to travel around the United
22 States for a short period of time, and then after that go back
23 to his home of record, which would have been the country of
24 South Africa.

25 Q. Okay. And did he express any desire to stay in the

1 United States?

2 A. He did not.

3 Q. Okay. Did he express any desire to come back?

4 A. He did not specifically state that. And I don't recall
5 having that particular conversation with him.

6 Q. Okay. Just one moment, please.

7 (Pause)

8 Q. No more questions. Thank you.

9 **MR. KAPPEL:** I don't have any questions.

10 **THE COURT:** Thank you, sir. You may step down. Watch
11 your step as you're stepping down.

12 **MR. LOVELESS:** Thank you, Your Honor.

13 **THE COURT:** Any reason why the witness cannot be excused?

14 **MR. SMITH:** No, Your Honor.

15 **MR. KAPPEL:** No, Your Honor.

16 **THE COURT:** Thank you, sir. You may be excused as well,
17 officer.

18 **MR. LOVELESS:** Thank you.

19 **THE COURT:** Thank you for coming.

20 **MR. SMITH:** Your Honor, that's the State's case. The
21 only thing we would ask is maybe a few minutes to argue and
22 close.

23 **THE COURT:** Any reply witnesses?

24 **MR. KAPPEL:** Nothing, Your Honor.

25 **THE COURT:** All right. Y'all want to argue?

1 **MR. KAPPEL:** Briefly, Judge.

2 **THE COURT:** Okay.

3 **MR. KAPPEL:** I think -- I think we've satisfied our
4 burden. The magistrate indicated he had no specific
5 recollection of advising Mr. McCarthy the immigration -- there
6 may be immigration consequences for pleading guilty. Cases
7 are pretty clear that the pleas need to be voluntarily --
8 freely and voluntarily given. We've produced an immigration
9 lawyer that stated quite succinctly that there are significant
10 immigration consequences for pleading guilty.

11 The whole purpose of Form 685 is to basically let a
12 defendant know there's a potential issue so they could ask for
13 additional time and seek counsel. That was not done. Had it
14 been done I'm confident he would have gone and talked to an
15 immigration lawyer.

16 This whole notion that he advised the court that he had
17 no plans to stay in the United States, I think, is a red
18 herring. It really doesn't matter. We don't really
19 distinguish between non-U.S. citizens as to what their plans
20 are regarding advising them of the immigration -- potential
21 immigration consequences, that there might be immigration
22 consequences of pleading guilty.

23 There is no distinction of such. And trying to create
24 one would be basically unworkable. The fact of the matter is
25 is if someone's here that's not a U.S. citizen, they need to

1 be told that there is a potential issue that they need to
2 either waive or ask for additional time to deal with. That
3 was not done here. And that's by the magistrate's own
4 admission.

5 And I have great respect for Judge Horne. And I'm not
6 trying to say that he's -- he did a bad job. It's just this
7 is one of those things that needed to be dealt with at that
8 particular time and was not.

9 **MR. SMITH:** Okay, Your Honor. And I'll try to keep it
10 brief as well.

11 I agree that it's so that counsel has a duty to advise
12 his client with regard to possible deportation issues. And,
13 you know, -- and I believe maybe Mr. Kappel decided to be in
14 there.

15 But the problem is those cases deal with counsel's duty
16 to advise applicant of possible deportation consequences
17 falling under the Sixth Amendment right to counsel. Those
18 line of cases do not discuss whether a court should advise a
19 defendant or, in those cases, to not discuss whether it's a --
20 it's a due process violation for the court not to advise the
21 applicant of possible deportation consequences before pleading
22 guilty.

23 Essentially what we're doing today is arguing about
24 something that's been applied in a Sixth Amendment context and
25 trying to incorporate into the Fifth Amendment and Fourteenth

1 Amendment. But there's simply no case law saying that due
2 process requires a defendant to know from the court of
3 possible deportation consequences for pleading guilty. I
4 mean, I've looked through the South Carolina cases, Fourth
5 Amendment cases and Supreme Court cases, and I just have not
6 found an authority that states that.

7 Now there are cases discussing the things that a
8 defendant has to know to plead guilty such as sentences,
9 elements, et cetera. But those are different than immigration
10 consequences because I would argue that that's a collateral
11 consequence. And even if it's not, there's no case that I can
12 find saying a court did wrong by not telling an applicant -- a
13 defendant about those potential consequences.

14 And I'll point out in this case that because Mr. McCarthy
15 was pleading guilty to misdemeanors and there was no jail time
16 imposed that he actually wouldn't have had a Sixth Amendment
17 right to counsel anyway. And even if he had, I believe the
18 testimony here today was that he would have waived that right
19 anyway.

20 So I would just challenge counsel to provide us with
21 authority in which potential immigration consequences has been
22 used as a reason and a control in court for invalidating a
23 guilty plea. Because if there is one, I have not found it
24 myself.

25 But then beyond that I believe just as a burden of proof

1 issue that Mr. McCarthy has failed to show that he would not
2 have pleaded guilty had he known of possible deportation
3 risks. Although, you know, Ms. Wallace did testify about
4 potential consequences, she did say generally about what she
5 would advise the client in a situation.

6 I don't believe Mr. McCarthy testified about any adverse
7 consequences he has experienced as a result of pleading
8 guilty. He did testify that he would not have pled guilty
9 that day if he had known of the possible risks but that he
10 would have talked to an immigration lawyer first, but he still
11 didn't say that he would not have pled guilty.

12 And I would also point out that his -- his testimony on
13 what he would have done, I believe, contradicts itself. And
14 it's contradicted by the testimony from Judge Horne and Deputy
15 Loveless.

16 Mr. McCarthy testified that he decided he wanted to stay
17 about a month after pleading guilty in which I believe
18 contradicts his testimony that he wouldn't have pled guilty if
19 he had known of immigration consequences because at that time
20 he planned on staying by his own testimony.

21 And as well I believe that Deputy Loveless' and Judge
22 Horne's testimony confirms that his plans at the time were to
23 leave. So I'm not sure he can show any prejudice because, you
24 know, by his own admission he didn't plan on staying at the
25 time.

1 And if we talk about this court form, I guess I would
2 just make the argument that this is a form published by Court
3 Administration. I'm not aware of any constitutional issues
4 where a defendant doesn't sign a form like this.

5 I believe that I would just make an argument that this is
6 a formality used in the case. And I would be surprised if the
7 courts would find that defendants in magistrate courts who
8 don't sign this form involuntarily entered guilty pleas.

