

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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DEC 14 2015

APPEAL FROM DORCHESTER COUNTY  
Court of Common Pleas

S.C. Supreme Court

DeAndrea G. Benjamin, Circuit Court Judge

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Opinion No. 5352 (S.C. Ct. App. filed September 9, 2015)  
Appellate Case No. 2015-002396

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Ken Lucero

Petitioner,

v.

State of South Carolina

Respondent.

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PETITION FOR A WRIT OF CERTIORARI

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Eleanor Duffy Cleary  
Cleary Law LLC  
Bar #7068  
1116 Blanding Street, Suite 2B  
Columbia, South Carolina 29201  
(803) 376-0075  
Attorney for Petitioner

Other Counsel of Record:  
David Spencer, Senior Assistant Attorney General  
Bar # 68571  
Post Office Box 11549  
Columbia, South Carolina 29211  
(803) 734-3737  
Attorney for Respondent

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## CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on October 23, 2015.

### QUESTION PRESENTED

Did the Court of Appeals err in holding that *Padilla v. Kentucky* should not be applied retroactively in South Carolina courts?

### STATEMENT OF THE CASE

The Honorable DeAndrea G. Benjamin granted Petitioner Lucero's application for post-conviction relief by an order filed July 31, 2012 and modified October 22, 2012.

The Court of Appeals granted the State of South Carolina's petition for writ of certiorari to review that Order and reversed September 9, 2015. Lucero now seeks a writ of certiorari to review this decision.

Respondent pled guilty in November 2002 to possession of heroin, as proscribed by S.C. Code Ann. § 44-53-370 (d) (1) (2002). Represented by former attorney Marva Hardee-Thomas, Respondent was sentenced to two years in prison (suspended with three years of probation) in Dorchester County Court of General Sessions under indictment number 2002-GS-18-0689. App. p. 199. On April 14, 2011, Respondent applied for post-conviction relief, seeking a vacation of her conviction pursuant to *Padilla v. Kentucky*, 130 S.Ct. 1473, 176 L.Ed. 2d 284 (2010). App. p. 4. In that case, the United States Supreme Court held that counsel must correctly advise a criminal client regarding the risk of deportation when the law is clear on the issue.

After a hearing on May 22, 2012 and the submission of post-hearing briefs submitted by both parties, the PCR Court ruled that Respondent is entitled to post-conviction relief and

her conviction for possession of heroin was vacated. App. pp. 129-148.

In the throes of America's failed "War on Drugs," a young mother who did not speak English found herself faced with prison and the loss of her young child if she did not plead guilty to possession of heroin. Stopped for a "routine traffic violation," the highway patrolman searched the rental car she was driving on Interstate 95 and found heroin. Even though there was no probable cause to search the vehicle, it went unchallenged by Lucero's public defender.

Lucero testified credibly that she had never even seen heroin. Faced with a mandatory minimum sentence of twenty-five years in prison and the unspeakable pain of separation from her young child, Lucero pled guilty in exchange for probation. Like the vast majority of criminal defendants, she pled guilty upon the advice of counsel rather than going to trial.

Respondent, a native of Ecuador, has lived in the United States since 1993 and has been a lawful permanent resident of the United States since November 23, 2000. She has two children who are American citizens. She works as a cleaning attendant in New York. App. p. 38, line 18 – p. 39, line 15.

On April 16, 2008, she returned to the United States after a short visit to Ecuador to see her ailing father. This apparently caused a review of her criminal record and on January 10, 2010, she received a notice to appear before the Immigration Board, charged with removability under federal immigration law. App. pp. 47-49.

Respondent testified, through a certified interpreter, that neither her appointed counsel nor the plea judge advised her of any immigration consequences of pleading guilty to a controlled substance related offense. She testified that she had no knowledge that

pleading to this offense would cause her to be deported. App. p. 47. In February 2011, an immigration judge ordered her removed to Ecuador due to her conviction.

The United States Supreme Court ruled *Padilla v. Kentucky*, 559 U.S. 356 (2010), that counsel must inform his client whether his plea carries a risk of deportation. The Court noted the extremely harsh consequences of deportation and held the Sixth Amendment demanded that the client understand that even though he is a legal resident and has lived in the country for years, a plea to certain drug charges makes deportation a certainty.