9 And I'll -- and I'll also add that by Judge Horne's own
10 testimony and Mr. McCarthy's even if Mr. McCarthy didn't sign
11 this form, Judge McCarthy [sic] went over most, if not all, of
12 this information anyway. So that's the State's case, Your
13 Honor.

14 **MR. KAPPEL:** Briefly, Your Honor. Most, if not all, I
15 mean, you know, close doesn't quite get you there. I think
16 where this really comes down to -- it comes down to
17 application of kind of weaving the Padilla case with our
18 cases. And the Supreme Court in Padilla said an informed
19 consideration of possible deportation can only benefit the
20 state of non-citizens.

21 You know, and what they're driving at is that we really
22 want to make sure that guilty pleas are voluntarily given.
23 And our cases are obviously very clear that the due process
24 clause requires guilty pleas to be entered into voluntarily,
25 knowingly, intelligently.

Certificate of Reporter

I, The undersigned, Susan W. Hudgins, Official Court Reporter for the Thirteenth 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/hearing of the captioned case, relative to appeal, in the Circuit Court for Greenville County, South Carolina, on the 22nd day of January 2020.

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

September 11, 2023

s/Susan W. Hudgins

Circuit Court Reporter

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STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)
)
Storm Riley Brian McCarthy)
)
vs.)
)
State of South Carolina,)
)
Defendant.)
_____)

IN THE COURT OF COMMON PLEAS
THIRTEENTH JUDICIAL CIRCUIT

CA No.: 2019-CP-23-02586

**ORDER GRANTING POST
CONVICTION RELIEF**

Background

The Applicant is a citizen of South Africa and entered the United States with a tourist visa. On or about September 1, 2018, the Greenville County Sherriff's Office arrested the Applicant for Simple Possession of Marijuana (hereinafter "SPM") and Driving Under the Influence (hereinafter "DUI"). The Applicant appeared before the magistrate judge on October 9th without counsel. Prior to pleading guilty, the judge discussed, among other things, Applicant's right to a jury trial and Applicant's country of origin and his plans to travel in the US and return to South Africa. The Applicant waived his right to a jury trial and pleaded guilty to both charges. The Court sentenced Applicant to fines of \$420.00 and \$1,017.00, respectively.

Applicant filed this Application for Post-Conviction Relief on May 7, 2019 wherein Applicant alleged the magistrate judge erred in failing to advise him that his immigration status may be affected by pleading guilty. Applicant further alleged that had he known of the immigration consequences he would have pleaded not guilty and demanded a jury trial. The State filed a return on January 2, 2020 urging the court deny Applicant relief.

Hearing

This court convened a hearing on January 22, 2020. The following individuals testified:

1



The Applicant, the magistrate judge, immigration lawyer Jessica Wallace and Joseph A. Lovelace of the Greenville County Sheriff's Office.

Immigration Lawyer

The Applicant offered Ms. Wallace an experienced immigration lawyer for the purpose of offering an opinion as to the immigration consequences to non-US citizens for criminal convictions for SPM and DUI. In particular, the Applicant wished Ms. Wallace provide the court an opinion of how these convictions would affect a foreign national in the United States on a tourist visa.

Ms. Wallace testified that she works for Ibrahim and Rao, LLP which is an immigration law firm out of Atlanta Ga. Ms. Wallace also testified that she has worked for approximately 8 years exclusively in immigration law and has previously appeared in post-conviction proceedings to offer testimony regarding immigration consequences for criminal convictions.

The State did not object to Ms. Wallace's testimony.

Ms. Wallace testified that a conviction for SPM and DUI would have negative immigration consequences for the Applicant. Ms. Wallace stated a conviction for SPM is by statute a crime of inadmissibility and would cause the Applicant to lose his visa. Applicant's only hope to escape the negative consequence for the SPM is to apply for a waiver, which is rarely granted. Alternatively, DUI is not a statutory bar, but one that is discretionary. In other words, the Department of Homeland Security (hereinafter "DHS") can deny relief for the Applicant if they feel it appropriate. Ms. Wallace stated the Applicant would have an opportunity avoid the negative immigration consequence if he can convince DHS to use their

discretion to overlook the DUI conviction.

In summary, Ms. Wallace testified there are significant negative immigration consequences for Applicant's convictions. Ms. Wallace characterized the SPM as catastrophic because it makes the Applicant statutorily unable to adjust his status, extend his status or return to the United States after a trip abroad. Ms. Wallace further stated the DUI conviction is highly problematic but inadmissibility is discretionary rather than mandatory. Lastly, Ms. Wallace testified that should Applicant's petition for a waiver for the SPM or appeal to DHS's discretion be denied, Applicant would be forever barred from returning to the United States.

Applicant's Testimony

The Applicant testified that entered the United States on a tourist visa. The Applicant further testified that he has family in the Greenville area who are both US citizens and permanent residents.

The Applicant testified that he appeared before the magistrate judge at his initial court date. The Applicant recalled that he discussed his country of origin and that he informed the court that he planned to travel in the United States and return to South Africa. Applicant further testified that he changed his mind about trying to stay in the United States a few months after his court date. Applicant also testified that the judge did not advise him that pleading guilty to SPM or DUI could negatively affect his immigration status.

The Applicant testified that had he known SPM or DUI could negatively affect his immigration status, he would have asked the judge for additional time to seek the advice of an immigration lawyer. Applicant further testified that had he known the SPM and DUI will have negative immigration consequences, he would have pleaded not guilty and requested a jury trial.

Magistrate Judge

The magistrate judge testified that he recalled the Applicant's case and that he reviewed various rights with the Applicant prior to his guilty plea. The judge specifically recalled reviewing Applicant's right to a jury trial and self-representation and that a lawyer could benefit him. The judge further recalled reviewing Applicant's immigration status and his plans to travel to Niagara Falls and ultimately return "home" to South Africa. The judge, however, stated the Applicant wanted to get this matter behind him and plead guilty. The judge, however, could not specifically recall informing the Applicant that pleading guilty to SPM and DUI could have negative immigration consequences.

GCSO Deputy Joseph A. Lovelace

Deputy Lovelace testified on behalf of the State. Deputy Lovelace provided background information regarding Applicant's arrest and his first appearance in court. Deputy Lovelace stated that Applicant planned to travel in the United States and then return to South Africa.

Law/Analysis

The seminal case governing the notification of non-US citizens of the immigration consequences of criminal convictions is Padilla v. Kentucky, 559 U.S. 356 (2010). Essentially, the US Supreme Court stated lawyers who do not advise non-US citizen clients of the immigration consequences of pleading guilty are deficient and ineffective under Strickland v. Washington, 466 U.S. 668 (1984). The basis for this opinion is grounded in the notion that "deportation is an integral part—indeed, sometimes the most important part of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes." Padilla v. Kentucky, 559 US at _____. Moreover, "[p]reserving the client's right to remain in the United



States may be more important to the client than any potential jail sentence.” Padilla, 559 US at ____ (quoting INS v. St. Cyr, 533 U. S. 289, 323 (2001)).

The accused in Padilla was represented by counsel. However, advising any non-US citizen that there may be immigration consequences of pleading guilty applies to pro-se defendants as well. First, a court must require a guilty plea is valid by ensuring the plea is entered into freely and voluntarily. Anderson v. State, 535 S.E.2d. 649 (2000) (quoting Boykin v. Alabama, 395 U.S. 238 (1969)). “The longstanding test for determining the validity of a guilty plea is ‘whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.’ ” Kolle v. State, 690 S.E.2d 73 (2010); Hill v. Lockhart, 474 U.S. 42, 56 (1985) (quoting North Carolina v. Alford, 400 U.S. 25, 31 (1970)). In South Carolina, the Summary Court Judge’s Bench Book (“SCJBB”) states “the court must be able to show in the court record that the accused both understood his offense and its possible consequences” Vickery v. State, 258 S.C. 33, 186 S.E.2d 827 (1972)(emphasis added). Pursuant to SC Magistrate’s Court Form “SCCA 685” entitled “Guilty Plea Information,” “possible consequences” requires the magistrate judge to advise the accused that “there may be collateral consequences of a conviction” including the accused’s “immigration status may be affected.”

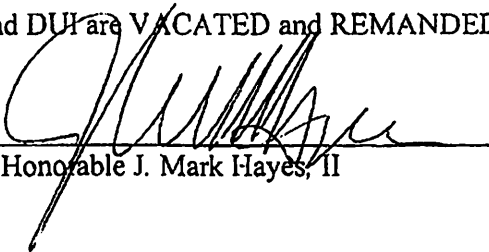
Here, I find the judge did not advise the Applicant that his immigration status may be affected by pleading guilty. Moreover, the Applicant testified he would have sought out an immigration lawyer for advice had he known there were potential immigration problems. In fact, there are significant immigration consequences in this instance that will dramatically impact the Applicant. Moreover, the SPM conviction statutorily classifies the Applicant as inadmissible



and therefore is not collateral in nature but rather a direct penal consequence of his guilty plea.

Padilla, Kolle and SCCA 685, all support the notion that “deportation is an integral part—indeed, sometimes the most important part of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes.” Id. This case is yet another example of how seemingly nonserious offenses can dramatically affect a non-US citizen. Therefore, any non-US citizen guilty plea cannot be deemed voluntary unless he has been advised by counsel or a judge that there may be possible immigration consequences.

Based upon the above, this court finds Applicant met his burden and THEREFORE his convictions for SPM and DUI are VACATED and REMANDED.


The Honorable J. Mark Hayes, II

February 28, 2023
Spartanburg, South Carolina

Copy mailed to
Attorney General/TS / Matt Kappel
on 3 / 2 / 2023

STATE OF SOUTH CAROLINA)
COUNTY OF GREENVILLE)
Storm Riley Brian McCarthy,)
Applicant,)
v.)
State of South Carolina,)
Respondent.)

IN THE COURT OF COMMON PLEAS
FOR THE THIRTEENTH JUDICIAL CIRCUIT

Case No. 2019-CP-23-02586

**MOTION TO ALTER OR
AMEND THE JUDGEMENT**

On January 22, 2020, the parties appeared before this Court in Greenville County for an evidentiary hearing on Storm Riley Brian McCarthy’s (“Applicant”) application for post-conviction relief, which was filed on May 7, 2019. Matthew J. Kappell represented Applicant at that hearing and Taylor Z. Smith of the South Carolina Attorney General’s Office represented the State (“Respondent”). In an order issued on February 28, 2023, this Court granted the application, vacating Applicant’s convictions for driving under the influence, .08 but less than .16 (20181100029749), and the simple possession of marijuana (20181100029748), and remanding for a new trial on the offenses. That order is attached to this motion and is incorporated herein by reference. The order was filed with the Greenville County Clerk of Court on March 2, 2023, and delivered to the parties by email from the Clerk of Court on that same date. Respondent moves, pursuant to Rule 59(e), SCRCP, to alter or amend the judgment, and would show as follows.

Background

On September 1, 2018, Applicant, a citizen of South Africa who was in the United States on a tourist visa, was cited for the two offenses noted above, and later pleaded guilty to each as a pro se defendant¹ in the Magistrate's Court in Greenville County, with the Honorable Jonathan A. Home ("plea court") presiding. Subsequently, Applicant retained Mr. Kappell, who represents him in this present action, to move for reconsideration before the plea court. The plea court denied the motion for reconsideration and fined Applicant for each offense. Applicant did not appeal.

The basis for this Court's grant of relief to Applicant

This Court identified *Padilla v. Kentucky*, 559 U.S. 356 (2010), as the seminal case concerning a criminal defense lawyer's obligation to notify his or her client of the consequences that a criminal conviction could have on the client's immigration status. This Court then stated that *Padilla's* requirement "applies to pro-se defendants as well." This Court 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." This Court cited 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, this Court made a series of findings. First, this

¹ Because the plea court merely fined Applicant, Applicant had no right to counsel. See *Argersinger v. Hamlin*, 407 U.S. 25 (1972) (instructing that a defendant may not be imprisoned unless he was represented by counsel or waived that right to counsel and that any misdemeanor proceeding would be affected by *Argersinger* only if there was an "actual deprivation" to that defendant's liberty); *Glaze v. State*, 366 S.C. 271, 274, 621 S.E.2d 655, 656-57 (2005) ("[A]ctual imprisonment is the event that triggers the right to counsel.").