#### ARGUMENT

#### THE COURT OF APPEALS ERRED IN HOLDING THAT *PADILLA V. KENTUCKY* SHOULD NOT BE APPLIED RETROACTIVELY IN SOUTH CAROLINA COURTS.

The Court of Appeals correctly held that the United States Supreme Court's decision in *Chaidez v. United States*, 133 S. Ct. 1103, 1107 (2013), holding that *Padilla v. Kentucky*, 559 U.S. 356 (2010) should not be applied retroactively is not binding on the State courts. App. p. 279. State courts are clearly allowed to apply new rules retroactively. *Danforth v. Minnesota*, 552 U.S. 264, 288 (2008).

However, the Court of Appeals erred in holding that *Padilla* should not be applied retroactively in South Carolina. The Court held that *Padilla* did not pronounce a "watershed rule." Using the federal definition of "watershed rule," the Court held that *Padilla* did not "concern the accuracy and fairness of the criminal proceeding." App. p. 277. The Court held that *Padilla* should not be applied retroactively because it "did not provide for a right to counsel in a situation in which one had not previously been entitled to it." App. p. 279.

South Carolina's concepts of fundamental fairness and justice do not have to be hamstrung by draconian procedural rules of the federal courts that cause the ruination of a

legal resident by deporting her to a country where she has not lived for twenty-five years and of which her children are not even citizens. A guilty plea made without understanding of such consequences is no different from a plea made without advice of counsel. The constitution requires effective assistance of counsel, which Lucero did not have. The fundamental fairness of the proceeding is implicated in these circumstances.

Under South Carolina law, in order to receive collateral review outside of the one-year statute of limitations, the case must have necessarily imposed a “new rule,” labeled as a “substantive standard not previously recognized or a right not in existence at the time of the state court trial.” S. C. Code Section 17-27-45 (B). Clearly, the statute contemplates an application of “new rules” which is broader than the United States Supreme Court. The *Padilla* court imposed a new rule and it should be applied retroactively,

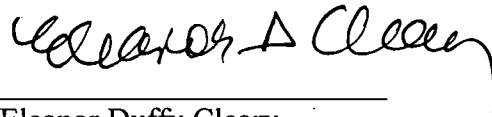
The right to be advised of the harsh immigration consequences of pleading guilty was not in existence at the time of Lucero’s plea. It imposes a new rule under South Carolina law. The statute also provides that the new rule must have been “intended to be applied retroactively.” The Court of Appeals stated that this part of the statute was not met in this case. App. p. 280. However, there is no case law interpreting this passive sentence, which does not indicate who must have the intent.

As noted extensively in Petitioner’s Brief of Respondent, this Court has applied new rules retroactively where the United States Supreme Court has not. See *Tally v. State*, 371 S.C. 535, 640 S.E.2d 878 (2007). Therefore, the phrase should not be interpreted to mean that the intent for a rule to applied retroactively must come from the United States Supreme Court.

CONCLUSION

For the reasons stated, petitioner asks the Court to grant the petition for a writ of certiorari and allow petitioner to more fully brief this issue.

Respectfully submitted,



December 14, 2015

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Eleanor Duffy Cleary  
Cleary Law LLC  
Bar #7068  
1116 Blanding Street, Suite 2B  
Columbia, South Carolina 29201  
(803) 376-0075  
Attorney for Petitioner

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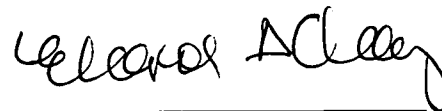
State of South Carolina,

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CERTIFICATE OF SERVICE

I, Eleanor Duffy Cleary, certify that I served the Petition for Writ of Certiorari and Appendix in the above captioned case by mailing a copy by US Mail with the return address clearly indicated on the envelope and proper postage attached on the 14<sup>th</sup> day of December, 2015, on the attorney for the State of South Carolina to the following address:

David Spencer  
Senior Assistant Attorney General  
PO Box 11549  
Columbia, SC 29211



Eleanor Duffy Cleary