Court found that the plea court did not advise Applicant that his immigration status could be affected by the entry of his guilty pleas. Second, that there are “significant immigration consequences” that will “dramatically impact” Applicant; in doing so, apparently relying upon Applicant’s testimony that he would have talked to an immigration lawyer had he known that there would be immigration problems associated with the convictions. Third, that federal law’s mandate that Applicant’s conviction for simple possession of marijuana render him “inadmissible” under federal law was not a collateral consequence of his conviction but was instead a “direct penal consequence.”

This Court’s cited authorities do not support the grant of relief

In *Padilla*, the United States Supreme Court (“USSC”) found that a criminal defense lawyer 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 our Supreme 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 USSC decided that the two-part test for constitutional ineffectiveness articulated in *Strickland v. Washington*, 466 U.S. 668 (1984), applied to *Padilla*’s claim. *Padilla*, 559 U.S. at 366. The USSC 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 that 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, noting that the opinion did not impose any new obligations on the district court); *see also Figuereo-Sanchez v. United States*, 678 F.3d 1203, 1209 (11th Cir. 2012) (finding that *Padilla* has not “altered our understanding of bedrock procedural elements . . . given that the [USSC] 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 (Pa. Super. Ct. 2012) (affirming the denial of post-conviction relief to Rachak, agreeing with the court below that *Padilla* did not apply because Rachak chose to proceed pro se when he pleaded guilty and because *Padilla* placed the onus on defense lawyers and not the courts); *State v. Lopez*, 794 N.W.2d 379 (Minn. Ct. App. 2011) (reversing and remanding because Lopez established a fair and just reason that he should have been allowed to withdraw his guilty plea, which he had entered while he was pro se, because the guilty plea court did not advise Lopez that a guilty plea could result in adverse immigration consequences, which was an advisory that was required by Minnesota statute; citing *Padilla* “only for its recognition of the gravity of immigration consequences” but also recognizing that *Padilla* has “potentially broader implications.”). At no time before, during, or after the January 22, 2020, hearing in this case did Applicant provide authority for an application of the *Padilla* requirements to a court accepting the entry of a guilty plea from a pro se defendant, and this Court’s order did not cite any such authority. Respondent submits that that omission is due to the fact that no such authority exists.

Similarly, *Kolle v. State*, 386 S.C. 578, 589, 690 S.E.2d 73, 79 (2010), which this Court

cites, does not support the findings and grant of relief. In *Kolle*, our Supreme Court considered and then affirmed a court's grant of post-conviction relief; really, this Court relies upon that opinion only for the law that "[t]he 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 the defendant.'" *Id.* at 589, 690 S.E.2d at 79 (quoting *Hill v. Lockhart*, 474 U.S. 52 (1985)). The USSC 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. *Pittman v. State*, 337 S.C. 597, 599, 524 S.E.2d 623, 624 (1999). *Kolle* does not support this Court's application of the *Padilla* requirements to plea courts.

This Court also cites to Form 685 and states 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 that by policy would not affect the validity of a defendant's guilty pleas in a *constitutional* sense. *Boykin* and *Pittman* identify the things that Applicant had to know before pleading guilty as a pro se defendant for his pleas to be valid constitutionally; the magistrate's court form adds nothing new here. Furthermore, even if the plea court had read to Applicant the relevant section from the form, as this Court indicates was necessary, it is not altogether clear that the form's language itself is sufficient to satisfy the advisory requirements

that *Padilla* put laid on defense lawyers. *See Taylor*, at 225, 810 S.E.2d at 863 (explaining what advice a defense attorney must give to his client, depending upon the circumstances).

Respondent is not aware of any authority that requires a court to advise a pro se defendant of possible immigration consequences, and respectfully submits that neither Applicant nor this Court has identified one. This Court's reliance upon *Padilla*, *Kolle*, and Form 685 is misplaced and the authorities do not give this Court a basis upon which to grant relief to Applicant. This Court should alter or amend its judgment to find that the plea court had no obligation in a constitutional sense to advise Applicant of potential immigration consequences to his pleading guilty.

The Court's factual findings are not supported by the record

This Court found that there are "significant immigration consequences" that will "dramatically impact" Applicant because of his guilty pleas. An immigration lawyer whom Applicant offered as a witness testified that one convicted of the simple possession of marijuana is subject to deportation and that the conviction would prevent him from returning to the United States in the future, unless the United States grants him a waiver to the statutory bar due to a significant hardship on his part; she also testified that federal government could apply a discretionary bar in the future to prevent one convicted of driving under the influence who had left the country from returning. If the simple possession offense had a "significant" immigration consequence for Applicant, Respondent submits that the driving under the influence conviction was much less serious as it did not subject Applicant to deportation, but only would make his re-entry into the United States subject to discretionary review by federal authorities. Applicant also testified that he was *not* subject to deportation at the time of the hearing, even though it took place after he pleaded guilty. The Court's order fails to draw any distinction between the two possible

immigration outcomes and does not give any consideration to Applicant's testimony that he was not subject to deportation.

If the *Padilla* requirements apply in this case even though Applicant was a pro se defendant, then surely the prejudice prong of *Strickland* would apply, too. A post-conviction relief applicant asserting that his lawyer 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 that Padilla had sufficient proven that his lawyer's performance was deficient under *Strickland*, but stating that Padilla still had to satisfy the prejudice prong). According to Applicant's own testimony, even if the plea court had advised him of the potential immigration consequences to pleading guilty, the only thing that he would have done differently would have been to talk to an immigration lawyer. Applicant did not testify that he would have proceeded to trial instead of pleading guilty, and he would have had no reason to do so because he testified that he decided a few months *after* he pleaded guilty that he wanted to stay in the United States instead of returning to South Africa. That corroborated the plea court's testimony that, when he asked Applicant about his immigration status before Applicant pleaded guilty, Applicant disclosed only that he wanted to return to South Africa after seeing Niagara Falls and that he lived and worked in South Africa, which he referred to as "home." Likewise, Greenville County Sheriff's Deputy Joseph Loveless, who attended Applicant's hearing before the plea court, testified that Applicant said that he was in the United States to sightsee. Applicant has failed to prove that he would have been prejudiced by the alleged failure on the part of the plea court to warn Applicant about possible immigration consequences because, by his own admission, he did not intend to stay in the United States until months after he pleaded guilty. This Court should find that there was no prejudice because there is no reason to conclude that immigration warnings from the plea court, if they were in fact not given, would have

had any effect on Applicant's decision to plead guilty.

This 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 and was instead a "direct penal consequence." This Court provides no authority for this conclusion, which Respondent submits is because there is no such authority. The USSC 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." *Padilla*, 559 U.S. at 366. If the USSC will not endeavor to classify the immigration consequence, then this Court should refrain from that conclusion, also.

Conclusion

This Court’s grant of relief to Applicant is dependent upon the finding that a guilty plea entered by a defendant who is not a United States citizen “cannot be deemed voluntary unless he has been advised by counsel or a judge that there may be possible immigration consequences.” As noted in this motion, that is an incorrect conclusion of law. Additionally, some of this Court’s factual findings are not supported by the evidence. Respondent urges this Court to alter or amend its judgment by correcting its conclusions of law and findings of fact and reversing its grant of post-conviction relief to Applicant.

Respectfully submitted,

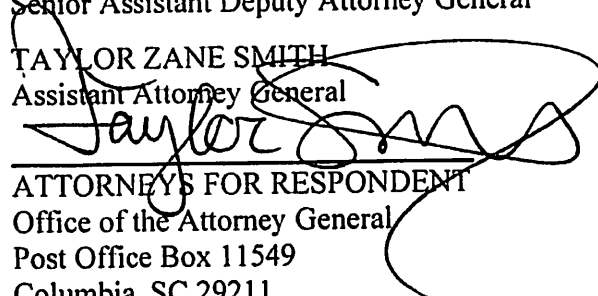
ALAN WILSON
Attorney General

W. JEFFREY YOUNG
Chief Deputy Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General

TAYLOR ZANE SMITH
Assistant Attorney General

By:


ATTORNEYS FOR RESPONDENT
Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211

March 8, 2023

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)
)
)
)
STORM RILEY BRIAN MCCARTHY,)
)
)
Applicant,)
)
)
vs)
)
STATE OF SOUTH CAROLINA,)
)
)
Respondent.)
_____)

IN THE COURT OF COMMON PLEAS

2019-CP-23-2586

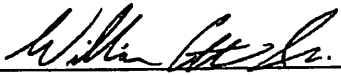
CERTIFICATE OF SERVICE BY MAIL

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of Respondent's Motion to Alter or Amend the Judgment in *McCarthy v. State*, 2019-CP-23-2586, and the February 28, 2023, order attached thereto granting post-conviction relief to Applicant, on the following by depositing same in the United States mail, postage prepaid:

Matthew J. Kappel, Esquire
Law Office of Matthew J. Kappel, PC
114 Whitsett Street
Greenville, SC 29601

Honorable J. Mark Hayes, II
180 Magnolia Street
Spartanburg, SC 29306

DATED this 9th day of March 2023.



William J. Corbett, Jr.
Legal Assistant for Respondent

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)
)
Storm Riley Brian McCarthy)
)
vs.)
)
State of South Carolina,)
)
Defendant.)
_____)

IN THE COURT OF COMMON PLEAS
THIRTEENTH JUDICIAL CIRCUIT

CA No.: 2019-CP-23-02586

ENTERED COMPUTER

**PETITIONER'S BRIEF REPLY TO
STATE'S MOTION PER 59(e)**

2020 MAR 11 AM 10:13
Case: 2019-CP-23-02586-30

On behalf of the Petitioner, Counsel offers this brief response.

The State argues that a the plea court is not responsible for informing a defendant of the *actual* collateral consequences of a guilty plea on immigration status. Applicant does not, however, claim that the plea court must advise a defendant *what* the collateral consequences will be, which *Padilla* requires of defense attorneys in certain situations. Instead, Applicant asserts that a trial court needs to inform a defend that a guilty plea *could* affect immigration status. This is all that is required in Form SSCA 685, that there “may be collateral consequences ... on your immigration status.” Unless a plea court determines that a defendant understands that there is potential effects on immigration status, a guilty plea is not voluntary.

Other jurisdictions have similar rules that recognize the need for plea courts to confirm that defendants understand that a guilty plea could have immigration consequences. In New Mexico, a court shall not accept a guilty plea without first determining that the defendant understands that “if the defendant pleads guilty or no contest, it may have an effect upon the defendant's immigration or naturalization status...” N.M. R. Mun. Ct. P. 8-502 Pleas (New Mexico Rules of Procedure for the Municipal Courts (2022 Edition)). North Dakota and Tennessee are among other states that have adopted this rule. See N.D. R. Crim. P. 11 Pleas

[Effective March 1, 2023] (North Dakota Rules of Criminal Procedure (2023 Edition)); Tenn. R.
Crim. P. 11(d)(1)(J) Pleas (Tennessee Rules of Criminal Procedure (2022 Edition)).

Respectfully submitted,



Matthew J. Kappel
Law Office of Matthew J. Kappel, P.C.
114 Whitsett Street
Greenville, South Carolina 29601
(864) 467-9595
(864) 467-1945

May 5, 2023
Greenville, South Carolina

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)
)
Storm Riley Brian McCarthy)
)
vs.)
)
State of South Carolina,)
)
Defendant.)
_____)

IN THE COURT OF COMMON PLEAS
THIRTEENTH JUDICIAL CIRCUIT

CA No.: 2019-CP-23-02586

Certificate of Service

2023 MAY 11 AM 10:18
PAUL WICKENS@SCJUDICIALSC

The undersigned hereby certifies that he did this day place one copy of petitioners brief reply to the states motion pursuant to rule 59(e) in the US mail postage prepaid to the following address:

Taylor Smith
Assistant Attorney General
Post Office Box 11549
Columbia, SC 29211

Respectfully submitted,



Matthew J. Kappel
Law Office of Matthew J. Kappel, P.C.
114 Whitsett Street
Greenville, South Carolina 29601
(864) 467-9595
(864) 467-1945

11
May 8 2023
Greenville, South Carolina

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)
)
Storm Riley Brian McCarthy)
)
vs.)
)
State of South Carolina,)
)
Defendant.)
_____)

IN THE COURT OF COMMON PLEAS
THIRTEENTH JUDICIAL CIRCUIT

CA No.: 2019-CP-23-02586

**MODIFIED ORDER GRANTING
POST CONVICTION RELIEF
WITH CONSIDERATION OF
SCRCP RULE 59(e) MOTION¹**

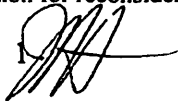
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Background

The Applicant is a citizen of South Africa and entered the United States with a tourist visa. On or about September 1, 2018, the Greenville County Sherriff's Office arrested the Applicant for Simple Possession of Marijuana (hereinafter "SPM") and Driving Under the Influence (hereinafter "DUI"). The Applicant appeared before the magistrate judge on October 9th without counsel. Prior to pleading guilty, the judge discussed, among other things, Applicant's right to a jury trial and Applicant's country of origin and his plans to travel in the US and return to South Africa. The Applicant waived his right to a jury trial and pleaded guilty to both charges. The Court sentenced Applicant to fines of \$420.00 and \$1,017.00, respectively.

Applicant filed this Application for Post-Conviction Relief on May 7, 2019 wherein Applicant alleged the magistrate judge erred in failing to advise him that his immigration status may be affected by pleading guilty. Applicant further alleged that had he known of the immigration consequences he would have pleaded not guilty and demanded a jury trial. The State filed a return on January 2, 2020 urging the court deny Applicant relief.

¹ In accordance with SCRCP Rule 59(f), the present motion for reconsideration is made without oral arguments.



Hearing

This court convened a hearing on January 22, 2020. The following individuals testified: The Applicant, the magistrate judge, immigration lawyer Jessica Wallace and Joseph A. Lovelace of the Greenville County Sheriff's Office.

Immigration Lawyer

The Applicant offered Ms. Wallace an experienced immigration lawyer for the purpose of offering an opinion as to the immigration consequences to non-US citizens for criminal convictions for SPM and DUI. In particular, the Applicant wished Ms. Wallace provide the court an opinion of how these convictions would affect a foreign national in the United States on a tourist visa.

Ms. Wallace testified that she works for Ibrahim and Rao, LLP which is an immigration law firm out of Atlanta Ga. Ms. Wallace also testified that she has worked for approximately 8 years exclusively in immigration law and has previously appeared in post-conviction proceedings to offer testimony regarding immigration consequences for criminal convictions.

The State did not object to Ms. Wallace's testimony.

Ms. Wallace testified that a conviction for SPM and DUI would have negative immigration consequences for the Applicant. Ms. Wallace stated a conviction for SPM is by statute a crime of inadmissibility and would cause the Applicant to lose his visa. Applicant's only hope to escape the negative consequence for the SPM is to apply for a waiver, which is rarely granted. Alternatively, DUI is not a statutory bar, but one that is discretionary. In other words, the Department of Homeland Security (hereinafter "DHS") can deny relief for the Applicant if they feel it appropriate. Ms. Wallace stated the Applicant would have an



opportunity avoid the negative immigration consequence if he can convince DHS to use their discretion to overlook the DUI conviction.

In summary, Ms. Wallace testified there are significant negative immigration consequences for Applicant's convictions. Ms. Wallace characterized the SPM as catastrophic because it makes the Applicant statutorily unable to adjust his status, extend his status or return to the United States after a trip abroad. Ms. Wallace further stated the DUI conviction is highly problematic but inadmissibility is discretionary rather than mandatory. Lastly, Ms. Wallace testified that should Applicant's petition for a waiver for the SPM or appeal to DHS's discretion be denied, Applicant would be forever barred from returning to the United States.

Applicant's Testimony

The Applicant testified that entered the United States on a tourist visa. The Applicant further testified that he has family in the Greenville area who are both US citizens and permanent residents.

The Applicant testified that he appeared before the magistrate judge at his initial court date. The Applicant recalled that he discussed his country of origin and that he informed the court that he planned to travel in the United States and return to South Africa. Applicant further testified that he changed his mind about trying to stay in the United States a few months after his court date. Applicant also testified that the judge did not advise him that pleading guilty to SPM or DUI could negatively affect his immigration status.

The Applicant testified that had he known SPM or DUI could negatively affect his immigration status, he would have asked the judge for additional time to seek the advice of an immigration lawyer. Applicant further testified that had he known the SPM and DUI will have

A handwritten signature in black ink, appearing to be the initials 'JM' followed by a long horizontal stroke.

negative immigration consequences, he would have pleaded not guilty and requested a jury trial.

Magistrate Judge

The magistrate judge testified that he recalled the Applicant's case and that he reviewed various rights with the Applicant prior to his guilty plea. The judge specifically recalled reviewing Applicant's right to a jury trial and self-representation and that a lawyer could benefit him. The judge further recalled reviewing Applicant's immigration status and his plans to travel to Niagara Falls and ultimately return "home" to South Africa. The judge, however, stated the Applicant wanted to get this matter behind him and plead guilty. The judge, however, could not specifically recall informing the Applicant that pleading guilty to SPM and DUI could have negative immigration consequences.

GCSO Deputy Joseph A. Lovelace

Deputy Lovelace testified on behalf of the State. Deputy Lovelace provided background information regarding Applicant's arrest and his first appearance in court. Deputy Lovelace stated that Applicant planned to travel in the United States and then return to South Africa.

Law/Analysis

The seminal case governing the notification of non-US citizens of the immigration consequences of criminal convictions is Padilla v. Kentucky, 559 U.S. 356 (2010). Essentially, the US Supreme Court stated lawyers who do not advise non-US citizen clients of the immigration consequences of pleading guilty are deficient and ineffective under Strickland v. Washington, 466 U.S. 668 (1984). The basis for this opinion is grounded in the notion that "deportation is an integral part—indeed, sometimes the most important part of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes." Padilla v.



Kentucky, 559 US at 364. Additionally, “Our law has enmeshed criminal convictions and the penalty of deportation....” *Id.* at 365-66. Moreover, “[p]reserving the client’s right to remain in the United States may be more important to the client than any potential jail sentence.” *Id.* at 368 (quoting INS v. St. Cyr, 533 U. S. 289, 323 (2001)).

The accused in Padilla was represented by counsel. However, advising any non-US citizen that there may be immigration consequences of pleading guilty applies to pro-se defendants as well. First, a court must require a guilty plea is valid by ensuring the plea is entered into freely and voluntarily. Anderson v. State, 535 S.E.2d. 649 (2000) (quoting Boykin v. Alabama, 395 U.S. 238 (1969)). “The longstanding test for determining the validity of a guilty plea is ‘whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.’ ” Kolle v. State, 690 S.E.2d 73 (2010); Hill v. Lockhart, 474 U.S. 42, 56 (1985) (quoting North Carolina v. Alford, 400 U.S. 25, 31 (1970)). In South Carolina, the Summary Court Judge’s Bench Book (“SCJBB”) states “the court must be able to show in the court record that the accused both understood his offense and its possible consequences . . .” Vickery v. State, 258 S.C. 33, 186 S.E.2d 827(1972) (emphasis added). Pursuant to SC Magistrate’s Court Form “SCCA 685” entitled “Guilty Plea Information,” “possible consequences” requires the magistrate judge to advise the accused that “there may be collateral consequences of a conviction” including the accused’s “immigration status may be affected.”

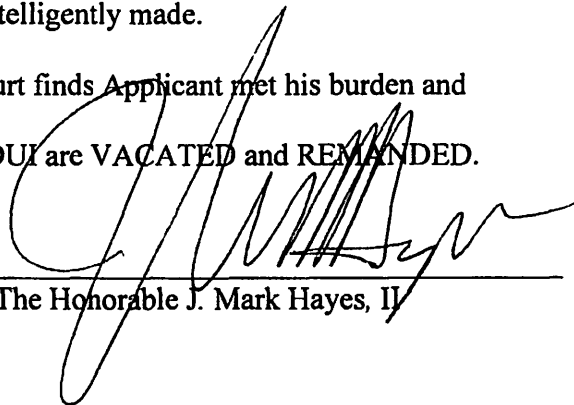
Here, I find the judge did not advise the Applicant that his immigration status may be affected by pleading guilty. Moreover, the Applicant testified he would have sought out an immigration lawyer for advice had he known there were potential immigration problems. In

5 

fact, there are significant immigration consequences in this instance that will dramatically impact the Applicant. Moreover, the SPM conviction statutorily classifies the Applicant as inadmissible and therefore is not collateral in nature but rather a direct penal consequence of his guilty plea.²

Padilla, Kolle and SCCA 685, all support the notion that “deportation is an integral part—indeed, sometimes the most important part of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes.” Padilla, 559 US at 364. This case is yet another example of how seemingly nonserious offenses can dramatically affect a non-US citizen.³ Any non-US citizen’s guilty plea cannot be deemed voluntary and intelligently made unless he has been advised by counsel that there may be possible immigration consequences; however, in a case where there is a pro se, non-US citizen defendant, the presiding judge is then given the obligation to warn the defendant that there may be immigration consequences. Therefore, if a presiding judge does not warn a pro se, non-US citizen defendant that there may be possible immigration consequences due to pleading guilty to a crime, the subsequent guilty plea cannot be deemed to be voluntary and intelligently made.

Based upon the above, this court finds Applicant met his burden and
THEREFORE his convictions for SPM and DUI are VACATED and REMANDED.



The Honorable J. Mark Hayes, II

May 31, 2023
Spartanburg, South Carolina

² In Padilla, the Supreme Court did not distinguish between direct and collateral consequences in defining the scope of constitutionally “reasonable professional assistance” required under Strickland. *Id.*, 559 U.S. at 357.

³ The State argued that a Court’s obligations to a non-US citizen to ask the Padilla questions is somehow tied to the end result of the case. In this case the State argues that because the defendant only received a fine as a result of his guilty plea, a court should be excused from asking the Padilla questions. This Court disagrees with the State’s logic.

Copy mailed to
Attorney general / Matt Kappel
on 6 / 20 2023

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Jul 19 2023

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

—————
CERTIORARI TO GREENVILLE COUNTY
Court of Common Pleas

J. Mark Hayes, II, Circuit Court Judge

—————
Case No. 2019-CP-23-02586
—————

Storm Riley Brian McCarthy,

Respondent,

v.

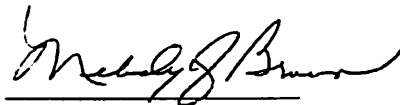
State of South Carolina,

Petitioner.

—————
NOTICE OF APPEAL
—————

The State of South Carolina hereby appeals from the Order of the Honorable J. Mark Hayes, II *granting Post-Conviction Relief with Consideration of SCRPC Rule 59(e)* dated May 31, 2023, and filed on June 20, 2023. The state received a copy of the filed Order on June 20, 2023.

July 19, 2023



Melody J. Brown
Senior Assistant Deputy Attorney General
Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-6305
Mbrown@scag.gov

Other Counsel of Record:
Matthew J. Kappel, Esquire
114 Whitsett Street
Greenville, South Carolina 29601
(864) 467-9595
matt@kappellaw.com

RECEIVED

Jul 19 2023

S.C. SUPREME COURT

From: [Angela Brown](#)
To: [Supreme Court Filings](#)
Cc: matt@kappellaw.com; [Melody Brown](#)
Subject: Notice of Appeal - Storm McCarthy
Date: Wednesday, July 19, 2023 4:10:07 PM
Attachments: [image001.png](#)
[McCarthy, Storm - Notice of Appeal - July 19, 2023 \(03337309xD2C78\).PDF](#)
[McCarthy, Storm - Transcript Request - July 19, 2023 \(03337311xD2C78\).PDF](#)

*** **EXTERNAL EMAIL:** This email originated from outside the organization. Please exercise caution before clicking any links or opening attachments. ***

Ms. Howard, please find attached for filing in your office the state's notice of appeal, a copy of the order on appeal and the request for transcript all in reference to the above matter. By copy of this email, we are providing opposing counsel, Matthew Kappel with a copy of the notice of appeal, order and transcript request.

Thank you,

Angela Bennett Brown, Administrative Coordinator II
Office of the South Carolina Attorney General
Criminal Division | Office [803-734-0368](tel:803-734-0368) | Abennett@scag.gov
P.O. Box 11549 | Columbia, SC 29211



This email, together with any attachments, may be legally privileged. If you have received it in error, please notify the sender immediately, and then delete it from your system. This email and any replies to this email may be subject to disclosure under the Freedom of Information Act.

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Jul 19 2023

S.C. SUPREME COURT

**THE STATE OF SOUTH CAROLINA
In The Supreme Court**

**CERTIORARI TO GREENVILLE COUNTY
Court of Common Pleas**

J. Mark Hayes, II, Circuit Court Judge

Case No. 2019-CP-23-02586

Storm Riley Brian McCarthy,

Respondent,

v.

State of South Carolina,

Petitioner.

PROOF OF SERVICE

I, Angela Brown, am an employee of the Petitioner, hereby certify that as per the March 20, 2020 Order of the Chief Justice, the Notice of Appeal and Proof of Service have been forwarded to Respondent's counsel, Matthew J. Kappel, Esquire via email today, July 19, 2023 to matt@kappellaw.com.

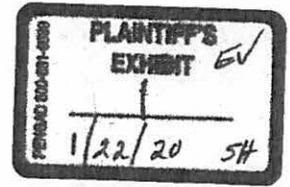
I further certify that all parties required by Rule to be served have been served.

This 19th day of July, 2023.

s/ Angela Brown

Angela Brown
Legal Assistant to Melody J. Brown
Senior Assistant Deputy Attorney General

State vs. _____
 Ticket/Warrant Number(s) _____
 Offense(s) Charged _____
 Penalty: _____



GUILTY PLEA INFORMATION – DEFENDANT AGREES TO THE FOLLOWING:

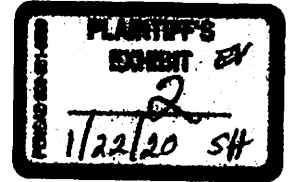
- You understand you have a right to an attorney and if you have not employed an attorney or had an attorney assigned to your case, you are giving up this right by pleading guilty.
- You understand the charge against you.
- You are not under the influence of alcohol and/or drugs at this time.
- You are of sound mental capabilities and are not suffering from and/or being treated for a mental illness.
- You are pleading guilty freely and voluntarily and no one has in any way threatened, pressured or influenced your decision to plead guilty.
- You are pleading guilty because you are guilty.
- You understand you have the right to appeal this guilty plea within ten (10) days of said plea.
- You understand you are presumed innocent until the State, who has the burden of proof, has proven you guilty beyond a reasonable doubt. In a jury trial all jurors must unanimously agree that you are guilty.
- You understand you have the right at trial to see and hear all witnesses called to testify against you and to confront, cross-examine, and question them. You are giving up this right by pleading guilty.
- You understand you have the right at trial to take the witness stand and testify or not take the witness stand and that you cannot be required to take the witness stand. If you do not take the witness stand at trial, the finder of fact cannot use that as evidence against you. You understand you are giving up this right by pleading guilty.
- You understand you have the right to use the subpoena power of the Court (pursuant to Rule 23, SCRMC) to require the attendance of any witnesses on your behalf at trial, whether they want to come or not. You understand you are giving up this right by pleading guilty.
- You understand by pleading guilty, you are giving up the right to present any defense(s).
- You understand you will be found guilty without a trial.
- You understand if you gave a statement in which you admitted all or part of the crime(s) to which you are pleading guilty, you are giving up the right to challenge the voluntariness of that statement.
- You understand if you plead guilty prior to receiving a pending drug analysis, you are giving up the right to challenge the results.
- You understand if you are currently on parole or probation or are participating in a Pre-Trial Intervention Program, this plea could result in its revocation.
- **You understand by pleading guilty, there may be collateral consequences of a conviction or plea that you are not aware of, including, but not limited to, you could face increased penalties for subsequent offenses, suspension of your driver's license, the restriction of the right to possess firearms and/or ammunition, or your immigration status may be affected.** Should the charge be Criminal Domestic Violence pursuant to SC Code of Laws, 16-25-20, notice is being given pursuant to 18 U.S.C. 922, it is unlawful for a person convicted of a violation of section 16-25-20 or 16-25-65 to ship transport, possess, or receive a firearm or ammunition.
- You understand you have the right to file a Post-Conviction Relief (PCR) application regarding this case within one year of this plea.
- Your attorney and/or the court has reviewed all of the rights you are waiving and everything has been explained to you to your complete satisfaction including but not limited to the "Faretta Warnings" Form.
- You fully understand your actions and what rights you are waiving.

I state that I have fully and completely read this document and I have had any and all of my questions answered to my complete satisfaction. I am **FREELY** and **VOLUNTARILY** pleading **GUILTY** to the above referenced charge(s).

 Signature of Defendant Date

 Attorney Signature (if represented) Date

 Signature of Judge Date



State vs. _____
 Ticket/Warrant Number(s) _____
 Offense(s) Charged _____
 Penalty: _____

GUILTY PLEA INFORMATION – DEFENDANT AGREES TO THE FOLLOWING:

- You understand you have a right to an attorney and if you have not employed an attorney or had an attorney assigned to your case, you are giving up this right by pleading guilty.
- You understand the charge against you.
- You are not under the influence of alcohol and/or drugs at this time.
- You are of sound mental capabilities and are not suffering from and/or being treated for a mental illness.
- You are pleading guilty freely and voluntarily and no one has in any way threatened, pressured or influenced your decision to plead guilty.
- You are pleading guilty because you are guilty.
- You understand you have the right to appeal this guilty plea within ten (10) days of said plea.
- You understand you are presumed innocent until the State, who has the burden of proof, has proven you guilty beyond a reasonable doubt. In a jury trial all jurors must unanimously agree that you are guilty.
- You understand you have the right at trial to see and hear all witnesses called to testify against you and to confront, cross-examine, and question them. You are giving up this right by pleading guilty.
- You understand you have the right at trial to take the witness stand and testify or not take the witness stand and that you cannot be required to take the witness stand. If you do not take the witness stand at trial, the finder of fact cannot use that as evidence against you. You understand you are giving up this right by pleading guilty.
- You understand you have the right to use the subpoena power of the Court (pursuant to Rule 23, SCRMC) to require the attendance of any witnesses on your behalf at trial, whether they want to come or not. You understand you are giving up this right by pleading guilty.
- You understand by pleading guilty, you are giving up the right to present any defense(s).
- You understand you will be found guilty without a trial.
- You understand if you gave a statement in which you admitted all or part of the crime(s) to which you are pleading guilty, you are giving up the right to challenge the voluntariness of that statement.
- You understand if you are currently on parole or probation or are participating in a Pre-Trial Intervention Program, this plea could result in its revocation.
- You understand by pleading guilty, there may be collateral consequences of a conviction or plea that you are not aware of, including, but not limited to, you could face increased penalties for subsequent offenses, suspension of your driver's license, the restriction of the right to possess firearms and/or ammunition, or your immigration status may be affected. Should the charge be Criminal Domestic Violence pursuant to SC Code of Laws, 16-25-20, notice is being given pursuant to 18 U.S.C. 922, it is unlawful for a person convicted of a violation of section 16-25-20 or 16-25-65 to ship, transport, possess, or receive a firearm or ammunition.
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- Your attorney and/or the court has reviewed all of the rights you are waiving and everything has been explained to you to your complete satisfaction including but not limited to the "Faretta Warnings" Form.
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 Signature of Defendant Date

 Attorney Signature (if represented) Date

 Signature of Judge Date